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Code Remedies: Remedies and Remedial Rights by the Civil Action According to the Reformed American Procedure

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CODE REMEDIES

CODE REMEDIES:

REMEDIES AND REMEDIAL RIGHTS

BY THE CIVIL ACTION

ACCORDING TO

THE REFORMED AMERICAN PROCEDURE

A TREATISE ADAPTED TO USE IN ALL THE STATES AND TERRITORIES WHERE THAT SYSTEM PREVAILS

BY

JOHN NORTON POMEROY, LL.D.

AUTHOR OF "A TREATISE ON EQUITY JURISPRUDENCE," ETC.

Fourth Edition

REVISED AND ENLARGED

BY

THOMAS A. BOGLE

PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN

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1904

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TO

AARON J. VANDERPOEL, Esq.,

OF THE NEW YORK BAR,

THIS BOOK IS INSCRIBED ALIKE AS A TRIBUTE TO HIS HIGH PROFESSIONAL CHARACTER, AND AS AN EXPRESSION OF THE AUTHOR'S PERSONAL REGARD.

PREFACE TO THE FOURTH EDITION.

THE LAST EDITION of this work was published in 1894. Since that time so many decisions upon important questions of Code Pleading have been reported that another edition has become necessary. To collect, cite, and classify these decisions with reference to the topics discussed in the text, and thus place them at the convenient disposal of members of the legal profession, as well as students of the law, has been the main purpose of the present editor. This required a large amount of space, but as the original text included considerable matter that was theoretical rather than of present practical value, as well as extended quotations that properly belonged in the notes, it has been possible to do much in the way of omission and condensation. At the same time everything essential to the subject has been included, and it is believed that the text as so amended presents a more concise and systematic view than in its original form.

In some cases the text has been re-written, such altered portions being indicated by brackets, and in a few instances verbal changes have been made without being indicated. The paragraphs of the text have been supplied with appropriate black-letter headings. Many of the notes of the author and of the previous editor have been condensed, but the cases have all been retained. Nearly three hundred pages of new matter have been added, while the new cases cited number over four thousand, with dates and references to both the official Reports and the

National Reporter system. New topics have been treated in the notes, with suitable italic or black-letter headings, and in all cases the new notes, as well as the new portions of the text, have been distinguished by brackets.

The statutory references and citations have been fully revised, the references now being made to the latest revisions of the statutes. These notes on the statutory provisions are believed to present the most complete view of the details of the various Codes now conveniently available to the profession in a work of this kind, and it is hoped they will prove useful in determining the value of cases decided in the different States. The Table of Contents has been wholly re-written, and made more complete, while the Index and the Table of Cases have also been reconstructed. The paragraphs of the text as they now stand have been numbered consecutively, but the original numbers have been retained, and distinguished by stars.

Granted that Professor Pomeroy's criticisms of Common Law Pleading were not always just, his eulogies of the "Reformed System" not always deserved, and that he was too much given to theoretical discussion of practical subjects, still it may justly be said that as a writer upon the Code he stands without a rival.

The facts make it my duty to acknowledge here my deep obligation to Edson R. Sunderland, assistant professor of law in the University of Michigan, for most valuable assistance rendered me throughout the preparation of this edition.

THOMAS A. BOGLE.

University of Michigan,
Ann Arbor, July 27, 1904.

PREFACE TO THE SECOND EDITION.

A SECOND EDITION of this work has for some time been needed, and the delay in preparing it must be attributed to an overwhelming pressure of other engagements. In now presenting it to the profession, I desire to express my sincere thanks for the favor with which the book has been received by the Bar and the Bench. The work, when originally published, was to some extent an experiment. It was, I believe, the first attempt professedly to treat of those features which are common to all the codes of procedure, and which constitute the essential elements of the new system. In it I ventured to call that system the "Reformed American System of Procedure," and was gratified to know that the name was accepted by one of its principal authors as distinctive and appropriate. The abbreviated title by which my book is commonly known, — "Remedies," — and which it is now too late to change, is in some respects misleading; for it fails to indicate the real subject-matter and purpose of the work. In the full title given to it, the words "by the civil action" were meant to be the most emphatic and important. The work is intended to be both a scientific and a practical treatise of the fundamental principles and essential elements of the "Civil Action," as the instrument for administering justice established by the Reformed Procedure in all the Code States of our own country, and in England, and in many of the British colonies. Whatever varieties of

detail in matters of mere practice may be found in the different State codes, these principles and elements are fundamental and essential, and are inherent in the Reformed Procedure wherever it prevails, whether in the United States or in Great Britain. They are the union of legal and equitable rights of action and remedies in the same civil action, resulting from the abolition of the distinction between actions at law and suits in equity, and of the forms of legal actions; the equitable instead of the legal theory of parties; the general principles of pleading, including the union of causes of action in the same complaint or petition; the mode of stating causes of action; the answer of "denial," and what defences may be proved under it; the answer of "new matter," and what defences it embraces, and equitable defences; the counter-claim, including all affirmative relief, legal or equitable, to the defendant; the final reliefs, or judgments. In adjudicating upon these most important matters, the courts of the various Code States have, with a remarkable unanimity, substantially reached the same conclusions. At the inauguration of the new system, it is not surprising that there should have been some discrepancy of judicial opinion; but every year has shown a stronger tendency towards a complete agreement, so that the unity of the system throughout the Code States is now virtually established. It would be a source of the highest gratification if I might believe that my own book had contributed anything to the attainment of this result. These are the subjects with which it deals; and by citing and comparing the corresponding sections of the codes, as well as the decisions interpreting them, in different States, it endeavors to present all that is essential to the reformed procedure, as one complete whole, and as both scientifically and practically superior to the common-law methods which it has displaced.

In preparing this edition, I have not thought it expedient to alter in any substantial manner the original text; a few mistakes and omissions have been corrected, but the text stands virtually

unchanged. I have seen no sufficient reason to modify any of its theoretical conclusions, and several of its practical conclusions have been sustained by the courts; none, so far as I am aware, have been distinctly condemned. The new matter is, therefore, chiefly confined to the notes; and it brings the discussions of the text, as illustrated by judicial opinion, down to the present day. The important decisions in each of the Code States and Territories, made since the publication of the first edition, have been collected and arranged in the notes in connection with the doctrines and rules to which they relate. Some cases may have been overlooked, but I believe the additions will enable the reader to discover the present condition of the law and of judicial authority upon all the important topics discussed in the text. A new and much fuller *Index* has also been added. I had received complaints from several sources that the Index of the first edition was too meagre for the wants of the practising lawyer; I trust it will be found that this defect has been cured. All other substantial additions, and new materials or modes of treatment, are reserved for the supplemental work on the Civil Action, by which I still hope to complete my original design.

The Reformed Procedure is no longer an experiment. It is certain to become universal wherever the common law and equity jurisprudence is found. The fact that it was accepted, in all of its essentials, by the ablest judges, lawyers, and statesmen of England, shows that it rests upon a scientific as well as practical basis. It has been adopted, since the publication of this work, by two additional American States, Colorado and Connecticut; its adoption in substance by all is, in my opinion, a mere question of time. There is, however, one grave defect in the legislation of all our American commonwealths, — with the single exception of Connecticut, — to which I would earnestly call the attention of all judges and lawyers who are interested in the improvement of the law: a defect which is the immediate cause of nearly all the uncertainties, discrepancies, and conflicts of judicial

opinion that have arisen under the system. By the union of legal and equitable rights and remedies in the single civil action, courts were necessarily confronted with the direct opposition between many doctrines and rules of the common law and of equity, applicable to exactly the same condition of facts; and the question at once arose, How is this opposition to be dealt with in the practical administration of justice? Every lawyer who has carefully considered this matter, and especially every lawyer who has examined the course of judicial decision through all the Code States, will agree with me that this conflict between equitable and legal rules concerning the same state of facts has been the source of all the real difficulty in interpreting and settling the Reformed Procedure. Some courts have evaded the difficulty by retaining the distinctions between legal and equitable actions, and legal and equitable remedies, practically as broad and well defined as under the former system; but this method plainly violates both the spirit and the letter of the codes. The whole difficulty and its cause might be removed by a brief addition to the codes, which would carry out to its final results the clear intent of the reform. The same difficulty presented itself to the advocates of the new procedure in England while the measure was pending in Parliament; it was obviated by inserting in the "Supreme Court of Judicature Act" the following clause: "Generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, *the rules of equity shall prevail.*" The State of Connecticut has incorporated the clause into its recent reformatory legislation. If the provision, or one substantially the same, were added to all the codes, the union of legal and equitable remedies would be made perfect, and the Reformed Procedure would be freed from the only practical difficulty which it has encountered; until such an amendment is effected, it must remain somewhat crippled in its operations, and imperfect in its results.

In conclusion, I desire to acknowledge the aid which I have received, in preparing this edition, from my former students, Mr. Charles W. Slack and Mr. Marcellus A. Dorn, members of the San Francisco Bar.

JOHN NORTON POMEROY.

San Francisco, Feb. 17, 1883.

Hastings College of the Law: University of California.

PREFACE TO THE FIRST EDITION.

THE new procedure which was devised by the codifiers and inaugurated by the Legislature of New York, in the year 1848, now prevails in more than twenty other States and Territories of this country, and may, therefore, be properly termed "The Reformed American System of Procedure." After a most careful consideration, and the most cautious and deliberate examination by a commission composed of the ablest judges and barristers, it has finally been accepted in its essential features and elements by the British Parliament, and has recently displaced the time-honored methods of the common-law and the equity courts in England. This fact alone may be regarded as decisive of its intrinsic excellence, as conclusively demonstrating that it is founded upon natural and true principles; that it embodies rational notions in respect to the manner of conducting judicial controversies between private litigants; and that, in its conception and design, it is far superior to the artificial, technical, and arbitrary modes which had so long been looked upon as perfect by generations of English and American lawyers. It is shown in the Introductory Chapter of the present work that this whole course of reform is but a repetition, not simply in a general outline, but even in the minute details, of what took place in the jurisprudence of Rome; so that the modern legislation has, in this respect, merely followed an inevitable law of progress, which

always works out the same results under the same social conditions and circumstances.

Although the codes which have been enacted in the various States and Territories sometimes differ slightly from each other in respect to the minor measures and steps of practice, and although some of them, in reference to certain special matters, have more freely carried out the original and underlying theory to its logical results, and have by distinct provisions expressly abrogated particular dogmas of the old law, which in other States are only included in the general language of the statute, and are thus left within the domain of judicial construction, yet in all its essential notions and fundamental doctrines the reformed procedure is one and the same wherever it prevails, either in the United States or in England. The "Civil Action" which it has created and introduced as the single and sufficient instrument for the trial of all judicial controversies between private suitors and for the pursuit of all judicial remedies is the same in conception, in form, and in substance, possessing the same characteristic features, governed by the same elementary rules, and embodying the same organic principles. How completely the reformed system is severed from the ancient common-law modes, how entirely it abandons all the arbitrary, formal, and technical notions which were their very essence and life, and how firmly it rests upon natural and necessary facts as its foundations, is shown in the Introductory Chapter and in other portions of this work. It is impossible, therefore, that its full benefits can be attained, and that full scope can be given to its original purpose, until the courts and the profession shall accept it in its simplicity, and shall cease to obstruct its efficient operation and to interrupt its free movements by antiquated dogmas and rejected doctrines drawn from the system which it has thoroughly overthrown and supplanted.

The design of the author is to present the entire remedial department of the law — the remedies and remedial rights —

according to the reformed procedure. The volume now submitted to the profession, although in itself a complete and independent work, accomplishes a part of this full purpose. It treats of the "Civil Action," which is the central fact of the new procedure, and which, as has been said, is everywhere the same in all its distinctive features and elements. It is not a treatise upon "Practice;" but it discusses in a thoroughly practical manner those features and elements which constitute the Civil Action, and which differentiate that judicial proceeding from the action at law and the suit in equity. The discussions and conclusions which it contains are not theoretical; they are everywhere and always based upon an exhaustive examination, analysis, and comparison of the decided cases: and the author has freely drawn upon the judicial decisions of the States, and by this means presents to the reader a body of authority which fully indicates the action of the courts and their theories and modes of interpretation throughout the commonwealths in which the system prevails. Although it cannot be pretended that every case referring to the Civil Action has been cited, — in fact, many of them are unworthy of citation, since they are the reflections of crude and incorrect opinions long since rejected, while others are the mere repetitions of points already well settled, — yet it is believed that none are omitted which contain the statement of a new and correct principle. The author has endeavored to collect all the leading cases in every State, — all those which have been finally accepted as authoritative, and which represent the mature thought and convictions of the judiciary; and in no other work can be found such a mass of judicial opinion gathered from courts of the various States, giving a construction to the statutory provisions which describe the Civil Action, and building up an harmonious and consistent system of procedure upon the reform legislation. While the author has everywhere endeavored to reach the true principles of interpretation, and to extract from the cases a statement of universal doctrines which shall

aid in the solution of all future questions, and has not scrupled to express his own views and opinions, such speculations and arguments are always plainly indicated and represented in their real character, so that the reader need never confound them with the results of actual judicial decision, and be thus led to accept as settled law what is only a personal conviction or suggestion of the author.

While the work is thus intended to be a practical handbook for the lawyer, as an aid in the every-day duties of his profession, it is hoped that its use may tend to bring the procedures of the different States into closer relations, and may finally produce the perfect identity of method and form which is possible from the legislation itself, and which was, beyond doubt, the design of the several legislatures in adopting the reform. Such an identity is entirely practicable, and the full beneficial results of the change will not be attained until it is reached. In every State there has accumulated a growing amount of judicial interpretation which would be of the greatest assistance to the Bench and Bar of all the other States; and in several of them certain special rules and methods have been wrought out and finally established, which need only to be known in order to be universally followed. Such a reform, founded on the nature of things, and not upon artificial and arbitrary assumptions, never goes backward; and the time will surely come when the system that has already spread so widely will be introduced into every commonwealth, and when the distinction between legal and equitable modes of pursuing remedies will disappear, and finally be forgotten.

The central conception of the reformed procedure, and the one from which all the elements of the Civil Action are developed, is the abolition of the distinction between legal and equitable suits, and the substitution of one judicial instrument, by which both legal and equitable remedies may be obtained, either singly or in combination. The full scope and effect of this grand principle

are exhaustively discussed in the opening chapter, while the necessary limitations upon its operation which inhere in our judicial institutions are also carefully pointed out. Having thus laid the foundation upon which the whole superstructure rests, the remaining parts of the Civil Action are examined in turn, and the practical rules which control their use are minutely explained in the light of judicial authority. These general features are the parties to the Civil Action, plaintiff and defendant, the presentation of the cause of action by the plaintiff, and of the defence or claim of affirmative relief by the defendant. The two latter divisions include, among other important particulars, the principles of the reformed pleading; the scope and effect of the general denial, with the defences which may be proved under it; the nature and object of specific denials; the answer of new matter, and the defences which must be specially pleaded; and the counter-claim. The discussion of these special topics, being of the greatest practical importance, has been purposely made very full and minute. An attempt has also been made to obtain, in a general and complete form, the true meaning of certain phrases found in all the codes, upon which the interpretation of most important provisions, and the practical rules resulting therefrom, so closely depend. Among the statutory phrases are "the cause of action," "the subject of action," "transaction," "causes of action arising out of the same transaction," and the like. If the author has succeeded in ascertaining the true meaning of these and similar expressions, and the legislative intent in their use, he is confident that he will have rendered a substantial aid to the profession, and even to the courts, in the difficult work of statutory interpretation. The treatise, as a whole, if its purpose has been properly carried out, will be a practical handbook, adapted to the use of the profession in every State and Territory where the reformed procedure prevails. It is also designed as a text-book for students, whether in offices or in law schools; and to that end frequent reference has been made to the common-law and

equity systems of procedure, in explanation of their more general doctrines and principles, and in comparing them with those which have been substituted in their place.

JOHN NORTON POMEROY.

ROCHESTER, N. Y., December, 1875.

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CIVIL REMEDIES.

INTRODUCTION.

§ 1. * 1. **Necessity of Remedial Law.** By far the greater portion of any actual system of jurisprudence consists of commands that create and define those rights and corresponding duties which control the normal relations of individuals with each other and with the body politic of which they are members.[1] Some of these rights and their corresponding duties govern the relations alone of the state with individuals, and are properly termed *public;* the others are confined to the relations of individuals with each other, and are called *private.* As these rights and duties form the very substratum of the whole law, as the law and all the machinery of administration exist solely to declare and enforce them, as they are in fact the very end and object of legislation and government, they may be and are by most juridical writers appropriately styled *primary rights and duties.* If mankind were absolutely perfect so that disobedience would be impossible, if it were certain that every command uttered by the Supreme Power would be voluntarily obeyed by those to whom it was addressed, the law would contain nothing else than an enumeration of these primary rights and duties. Since, however, disobedience is possible, and these primary rights may be broken and duties unperformed, a supplemental branch of the law becomes a matter of necessity, by which obedience may be enforced. This secondary and supplementary department is by some writers called the "sanctioning," because it deals with

[1] [For a discussion of the question, "What is Law?" see vol. 25, Reports Am. Bar Ass'n, 1902, p. 445 *et seq.*]

the sanctions which give their compulsive efficacy to the commands of the supreme power. I shall, however, use the term *remedial* as descriptive of this department, since it more nearly accords with the nomenclature customary among lawyers in England and in America.

§ 2. * 2. **Remedies and Remedial Rights and Duties. Definitions and Illustrations.** This secondary and supplementary or remedial department of jurisprudence has to do with remedies and with remedial rights and duties. *Remedies*, in their widest sense, are either the final means by which to maintain and defend primary rights and enforce primary duties, or they are the final equivalents given to an injured person in the place of his original primary rights which have been broken, and of the original primary duties towards him which have been unperformed. *Remedial rights*, or *rights* of *remedy*, are rights which an injured person has to avail himself of some one or more of these final means, or to obtain some one or more of these final equivalents. *Remedial duties* are secondary duties, devolving upon the party who has infringed upon the primary rights of another, and failed to perform his own primary duties towards that other, to make the reparation provided by some one or more of these final means, or furnished in some one or more of these equivalents. One or two familiar and simple examples will illustrate and explain these abstract definitions. A. and B. have entered into a contract by which the latter has agreed to sell and deliver to the former a quantity of merchandise: analyze the results of this relation. A. has the right that B. should transfer and deliver to him the goods referred to, and a corresponding duty rests upon B. to make the transfer and delivery. This right and this duty are primary. B. fails to perform, and thereupon a new secondary right in A. arises, and a new secondary duty of B. A.'s new right is to have the remedy which the law permits in such a case, and B.'s new duty is to grant this remedy; this new right and this new duty are remedial. The remedy given under such circumstances is a pecuniary compensation, a sum of money in the place of the goods, which in our legal nomenclature is termed damages. In this instance the remedy is plainly an *equivalent*. A.'s primary right was to acquire the ownership and the possession of the *corpus* of the goods; B.'s primary duty was to transfer the ownership and possession of that *corpus*. The remedy,

however, is not the ownership and possession of the merchandise, but the ownership and possession of a sum of money instead thereof. It is a moral and indirect means of enforcing the primary right, because it may induce B. to perform his primary duty and deliver the goods; but, if it does not produce that effect, it is an equivalent for the ownership and possession of the articles themselves. In this instance we have a given primary right and duty, a breach thereof by non-performance, a new remedial right and duty in the place of the primary ones, and a remedy different from, but equivalent to, those originals. This familiar example illustrates every case of remedy by a pecuniary compensation in the place of the primary right and duty which have been broken. Another example will be sufficient. A. and B. have entered into a contract by which the latter has agreed to convey a certain farm, and to execute and deliver a deed thereof to the former. Here A.'s primary right is to have B. convey the farm, which is done by executing and delivering the deed and by surrendering possession of the land. B.'s corresponding primary duty is to perform these acts. Upon B.'s refusal, A. is at once clothed with a new and remedial right, and B. is subjected to a new and remedial duty. Under these circumstances the law gives a remedy which is the same as the end which was to be attained by the primary right and duty themselves; that is, the conveyance of the land. In other words, the law will compel B. to do just what he in terms contracted to do, — execute and deliver the deed and surrender the possession. Here the secondary remedial right and duty are the same as the original primary right and duty; and the remedy itself is not an equivalent to, but is identical with, the result to be reached by such primary right and duty. The remedy, however, is plainly a means by which A. maintains his primary right, and enforces the primary duty which B. owes to him, for by it the self-same right is upheld, and the self-same duty is performed.

§ 3. *3. **Distinction between Public and Private Remedies.** When the primary rights and duties are public, that is, when they govern the relations alone of the State with individuals, the remedies for the violation thereof are public, and the larger portion of them are criminal. When the primary rights and duties are private, that is, when they are confined to relations of individuals with each other, the remedies are also private, or,

as they are frequently termed, civil. This treatise will deal with the latter class alone. The vast majority of public remedies are designed to preserve the good order of society, and to enforce those duties of individuals towards the State whose violations are called crimes, and the remedies themselves are criminal: but there are other public remedies which are not in any respect criminal. The remedies to which I now refer may, at first blush, appear to be private, and to be used to enforce some rights that belong to an individual rather than to the body politic; yet, on closer examination of their elements and objects, it will be plainly seen that they are strictly public, and serve to uphold rights which inhere in the Commonwealth. The subdivision which I am thus describing includes those judicial proceedings by which the regular organization and structure of the government are preserved by determining the conflicting claims of litigant parties to occupy and hold the powers and functions of some particular public office. The individual who is, or who claims to be, a portion of the governmental organism, by virtue of an official position which he seeks to establish, may be an actor in the judicial proceeding; but the proceeding is not instituted, nor is the determination made, on his own personal account, nor for his own private benefit; the State is in theory and in practice the party primarily interested, and the rights of the State are maintained and established by the judicial decision. On the other hand, certain remedies which have the outward appearance of being public, which are required by some ancient and arbitrary rule of form to be brought in the name of the Commonwealth or of the people, are actually private and civil. The interposition of the State as a nominal actor is merely formal, and the rights to be upheld belong to individuals in their private characters and capacities. Remedies and remedial rights of this last class, being strictly private and civil, fall within the scope of the present work, while those of the preceding class are not embraced within its design.

CHAPTER FIRST.

ABOLITION OF THE DISTINCTIONS BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY, AND OF ALL THE COMMON-LAW FORMS OF ACTION.

§ 4. *44. **Statutory Provision.** The following is the form of the simple but most comprehensive provision found in the codes of procedure and practice acts, embodying the fundamental principle which is the subject-matter of the present chapter, and which is the single source from which all the other portions of the system flow as necessary consequences: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, 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."[1] In a very few of the States the change from the former modes is

[1] N. Y. § 69 (3339); Cal. § 307; S. C. § 92; Nev. § 1; Nebr. § 2; Kans. § 10; Ohio, § 3; Ind. § 1; N. C. § 12; [Connecticut, Gen. St., 1902, § 607; Minnesota, Gen. St., 1894, § 5131; Missouri, Rev. St., 1899, § 559; Wisconsin, St., 1898, § 2600; Idaho, Code Civ. Pro., 1901, § 3112; Montana, § 460; North Dakota, Rev. Codes, 1899, § 5181; Wyoming, Rev. St., 1899, § 3443; Colorado, § 1; Utah, Rev. St., 1898, § 2852; South Dakota, Ann. St., 1901, § 6030; Oklahoma, St., 1893, § 3882; Washington, Bal. Code, § 4793.

In the citations of New York statutes, the section numbers first given refer to the old Code of Procedure, while the numbers appearing in parentheses refer to the new code of Civil Procedure.] The provision in the California Code is as follows: "§ 307 (§ 1). There is in this State but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs."

[The provision of the New York code, quoted in the text, has been changed to read as follows: "There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." Code Civ. Pro., § 3339. The various codes differ somewhat among themselves in the wording of this provision, but in a general way they follow either the New York or California form. The New York form is found in Indiana, Kansas, Nebraska, Minnesota, Wisconsin, North Dakota, Wyoming, Colorado, South Dakota, and Oklahoma, while the California form is found in Missouri, Ohio, Connecticut, South Carolina, Nevada, Idaho, Montana, Utah, and Washington.

Georgia, which in many respects has followed the Code procedure, has adopted statutes as follows: "Bills in equity and all distinctions of actions into real, personal, and mixed, are abolished." "A civil action is one founded on private rights, arising either from contract or tort." Code, 1895, §§ 4931, 4932.]

not so complete, and a slight distinction is preserved between suits brought to obtain legal and those brought to obtain equitable relief. All the common-law forms of action are abolished, and one civil action is established for all remedial purposes: the proceedings in this civil action, however, may be either (1) ordinary or (2) equitable. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery, before the adoption of the code, had jurisdiction, and must so proceed in all cases where such jurisdiction was exclusive. In all other cases the plaintiff must prosecute his action by ordinary proceedings. The plaintiff indicates by the formula, "In ordinary proceedings," or "In equitable proceedings," at the commencement of his petition or complaint, to which class the action belongs. The provisions of the code regulating the prosecution of actions apply to both kinds of proceedings unless the contrary expressly appears. In fact, the only real distinction between them is that they are to be placed upon different dockets of the court, so that the suits of the one class will be tried by a jury, while those of the other class will be tried by the judge without a jury, and the evidence in equitable proceedings may be taken by deposition instead of by oral examination in open court.[1] It is evident that in these States the difference kept up between legal and equitable actions is more nominal than real, and that the principle of absolute unity prevails as truly in their codes as in those of the other commonwealths.[2]

[1] Ky. §§ 1–13; Iowa, §§ 2507, 2508, 2513, 2514, 2520; Oregon, §§ 1, 376; [Arkansas, Sand. & Hill's Dig., §§ 5607–5610, 5616–5622.]

[2] [The question cannot be raised by demurrer, but by motion to transfer from one docket to the other. McClure *v.* Dee (1902), 115 Ia. 546, 88 N. W. 1093; McCormick, etc. Co. *v.* Markert (1899), 107 Ia. 340, 78 N. W. 33. See also the following cases in which this distinction is discussed: Hodowal *v.* Yearous (1897), 103 Ia. 32, 72 N. W. 294; Kassing *v.* Ordway (1897), 100 Ia. 611, 69 N. W. 1013; Gatch *v.* Garretson (1896), 100 Ia. 252, 69 N. W. 550; Evans *v.* McConnell (1896), 99 Ia. 326, 68 N. W. 790; Leach *v.* Kundson (1896), 97 Ia. 643, 66 N. W. 913; Hawley *v.* Exchange Bank (1896), 97 Ia. 187, 66 N. W. 152; Reed *v.* Lane (1895), 96 Ia. 454, 65 N. W. 380; Wilkinson *v.* Pritchard (1895), 93 Ia. 308, 61 N. W. 965; Rabb *v.* Albright (1894), 93 Ia. 50, 61 N. W. 402; Meehan *v.* Watson (1898), 65 Ark. 216, 47 S. W. 109.]

SECTION FIRST.

THE GENERAL PRINCIPLES AS TO A UNION OF LEGAL AND EQUITABLE METHODS WHICH HAVE BEEN ADOPTED BY THE COURTS.

§ 5. *65. **Purpose of Section One, Chapter One. General Principles of Construction.** It is not my purpose in the present section to discuss in order the particular practical questions that have arisen in the construction of those provisions of the State codes of procedure and practice acts which abolish the distinction between legal and equitable actions; namely, the combining of legal and equitable causes of action and defence in the same suit, the interposing of equitable defences to legal causes of action, the granting of legal remedies where the pleadings had contemplated equitable ones, or of equitable remedies where the pleadings had contemplated legal ones, and the like. I intend rather to ascertain, if possible, and state the general principles of construction which the courts have finally adopted and applied in the settlement of these and all other similar questions which have arisen from this most distinctive and important feature of the reformed procedure. These principles are fundamental; they underlie the whole process of judicial interpretation; they shape the entire action of the courts in building up a system of practical rules out of the broad and somewhat vague enactments of the statute. A knowledge of these controlling motives and opinions which have guided the judges in their work of construction is of the highest importance; with it we may attain a systematic and harmonious result; without it we shall certainly be left in a chaos of conflicting decisions.

§ 6. *66. **Narrow Interpretation by Some Judges. This Interpretation Overruled.** The adoption of the Code of Procedure by the Legislature of New York in 1848 was undoubtedly a shock to the opinions and prejudices of lawyers who had been accustomed to regard the former system as perfect in principle, and while it met with a strenuous opposition from many members of the bar, it is not surprising that some of the judges also for a time found it difficult, if not impossible, to yield obedience to the letter even of the statutory requirement, much less to accept its spirit with zealous approval. Opinions are to be found, deliv-

ered at an early day by very eminent and able judges, sometimes sitting in the court of last resort, which, if taken as correct expositions of the statute, would have reduced the great reform to the empty change in a few words; the ancient names would have been abolished, but all the substance, all that was represented by those names, would have remained in full force and effect. According to this view there had been no union of methods into one common mode of proceeding, no abolition of any real distinctions between legal and equitable actions, because such a result is simply impossible of attainment.[1] Since the New York Constitution provides that the Supreme Court of that State shall have general jurisdiction in law and equity, and speaks in one or two other places of "equity," it has been said from the bench that a statute abolishing the distinctive features of equity would be unconstitutional, and that the New York code, so far as it purports to produce that effect, is void.[2] The system which this school of judges has constructed out of the reformatory legislation is the following.[3] The distinctions between law and equity inhere in the very nature of the subject, and cannot be abolished. The legislature may, unless restrained by the constitution, abrogate the law or equity, but cannot destroy the distinctions between them. The language of the statute, however, is not broad enough to effect such a change;

[1] See Reubens *v.* Joel, 13 N. Y. 488, 493, and Voorhis *v.* Child's Ex., 17 N. Y. 354, 357–362, per S. L. Selden J.

[2] Selden J., in Reubens *v.* Joel, 13 N. Y. 494, 495.

[3] Selden J., in Reubens *v.* Joel and Voorhis *v.* Child's Ex., *ubi supra*.

[See Anderson *v.* Chilson (1895), 8 S. D. 64, where it is stated in the syllabus that "Although the common law forms have been abolished, an equitable action under the code system is clearly distinguishable from one at law," quoting from Dalton *v.* Vanderveer (Sup.), 29 N. Y. Supp. 342, that a "distinction between equitable and legal actions still exists, though the forms have been abolished." In Casgrain *v.* Hamilton (1896), 92 Wis. 179, 66 N. W. 118, it is shown that whether the action is one in tort or in contract is still a practical question under the code. See also Rood *v.* Taft (1896), 94 Wis. 380, 69 N. W. 183, in which it is held error to permit the jury to find a cause of action *ex contractu* under pleadings showing that the cause of action was founded in tort. See also to the same effect State *ex rel. v.* Helms (1898), 101 Wis. 280, 77 N. W. 194. See further Joseph Dessert Lumber Co. *v.* Wadleigh (1899), 103 Wis. 318, 79 N. W. 237, affirming Kewaunee Cy. Sup. *v.* Decker, 30 Wis. 624, and in which it is said: "It is just as necessary to-day as it ever was that a suitor should so state his cause of action that the court may determine whether it be *ex contractu* or *ex delicto*." In Francisco *v.* Hatch (1903), 117 Wis. 242, 93 N. W. 1118, the court said: "Having brought this action in tort, neither the plaintiff nor the court could change it into an action upon contract upon the trial against the defendants' objections. This principle is well settled in this State."]

it is confined to external acts and forms, to the methods of obtaining remedies, to the incidents of actions, and not to their substance. Even when thus restrained, there are necessary elements in the subject-matter which cannot be affected by legislation, and which limit, therefore, the general phrases of the code. Assuming that primary legal and equitable rights and duties remain unaltered, essential differences must exist in the actions brought to enforce the legal and the equitable classes of rights, and also the various species of legal rights. For this reason the substantial features and characteristics of the various actions at law must and do subsist, and the rules which are based upon these facts must and do continue in operation. The names "covenant," "debt," "trespass," "assumpsit," "bill in equity," and the like, have been abandoned, but all the things which these names represented are left in their essentials exactly as before the attempted reforms. This theory of interpretation reduces the Code of Procedure from its position as the embodiment of a new system for the administration of justice to the level of a mere amendatory act regulating the minor details of practice. The explanation here made of it is now useful only as a matter of history;[1] it never became controlling; the opinions

[1] [See, however, the case of Draper *v.* Brown, decided in 1902 by the Supreme Court of Wisconsin, 115 Wis. 361, 91 N. W. 1001, from which we quote as follows: "It may seem somewhat anomalous that, under a Code, any distinction should exist between legal and equitable actions. That such distinction does exist is recognized in almost every Code State. It is a distinction inherent in the very nature of things, and must be recognized so long as both legal and equitable remedies are permitted. A man has both legal and equitable rights. In the vindication of his legal rights he can call upon the individual or individuals who have invaded such rights for reparation. In the enforcement of his equitable rights he has the power, and it is his duty, to call in every person necessary to a complete determination or settlement of the question involved. Such is the statute. Section 2603, Rev. St. 1898. In treating this question, Mr. Justice Lyon, in Bonesteel *v.* Bonesteel, 28 Wis. 245, wrote as follows: 'There are certain essential and inherent distinctions between actions at law and in equity, to abolish which is beyond the power of legislative enactment. The legislature may abolish the old forms of action and has done so; but the essential principles of equitable actions and equitable relief, as distinguished from legal actions and remedies, are as vital now, and as clearly marked and defined, as before the enactment of the Code. They are indestructible elements in our system of jurisprudence, and the courts are constantly required to recognize and apply them.' The courts of New York announced the same doctrine early in the history of the Code. Reubens *v.* Joel, 13 N. Y. 488; Goulet *v.* Asseler, 22 N. Y. 225; Gould *v.* Bank, 86 N. Y. 75–83. So pronounced and well preserved is this distinction that this court sustained a demurrer to a complaint in an equitable action, notwithstanding it contained allegations which, if standing by themselves, would constitute an action at law. Denner *v.* Railroad Co., 57 Wis. 218, 15 N. W. 158."]

which it represents were those of individual judges rather than of courts, and they have been repeatedly and completely overruled by tribunals of the highest authority.[1]

§ 7. *67. **How Interpreted in Most of the States. Criticism of Interpretation in these States.** This protest against the changes in the time-honored modes of judicial procedure, this antagonism to the principle of the new system, which was at the outset confined to a small though very able portion of the bench, was long since abandoned;[2] and the courts have in most of the States not only conformed to the letter of the reformatory legislation, but have to a considerable extent, but not, as I think, to the full extent, accepted and carried out its evident spirit and meaning. I speak advisedly in this statement. While the courts *on the whole*, and in all the States, do not show a disposition to defeat the reform by a hostile construction, but rather seem desirous of promoting it, and establishing it upon a secure basis, there are yet marked differences in this respect among the States, and also strange inconsistencies in the application of general principles to particular instances. The acceptance of the reformed procedure is much more constrained and reluctant in certain of the States than in the remaining and by far the larger portion of them. Again, a lack of uniformity will be discovered in applying the most general and comprehensive principles of interpretation to the various elements and features of judicial procedure. All these inconsistencies, when they exist, have arisen from the incapacity of the judicial mind to apprehend the fact that legal actions and equitable actions have been abolished, and a "civil action" has been substituted in their place. Conceding this truth in general, courts have sometimes failed to act upon it in reference to some subordinate particulars; the result has been, not a perfect harmonious structure built up by judicial labor, but a structure, although following on the whole a comprehensive and symmetrical plan, yet marred by many breaks and unfinished parts and misshapen additions. In short, the true fundamental principles of construction have been generally adopted as guides, the true spirit and design of the reform system have been gener-

[1] See the comments upon Mr. Justice Selden's opinion in Reubens *v.* Joel, made by Comstock J., in N. Y. Ice Co. *v.* N. W. Ins. Co., 23 N. Y. 359, 360.

[2] See, however, cases cited in note 1, p. 9.

ally apprehended; but in descending to the details, and in prescribing the practical rules of procedure, this principle and this spirit have been sometimes forgotten or intentionally disregarded.

§ 8. *68. **No Change in Rights, Duties, or Liabilities.** It has been abundantly settled, in perfect accordance with the theory developed in the preceding section, and in strict conformity with the language and design of all the State codes and practice acts, that the new system has not produced, and was not intended to produce, any alteration of, nor direct effect upon, the primary rights, duties, and liabilities of persons created by either department of the municipal law.[1] Whatever may have been the nature or extent of these primary rights and duties, from whatever causes, facts, acts, or omissions they took their rise, whether they were denominated legal or equitable, they remain exactly the same as before. The codes do not assume to abolish the distinctions between "law" and "equity," regarded as two complementary departments of the municipal law; not a clause is to be found which suggests such a revolution in the essential nature of the jurisprudence which we have inherited from England. The principles by which the courts determine the primary rights and duties of litigant parties remain unaltered; upon the acts or

[1] Peck *v.* Newton, 46 Barb. 173, 174, per Parker J.; Cole *v.* Reynolds, 18 N. Y. 74, 76, per Harris J.; Lattin *v.* McCarty, 41 N. Y. 107, 110, per Hunt C. J.; Meyers *v.* Field, 37 Mo. 434, 441, per Holmes J.; Richardson *v.* Means, 22 Mo. 495, 498, per Leonard J.; Maguire *v.* Vice, 20 Mo. 429; Matlock *v.* Todd, 25 Ind. 128, 130, per Elliot J.; Woodford *v.* Leavenworth, 14 Ind. 311, 314, per Worden J.; Emmons *v.* Kiger, 23 Ind. 483, 487; De Witt *v.* Hays, 2 Cal. 463, 468, per Murray C. J.; Grain *v.* Aldrich, 38 Cal. 514; Cropsey *v.* Sweeney, 27 Barb. 310; Klonne *v.* Bradstreet, 7 Ohio St. 322, 325, per Bowen, J.; Garret *v.* Gault, 13 B. Mon. 378, 380, per Hise J.; Bonesteel *v.* Bonesteel, 28 Wis. 245, 250, per Lyon J.; Dickson *v.* Cole, 34 Wis. 621, 625; Martin *v.* Mobile & O. R. R., 7 Bush, 116, 124; Richmond & L. Turnp. Co. *v.* Rogers, 7 Bush, 532, 535; Lamson *v.* Pfaff, 1 Handy, 449, 452; Claussen *v.* La Frenz, 4 Greene (Ia.), 224; Smith *v.* Rowe, 4 Cal. 6.

[See Kollock *v.* Scribner (1897), 98 Wis. 104, 73 N. W. 776, where the court says: "The framers of the code clearly intended to abolish all distinctions between actions at law and suits in equity, to abolish the forms of all such actions, and to provide that in this State there shall be but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action." See especially Draper *v.* Brown (1902), 115 Wis. 361, 91 N. W. 1001, citing and quoting from Bonesteel *v.* Bonesteel, *supra*. Hopkins *v.* Washington County (1898), 56 Neb. 596, 77 N. W. 53: "The distinction between law and equity is not abolished in this State. Section 2 of the Code of Civil Procedure, however, provides that there shall be but one form of action, called a 'civil action,' in which rules of law or doctrines of equity may, under proper pleading and proper states of facts, either or both be enforced."] See Mowry *v.* Hill, 11 Wis. 146, 149.

omissions which were the occasion of a right called equitable the same right is still based, and is still properly termed equitable; from the acts or omissions which were the occasions of a right called legal the same right still arises, and is still with propriety termed legal.[1] I remark, in passing, that much of the confusion and uncertainty which now exists would at once disappear, if the bar and the bench should adopt a nomenclature in conformity with the settled principle of interpretation, and should speak of legal and equitable rights, legal and equitable remedies, but not of legal and equitable actions. To term an action "legal" or "equitable" is a misnomer, and one which involves a wrong conception and a false doctrine, since the statute has removed all distinction between legal and equitable actions, and has substituted in place of both a single "civil action;" and the courts have decided that the legislature intended exactly what it has said.[2] But as the legislature did not say, nor mean to say, that the distinctions between legal and equitable rights or remedies are abolished, those terms may be used with propriety and correctness.[3] The reformed American system, in short, has given no new causes of action. Primary rights and duties are unchanged; the delicts or wrongs which are the violations of these rights and duties are still committed in the same manner as before; and as these primary rights and duties, and the wrongs which violate them, constitute the causes of action over which the courts exercise their remedial jurisdiction, it is plain that no statute relating solely to procedure can increase, diminish, or modify the causes of action which exist independently of procedure. In some instances particular parties are permitted to maintain an action who could not have maintained it under the old practice; but in no instance can this now be done where upon the same facts and circumstances a similar action could not have been maintained by some person. A familiar illustration of this statement is found in the change made in the common-law

[1] [Anderson *v.* War Eagle Min. Co. (1903), Idaho, 72 Pac. 671, quoting the text.]

[2] [It is not material by what name, or whether by any, an action under the code is designated. The pleader should state the facts, and if they constitute a cause of action, the law affords the remedy without reference to the form of action. Skinner *v.* Skinner (1894), 38 Neb. 756, 57 N. W. 534. But see Draper *v.* Brown (1902), 115 Wis. 361, 91 N. W. 1001.]

[3] [Anderson *v.* War Eagle Min. Co. (1903), Idaho, 72 Pac. 671, quoting the text.]

rule prohibiting an action by the assignee of a non-negotiable thing in action, and requiring the suit to be prosecuted in the name of the assignor, although for the benefit, and, as it was finally settled, under the complete control, of the assignee. The codes have abrogated this technical dogma, and thus permit an action to be brought by a party who formerly had no such power; but this does not create nor constitute any new cause of action. The assignee now sues where the assignor sued; the same facts must be proved, the same rights asserted, and the same relief given; the only change is in permitting the assignee to accomplish directly, and in his own name, what he before accomplished indirectly and by the use of another's name.

§ 9. *69. **No Change in Remedies or Remedial Rights.** The doctrine thus uniformly established in reference to the effect of the reform legislation upon primary rights and duties, and causes of action, is also as clearly settled in reference to its effect upon remedies and remedial rights, when the term is used — as it properly should be — to denote the reliefs which are conferred upon parties, and not the means of procuring these reliefs. The word "remedies" is sometimes used in two different technical senses, and from this dual meaning there arises — as in all such cases — doubt and confusion. The secondary and in strictness improper signification renders the word equivalent to the mere judicial instruments and their incidents, the actions at law, suits in equity, special proceedings, and the like, — the various steps in a forensic controversy which fall within the proper domain of practice. The primary and strictly accurate signification makes it synonymous with the judgments which are pronounced by the court, and which established the remedial rights and prescribe the manner in which and the means by which they are to be satisfied. Or "remedies" may denote those judgments executed and performed by which the party has received the very benefit to which he was entitled, — the sum of money, the possession of the land or of the chattels, the execution and delivery of the deed, the cancellation of the agreement, the removal of the obstruction, or whatever else was ordered to be done by the opposite party. In either of these two latter senses, the remedies which were in use under the former system, and which were awarded by the courts upon proper occasions, are absolutely unaffected in any of their essential features by the reformatory legisla-

tion.[1] The general and sweeping language so often quoted abolishes the distinction between actions at law and suits in equity; and other provisions and clauses recognize all the forms of judgment known to the common-law courts, namely, for payment of money, for the possession of land and of chattels, and also the specific kinds of relief which courts of equity embodied in their decrees. Strictly speaking, the remedy given is no part of the action, but is the result thereof; it is the object for which the action is prosecuted, the end at which all the litigation is directed. A modification of the action, a change in its forms, incidents, names, modes of procedure, including the process, the pleadings, the parties, the manner of trial, and all other steps preparatory to the judgment, does not involve any alteration in this result; the general language of the codes does not, therefore, include and apply to the substance of the judgments, that is, of the remedies. Without, however, relying exclusively upon an interpretation which may seem to be too refined and verbal, the practical construction given by the courts, and as illustrated by the citations contained in the preceding foot-note, fully sustains the conclusions which are reached by an analysis of the language. Abolition of the distinction between legal and equitable actions, and of the forms of legal actions, does not abolish the distinctions between remedies. If from the nature of the primary right, and of the wrong by which it is invaded, the injured party would under the old system have been entitled to an equitable remedy, he is still entitled to the same relief, and it may well be termed equitable; if from the like causes he would have been entitled to a legal remedy, he is still entitled to the same relief, and it may properly be described as legal.

§ 10. *70. **The Differences that have been Abolished. What is Established?** It having been thus determined that no effect has been wrought upon the primary rights and duties which consti-

[1] See cases last cited under § 8; also, Carrico *v.* Tomlinson, 17 Mo. 499; Butler *v.* Lee, 33 How. Pr. R. 251 (Ct. of App.).

[See Hord *v.* Bradbury (1900), 156 Ind. 30, 59 N. E. 31, where the court says: "Judgments at law and decrees in equity are all 'judgments' under the code." Olson *v.* Thompson (1897), 6 Okla. 74, 48 Pac. 184: "Notwithstanding the legislature has abolished the distinction between actions at law and suits in equity, yet the legislature has not intended thereby to change the nature of the remedies which generally obtain in those jurisdictions where courts of law and chancery are separate, nor could they do so if they wished, as it would be in most instances impossible to obtain relief in an action at law where such relief must come through the equitable powers of the court."]

tute the great body of the municipal law, nor upon the final remedies granted to the litigant parties, the courts have, with general though not with absolute unanimity, agreed upon the interpretation to be given to the provision under consideration. The broad principle of construction may be regarded as established in most if not all the States, that the clauses of the statutes abolishing the distinction between actions at law and suits in equity were intended to mean exactly what they say, without reservation or equivocation. All the differences which belonged to the external machinery by which a judicial controversy was conducted up to the judgment itself, all the rules respecting forms of action, all the peculiar characteristics of a legal or of an equitable action, or of the various kinds of legal actions, except the constitutional requirement as to the jury trial, have been swept away. One action, governed in all instances by the same principles as to form and methods, suffices for the maintaining of all classes of primary rights, and for the pursuit of all kinds of civil remedies.[1] I say, governed by the same *principles* as to form and method; but this does not assume that exactly the

[1] Dobson *v.* Pearce, 12 N. Y. 156, 165; Crary *v.* Goodman, 12 N. Y. 266, 268; N. Y. Cent. Ins. Co. *v.* Nat. Protection Ins. Co., 14 N. Y. 85, 90; Cole *v.* Reynolds, 18 N. Y. 74, 76; Bidwell *v.* Astor Ins. Co., 16 N. Y. 263, 267; Phillips *v.* Gorham, 17 N. Y. 270, 273, 275; Laub *v.* Buckmiller, 17 N. Y. 620, 626; N. Y. Ice Co. *v.* N. W. Ins. Co., 23 N. Y. 357, 359; Brown *v.* Brown, 4 Robt. 688, 701; Grinnell *v.* Buchanan, 1 Daly, 538; Crosier *v.* McLaughlin, 1 Nevada, 348; Rogers *v.* Penniston, 16 Mo. 432; Troost *v.* Davis, 31 Ind. 34, 39; Scott *v.* Crawford, 12 Ind. 411; Kramer *v.* Rebman, 9 Iowa, 114; De Witt *v.* Hays, 2 Cal. 463; Wiggins *v.* McDonald, 18 Cal. 126; Bowen *v.* Aubrey, 22 Cal. 566, 569; Ireland *v.* Nichols, 1 Sweeney, 208; Garret *v.* Gault, 13 B. Mon. 378, 380; Wright *v.* Wright, 54 N. Y. 437, 442; White *v.* Lyons, 42 Cal. 279; Giles *v.* Lyon, 4 N. Y. 600; Getty *v.* Hudson River R. R., 6 How. Pr. 269; Mowry *v.* Hill, 11 Wis. 146, 149; Chinn *v.* Trustees, 32 Ohio St. 236; Gress *v.* Evans, 1 Dak. 387; Williams *v.* Slote, 70 N. Y. 601; Stevens *v.* The Mayor, etc., 84 N. Y. 296, 304, 305; Anderson *v.* Hunn, 5 Hun, 79; McPherson *v.* Weston, 64 Cal. 275; Sykes *v.* First Nat. Bk. (S. D.), 49 N. W. 1058.

[South Bend Chilled Plow Co. *v.* Geo. C. Cribb Co (1900), 105 Wis. 443, 81 N. W. 675; Dickerson *v.* Spokane (1901), 26 Wash. 292, 66 Pac. 381: "Under the system of code procedure whereby the distinction between actions at law and suits in equity is abolished, an action at law is maintainable upon an equitable assignment." Morehouse *v.* Throckmorton (1899), 72 Conn. 449, 44 Atl. 747; Hahl *v.* Sugo (1901), 169 N. Y. 109, 62 N. E. 135. In Rogers *v.* Duhart (1893), 97 Cal. 500, 32 Pac. 570, it is said: "With us, mere forms of action are cast aside. Every action is now, in effect, a special action on the case." Merriman *v.* Walton (1895), 105 Cal. 403, 38 Pac. 1108; Whitehead *v.* Sweet (1899), 126 Cal. 67, 58 Pac. 376: "Under our code there is but one form of action, and if the complaint states facts which entitle the plaintiff to relief either legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action."]

same form or method is to be or can be used in all actions for whatever purposes brought. The common principle as to form and method is not that all actions shall assume absolutely the same form, nor is it that they shall be governed by any technical rules which separate them into arbitrary classes; it is that they shall all conform to and follow the facts and circumstances which constitute the cause of action, and entitle the parties to relief. It is established, therefore, that a single judicial action, based upon and conforming to the facts and circumstances of each particular case, whatever be the nature of the primary right which they create, must be used for the pursuit of all remedies, legal or equitable.[1] The authorities referred to in the notes show that this doctrine is now adopted in all the States where the reformed procedure prevails, and that there is little variation in the language by which it is expressed. When, however, we shall pass from this statement of the doctrine in the abstract to the application of it in particular instances, — as, for example, in questions as to parties, pleading, judgments, — the perfect uniformity of judicial opinion and action disappears; but still in the great majority of the States the courts have fairly followed the true intent of the legislation and the correct principle of interpretation.

§ 11. *71. **Rule Settled herein. Familiar Rule in Old System.** Thus it may be regarded as a settled rule, resulting from the

[1] [See cases cited in last preceding note. Zurfluh *v.* Smith (1902), 135 Cal. 644, 67 Pac. 1089. This was an action for accounting against the administrator of a deceased guardian and for judgment for the amount found due against the sureties on the guardian's bond. Appellants, the sureties, claimed that an equitable action must first be brought to ascertain the amount due and then a second action to obtain a judgment against the sureties for that amount. But the court held it proper to bring one action to decide the entire controversy, saying that it mattered not that part of the relief was equitable and part legal.]

[In Hahl *v.* Sugo (1901), 169 N. Y. 109, 62 N. E. 135, the court, referring to sections 3339, 481, and others of the code, said: "These sections of the Code, and others, which need not be specifically referred to, clearly evince the legislative intent to strip our modern procedure of the cumbrous forms and distinctions which made the practice under the common law and the earlier statutes so burdensome in its details and so uncertain in its results. Upon examining that portion of the Code which deals with actions to recover real property (Ch. 14, tit. 1, art. 1) we find that the old term 'ejectment' has been discarded in the title and it is now entitled 'Actions to recover real property.' This change of name was obviously a part of the plan of the codifiers to reduce our practice to a simple and composite scheme under which all of the rights of litigants, both legal and equitable, so far as they are consistent with each other and affect the same parties, can be tried in one action and be merged in one judgment."]

statutory provision in question, that if a plaintiff has set forth facts constituting a cause of action, and entitling him to *some* relief, either legal or equitable, his action shall not be dismissed because he has misconceived the nature of his remedial right, and has asked for a legal remedy when it should have been equitable, or for an equitable remedy when it should have been legal.[1]

[1] [Damon *v.* Leque (1896), 14 Wash. 253, 44 Pac. 261, quoting the text; Watson *v.* Glover (1899), 21 Wash. 677, 59 Pac. 516; Dreyer *v.* Hart (1896), 147 Ind. 604, 47 N. E. 174; Gartner *v.* Corwine (1897), 57 O. St. 246, 48 N. E. 945; Anderson *v.* War Eagle Min. Co. (1903), Idaho, 72 Pac. 671, quoting the text]; Crary *v.* Goodman, 12 N. Y. 266, 268; N. Y. Cent. Ins. Co. *v.* National Protec. Ins. Co., 14 N. Y. 85, 90; Emery *v.* Pease, 20 N. Y. 62, 64; Bidwell *v.* Astor Ins. Co., 16 N. Y. 263, 267; Phillips *v.* Gorham, 17 N. Y. 270, 273, 275; Laub *v.* Buckmiller, 17 N. Y. 620, 626; N. Y. Ice Co. *v.* N. W. Ins. Co., 23 N. Y. 357, 359; Farlow *v.* Scott, 24 N. Y. 40, 45; Marquat *v.* Marquat, 12 N. Y. 336; Troost *v.* Davis, 31 Ind. 34, 39; Grain *v.* Aldrich, 38 Cal. 514, 520; Leonard *v.* Rogan, 20 Wis. 540, 542. In Emery *v.* Pease, 20 N. Y. 62, the complaint set out facts entitling the plaintiff to an accounting, but did not ask one; it did not aver any settlement, nor ascertained balance due, and demanded judgment for a sum certain. On the trial the complaint was dismissed, on the ground that it did not set forth facts sufficient to constitute a cause of action. Comstock J., after stating the old rule by which the action would have been properly dismissed, proceeds (p. 64): "In determining whether an action will lie, the courts are to have no regard to the old distinctions between legal and equitable remedies. Those distinctions are expressly abolished. A suit does not, as formerly, fail because the plaintiff has made a mistake as to the form of the remedy. If the case which he states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled." Bidwell *v.* Astor Ins. Co., 16 N. Y. 263, was an action on a policy of insurance. The complaint asked that the policy be reformed, and that the defendant pay $7,000 as the sum insured by the reformed policy. Without a reformation the plaintiff was not entitled to a judgment for any amount. On the trial a mistake in the instrument was proved, and the court directed a judgment for $7,000. The defendant insisted that a judgment for damages, instead of one for a reformation, was improper. The court say: "There was nothing in the objection that the court should have stopped with reforming the policy, and turned the plaintiff over to a new action to recover damages." The N. Y. Ice Co. *v.* N. W. Ins. Co., 23 N. Y. 357, is an important and suggestive case. The action was on an insurance policy. The plaintiff claimed a money judgment for a loss, and also a reformation of the policy which, if made, would entitle him to a further recovery of money. He failed to make out a case for a reformation; whereupon the trial court dismissed the action, holding that the other issue could not be tried. Comstock J. said (p. 359): "I am of opinion that it was erroneous to turn the plaintiff out of court on the mere ground that he had not entitled himself to the equitable relief granted, if there was enough left of his case to entitle him to recover the sum in which he was insured. No suggestion was made that the complaint did not show a good cause of action for this money, even after striking out all the allegations and the prayer on the subject of the equitable relief." The same doctrine is again applied in Barlow *v.* Scott, 24 N. Y. 40, 45, Lott J. saying: "Under our present arrangement, the same court has both legal and equitable jurisdiction; and if the facts stated by a party in his complaint are sufficient to entitle him to any of the relief asked, and an answer is put in putting these facts in issue, it would be erroneous to dismiss the complaint on the trial merely because improper relief is primarily demanded." The true principle

Nothing was a more familiar rule in the old system than the one which turned a plaintiff out of court if he had misconceived the nature or form of his action. If he brought an action at law, and on the trial proved a case for equitable relief, or if he filed a bill in equity, and at the hearing showed himself entitled to a judgment at law, he must absolutely fail in that proceeding. It is very plain that this arbitrary and most unjust rule rested wholly upon the ancient notions as to distinctions between legal and equitable actions, and did not rest upon any notions as to the primary rights which the litigant parties sought to maintain. Wherever, therefore, the letter and spirit of the reformed system are followed by the courts, this harsh rule is swept away. A suit does not now fail because the plaintiff has erred as to the form or kind or extent of the remedy he demands.[1] A party cannot be sent out of court merely because the facts alleged do not entitle him to relief at law, or merely because they do not entitle him to relief in equity. If the case which he states shows him entitled to any relief, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment that is not embraced by the facts. The only inconvenience which a plaintiff can suffer from such an error is, that the trial may, perhaps, be suspended, and the cause sent to another branch of the court, or, as in Kentucky, Iowa, and Oregon, to another docket.[2] If a plaintiff had brought his action on the theory that it was based upon an equitable right, and sought an equitable relief, and it turns out to be in effect legal, so that the defendant is entitled to a jury trial, the trial must be had before a jury, and

was tersely and most accurately stated by Sanderson J. in Grain *v.* Aldrich, 38 Cal. 514, 520: "Legal and equitable relief are administered in the same forum and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when upon his facts he is entitled to no relief either at law or in equity." Hamill *v.* Thompson, 3 Colo. 518, 523; Schilling *v.* Rominger, 4 Colo. 100; Whiting *v.* Root, 52 Iowa, 292; Herring *v.* Neely, 43 Iowa, 157.

[1] See notes 2 and 3, p. 665.

[2] McCrory *v.* Parks, 18 Ohio St. 1; Ellithorpe *v.* Buck, 17 Ohio St. 72. See Dickson *v.* Cole, 34 Wis. 621, 625.

[See p. 6, note 1. Ming Yue *v.* Coos Bay R. R. Co. (1893), 24 Ore. 392, 33 Pac. 641: "The distinction between actions and suits is not abolished by our code. . . . When, therefore, the plaintiffs, being in equity, failed to state in their complaint a cause of suit, notwithstanding they may have stated a cause of action, the court had no jurisdiction to retain and try such action, but was bound to dismiss the suit, and leave the plaintiffs to prosecute their action, if they have one at law." See also Small *v.* Lutz (1899), 34 Ore. 131, 55 Pac. 529.]

not before a single judge sitting as a chancellor; and, when the trial had taken place before the wrong tribunal, the judgment would be reversed, and the cause sent for a new trial in the proper place.[1]

§ 12. * 72. **Struggle in Establishing Rule. Missouri Doctrine.** The rule discussed in the foregoing paragraph as to the relation between the facts alleged and the relief asked and granted was not established without a struggle, and has not at all times, and in all the States, prevailed without exception, and perhaps is not even now *universally* accepted. Many early cases in New York were decided under the influence of the former practice and the ancient notions; and although the Court of Appeals has completely repudiated the doctrine of those adjudications, yet the principles announced by it have not always been followed by the inferior tribunals of the same State.[2] In one or two of the States, and especially in Missouri, the ancient rules and doctrines in reference to this subject-matter have been repeatedly asserted, and, until a very recent period, prevailed in the courts, notwithstanding the adoption of the reformed procedure. In Missouri, the judiciary, standing alone in this respect, preserved for a long time the real distinctions between legal and equitable actions as strongly marked as under the former system, and, in fact, insisted upon a rule more strict than that enforced by the English Court of Chancery.[3] The following examples will illustrate this peculiar interpretation of their code by the Missouri courts. In those cases where the plaintiff holds the equitable title to land, while the legal title is in the defendant by

[1] Davis *v.* Morris, 36 N. Y. 569, 571, 572, per Grover J. In this case the New York Court of Appeals laid down, in a formal manner, the rule as to the trial of legal and equitable issues. If the pleadings present both legal and equitable issues, the parties are entitled to a jury, and all the issues must be tried together; that is, there should not be a partial trial before a jury and the residue before another tribunal. If, however, the plaintiff insists upon a trial before the court, and his claim is acceded to, upon the discovery that the action presents issues which must be decided by a jury, the complaint should not be dismissed, but the cause should be sent to the circuit for trial as a jury cause. Parker *v.* Laney, 58 N. Y. 469; Richmond *v.* Dubuque, etc. R. Co., 33 Iowa, 422, 489–491.

[2] See Peck *v.* Newton, 46 Barb. 173, 174.

[3] [See also Draper *v.* Brown (1902), 115 Wis. 361, 91 N. W. 1001, in which the court, in speaking of the distinction between legal and equitable actions, said: "So pronounced and well preserved is this distinction that this court sustained a demurrer to a complaint in an equitable action, notwithstanding it contained allegations which, if standing by themselves, would constitute an action at law. Denner *v.* Railroad Co., 57 Wis. 218, 15 N. W. 158."]

means of a fraudulent conveyance, it has been frequently held that the former must first obtain a decree in equity, cancelling the outstanding deed, and must then resort to a separate action of ejectment to recover possession of the land. A vendee of land has also been required to proceed in two distinct actions, — the first equitable, to compel a specific performance, and the second legal, to obtain possession. The plaintiff was turned over to a second legal action in order to complete his remedy, because, as the court repeatedly insisted, possession of land can never be awarded by a decree in equity.[1] The Missouri court has recently receded, in part at least, from this extreme position, and is plainly tending towards a complete harmony with the doctrines which are accepted in other States.[2] A simple criterion has been suggested by which to determine the nature of the action. If the facts alleged in the complaint or petition would entitle the plaintiff to both legal and equitable relief, the prayer for judgment — that is, the nature of the remedy demanded — might be a certain test by which the character of the suit should be known.[3] This suggestion has not, however, been followed in other cases.

[1] Meyers *v.* Field, 37 Mo. 434, 441; Maguire *v.* Vice, 20 Mo. 429; Curd *v* Lackland, 43 Mo. 199; Wynn *v.* Cory, 43 Mo. 301; Gray *v.* Payne, 43 Mo. 203; Bobb *v.* Woodward, 42 Mo. 482, 487; Peyton *v.* Rose, 41 Mo. 257, 262; Gott *v.* Powell, 41 Mo. 416; Moreau *v.* Detchemendy, 41 Mo. 431; Walker's Adm. *v.* Walker, 25 Mo. 367; Reed *v.* Robertson, 45 Mo. 580; Rutherford *v.* Williams, 42 Mo. 18, 23; Fithian *v.* Monks, 43 Mo. 502, 517; Magwire *v.* Tyler, 47 Mo. 115, 127.

[2] Henderson *v.* Dickey, 50 Mo. 161, 165, per Wagner J. Followed in numerous recent cases; see Paddock *v.* Somes, 102 Mo. 226.

[See Hollister *v.* Bell (1900), 107 Wis. 198, 83 N. W. 297, in which it is said: "The idea that a plain action at law, as to which there is an entire failure of proof, can be turned into an action in equity and a recovery be had such as that jurisdiction in any event can afford on the facts, does not find support in the decisions of this court. If an action be brought and tried as an action at law, such relief only is obtainable as is afforded on the facts in that form of action." Seals *v.* Augusta Ry. Co. (1898), 102 Ga. 817, 29 S. E. 116; Hamilton *v.* Mandle (1898), 103 Ga. 788, 30 S. E. 658; Field *v.* Brown (1896), 146 Ind. 293, 45 N. E. 464: "There may properly be joined causes or defences, one of which is triable by the court and the other by a jury."]

[3] Gillett *v.* Treganza, 13 Wis. 472, 475, per Dixon C. J. Followed in Lowber *v.* Connil, 36 Wis. 176; Harrall *v.* Gray, 10 Neb. 186.

[Topping *v.* Parish (1897), 96 Wis. 378, 71 N. W. 367. But in Stephens *v.* Harding (1896), 48 Neb. 659, 67 N. W. 746, the court said: "Under our system of pleading the nature of an action is determined not alone by the prayer for relief, but also from the character of the facts alleged." So, also, Lett *v.* Hammond (1899), 59 Neb. 339, 80 N. W. 1042; Irwin *v.* Richardson (1894), 88 Wis. 429, 60 N. W. 786; United Coal Co. *v.* Canon City Coal Co. (1897), 24 Colo. 116, 48 Pac. 1045; Imperial Shale Brick Co. *v.* Jewett (1901), 169 N. Y. 143, 62 N. E. 167.]

§ 13. *73. **Summary of Foregoing Discussion. Fundamental Principle Stated.** To recapitulate the results of the foregoing discussion: The courts have, with few exceptions, accepted the language of the code in its simplicity, and have given to it a reasonable meaning; they have acknowledged that the legislature intended to abolish, and has abolished, all the features which distinguish legal and equitable actions from each other, and has established a single action for the pursuit of all remedies; they have settled the doctrine that by the use of this single action neither the primary rights nor the remedial rights of litigant parties are affected or in any manner modified, since they do not depend upon matters connected with the form or external features of the action, and that among the matters which are thus connected with the form are the setting forth or statement of the cause of action or defence in the pleadings, and the demand of relief or prayer for judgment. A mistake or misconception in respect to the action being called legal or equitable does not defeat the plaintiff, but at most may require a trial before a properly constituted court. One fundamental principle controls the administration of justice by means of this common civil action, and this principle may be formulated in the following manner: The object of every action is to obtain a judgment of the court sustaining or protecting some primary right or enforcing some primary duty; every such primary right and duty results from the operation of the law upon certain facts, in the experience of the person holding the right or subjected to the duty; every wrong or violation of this primary right or duty consists in certain facts, either acts or omissions of the person committing the wrong. A statement, therefore, of the facts from which the primary right or duty arises, and also of the facts which constitute the wrong or violation of such primary right or duty, shows, and must of necessity show, at once a complete cause of action; that is, the court before which this statement is made can perceive from it the entire cause of action, the remedial right flowing therefrom, and the remedy or remedies which should be awarded to the injured party. All actions can be and should be constructed in the manner thus described; and, if so, they would conform to the single and common principle announced by the reformed method of procedure. Whether the rights and duties are legal or equitable, whether the remedies

appropriate are legal or equitable, whether the facts are simple and few or complex and numerous, does not in the slightest degree affect the application and universality of this principle; it is the central conception of the new system, the corner-stone upon which the whole structure is erected.

§ 14. *74. **Pleading at Common Law and in Equity.** It is not my purpose in the present section to follow this general principle in its application to the various features and phases of an action; to do so would be to anticipate the matter contained in several subsequent chapters. A brief allusion must be made, however, to one of these topics, or else the theory of construction finally accepted by the courts will be but partially explained, — I refer to the subject of pleading. No single element of difference more sharply marked the contrast between the action at law and the suit in equity under the former system than the manner in which the litigant parties in each stated their causes of action and their defences. Although it was said that in each kind of judicial proceeding the *facts* constituting the cause of action or defence should alone be alleged, this rule was not followed in actual practice. In a common-law action the "issuable facts" only were spread upon the record. The plaintiff never narrated the exact transaction between himself and the defendant from which the rights and duties of the parties arose; he stated *what he conceived to be the legal effect of these facts.* Thus, if the transaction was a simple arrangement respecting the sale and purchase of goods, instead of disclosing exactly what the parties had actually done, the pleader used certain formulas expressing the supposed legal effect of what had been done, as that he had "sold and delivered" or had "bargained and sold" the chattels; and, if a mistake was made in properly conceiving of this legal effect, — that is, if the real facts of the transaction, as disclosed by the evidence, did not correspond with this conception of their legal effect taken by the pleader, — the plaintiff might be, and, unless permitted to amend, would be, turned out of court. On the equity side the facts as they occurred, rather than the legal aspect of or conclusions from these facts, were set forth, according to the original theory of equitable pleading. In practice this narrative was always accompanied by a detail of mere evidentiary matter, which was inserted, not because it was necessary to the statement of the cause of action, but because it was a means of

obtaining admissions from the defendant, and of thus making him a witness in the cause against himself. A bill in equity had, therefore, two entirely distinct uses and offices; it was a narrative of the facts from which the plaintiff's rights to relief arose, and it was an instrument for obtaining evidence from the opposite party. This latter purpose, which was known as "discovery," the codes have expressly abolished, and have substituted in its stead the more direct method of an oral examination of one party by the other, if desired, either on the trial or preliminary thereto.

§ 15. *75. **Two Schools of Interpretation respecting Modes of Pleading under the Code.** Upon the adoption of the reformed system in New York there arose at once in that State, and subsequently in other commonwealths, two schools of interpretation in reference to the modes of pleading prescribed by the new procedure. One school maintained that all the distinctive features and elements of the common law and of the equity modes of pleading remained in full force, and that the legislature had simply abolished certain names and certain technical rules of mere form. This particular theory was a necessary and evident corollary of the broader principle advocated by the same school, and already explained in the present section, that the division of actions into legal and equitable still existed, in all that pertained to their substantial nature; if actions were now, as before, legal or equitable, the most characteristic features of the two classes, that which marked their difference in the most emphatic manner, — the peculiar modes of pleading appropriate to each, — were of course preserved. In a common-law cause the pleader was to follow the common-law rules of pleading, and in an equity suit the equity rules. This doctrine was asserted and was sustained with great ability and earnestness by several judges in the infancy of the system. It would be useless to cite all the reported decisions in which it was advocated; and I shall only refer to a few which have always been regarded as leading.[1] The other

[1] Rochester City Bank *v.* Suydam, 5 How. Pr. 216; Wooden *v.* Waffle, 6 How. Pr. 145.

[But see the following cases: Lassiter *v.* Roper (1894), 114 N. C. 17, 18 S. E. 946; quoting with approval Parsley *v.* Nicholson, 65 N. C. 210, the court said: "The rules of pleading at common law have not been abrogated. The essential principles still remain, and have only been modified as to technicalities and matters of form." Kilpatrick-Koch Dry-Goods Co. *v.* Box (1896), 13 Utah, 494, 45 Pac. 629: "Section 3219, Comp. Laws of Utah, 1888,

school asserted that all the distinctions between the common-law and the equity modes of pleading had been embraced within the sweeping language of the statute, and had been discarded; that one general principle of pleading was applicable to the civil action in all cases, whatever might be the nature of the primary right it sought to maintain, or of the remedy it sought to procure. This principle, which was stated in a preceding paragraph, is simple, universal, and natural. It is merely that the pleader must narrate in a plain and concise manner the actual facts from which the right and duties of the parties arise, and not his conception of their legal effect, nor, on the other hand, the mere detail of evidence which substantiates the existence of those facts. This comprehensive principle applies to all kinds of actions, to one founded upon a legal right and seeking a legal remedy, and to one founded on an equitable right and seeking an equitable remedy; and it avoids all questions and difficulties as to the "issuableness" of the matters alleged. Undoubtedly, from the very nature of the primary rights invaded and of the remedies demanded, the narrative of facts will generally be much more minute, detailed, and circumstantial in actions brought to

declares the rule for stating the cause of action as follows: 'The complaint must contain . . . a statement of the facts constituting the cause of action, in ordinary and concise language.' The above is, in substance, the common-law rule. 'Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defence. . . . Facts only are to be stated, and not arguments or inferences, or matters of law.' 1 Chitty Pl. pp. 213, 214." Casey *v.* Mason (1899), 8 Okla. 665, 59 Pac. 252: "The statute did not abolish common-law causes of action — it only abolished their forms and grouped them under one head — and there is no difference between trespass at common law and under the statutes. A plaintiff, under the statute, must allege and prove every fact that he was required to allege and prove at common law." Phelps, etc. Co. *v.* Halsell (1901), 11 Okla. 1, 65 Pac. 340; Huston *v.* Tyler (1897), 140 Mo. 252, 36 S. W. 654: "The above cases recognize the doctrine that the '*fundamental requirements*' of good pleading are and must remain the same, whether under code or at common law; that is to say, a pleading must be so drawn as to tender a definite issue or issues, and not leave the adversary to grope in the dark as to what the meaning of the pleading is; 'this is no more allowable now than formerly.'" Citizens' Bank *v.* Tiger Tail Mill Co. (1899), 152 Mo. 145, 53 S. W. 902: "While the use of formal and technical averments, which were necessary at common law to the statement of a cause of action, have been dispensed with by our code and are no longer necessary, the same material allegations are necessary under it that were necessary at common law; and it is clear, we think, that at common law, in order to state a cause of action in trover, the petition should state that the plaintiff had possession, or the right to the possession, of the property sued for at the time of the conversion." Merriman *v.* McCormick Harvesting M. Co. (1893), 86 Wis. 142, 56 N. W. 743; Sell *v.* Mississippi River Logging Co. (1894), 88 Wis. 581, 60 N. W. 1065.]

maintain equitable rights and to recover equitable relief than in those based upon legal rights and pursuing legal relief, but this incident does not alter or affect the principle which governs all cases; the pleader in both cases sets out the facts which entitle him to the remedy asked, and no more;[1] it simply happens that legal remedies usually depend upon a few positive facts, while equitable remedies often arise from a multitude of circumstances, events, and acts, neither of which, taken by itself, would have created any right or imposed any duty. It would be useless to incumber the page by a reference to all the reported cases in which this doctrine has been approved; and I shall merely cite one or two which are leading in point of time, and which may be regarded as examples of the class.[2] Without entering upon any discussion of these two theories, it is enough to say that the latter one has been accepted as expressing the true intent and

[1 "The spirit of our civil code is that a party shall state in his pleadings the real facts of his case and not falsehoods or fictions; and when each party states what he believes to be true and the real facts of his case, the court may know precisely where the parties differ:" Kennett *v.* Peters (1894), 54 Ken. 123, 37 Pac. 999. "Under the reformed procedure it is unnecessary, in a pleading, to state legal fictions. The pleader should state the facts which constitute his cause of action in ordinary and concise language": Ball *v.* Beaumont (1900), 59 Neb. 631, 81 N. W. 858.]

[2] Millikin *v.* Cary, 5 How. Pr. 272; Williams *v.* Hayes, 5 How. Pr. 470; People *v.* Ryder, 12 N. Y. 433, 437. The doctrine of the text was very clearly and accurately stated by Crocker J. in Bowen *v.* Aubrey, 22 Cal. 566, 569.

[See also Botsford *v.* Wallace (1899), 72 Conn. 195, 44 Atl. 10, where the court says: "Aiming at simplicity, the Practice Act has discarded the technical formalities of common-law pleading, and has followed in the main the practice in equity." Also Dunnett *v.* Thornton (1900), 73 Conn. 1, 46 Atl. 158; Cone *v.* Ivinson (1893), 4 Wyo. 226, 33 Pac. 31; Skinner *v.* Skinner (1894), 38 Neb. 756, 57 N. W. 534; Moore *v.* Spurrier (1899), 55 S. C. 292, 33 S. E. 352; Hawkins *v.* Overstreet (1898), 7 Okla. 277, 54 Pac. 472: "We have no action of trover. . . . The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished. . . . It is not necessary that the facts should be stated in such manner as would have entitled the plaintiff to a recovery under any particular form of action. It is sufficient if facts are alleged which show a right to recovery by the plaintiff against the defendant under the general principles of law determining the rights of parties, and without regard to what may or may not have been the rules of pleading or stating a cause of action before the adoption of our code."]

See *contra*, the remarks of Holmes J. in Meyers *v.* Field, 37 Mo. 434, 441. It will be seen in the sequel that the Supreme Court of Missouri stands quite alone — or at least did so until a very recent day — in its theory of interpretation, and retains the distinctions between legal and equitable forms, in as marked a manner as though no change had been made by the statutes.

[See Faulkner *v.* First Nat. Bank (1900), 130 Cal. 258, 62 Pac. 463, in which it is said: "While we have no forms of action here, yet when the averments of facts in a complaint show the case to be one for which a particular action would have been a proper one at common law, then the general principles of pleading and practice apply to it which apply to the special form of common-law action."]

spirit of the new procedure, and the former has left scarcely any traces in the practical administration of justice in the great majority of the States. The forms contained in the most popular and approved text-books upon practice and pleading furnish a sure test; and, without exception, these are all based upon the method of interpreting the codes last described. And yet with great inconsistency, as it seems to me, the courts have generally held that the ancient forms of common-law pleading in assumpsit *may* be used in actions upon contract, especially where the contract is implied; that they sufficiently meet the requirements of the codes, although they do not set out the actual facts of the transaction from which the legal right arises. Thus, it has been decided that the count in *indebitatus assumpsit* for goods sold and delivered is a sufficient complaint or petition in an action to recover the price.[1] The difference between this ruling of the courts and the theory first above stated is, that according to the latter theory the common-law mode of stating a legal cause of action or defence *must* be followed in substance, while by the decisions referred to it *may* be followed in the particular classes of actions described. But even this ruling, although, as I think, a plain departure from the essential spirit of the new system, is of little practical importance; the bar have, with almost absolute unanimity, adopted the method of stating the facts as they occurred, and do not attempt to aver in their stead the legal fictions of promises which are never made, or conclusions of law which are in no sense of the term actual facts. There are other important features of an action — the parties, the union of different causes of action or defence, affirmative relief to the defendant, the form of the judgments, and the like — which have been greatly affected by the general provision of the statute abolishing the distinctions between legal and equitable methods, and the judicial interpretation given thereto; but it is impossible to discuss them in any general manner, and their particular treatment is reserved for subsequent chapters.

[1] Allen *v.* Patterson, 7 N. Y. 476, 478. Some of the State legislatures have by a statutory enactment set forth forms of pleading under the code, and thus made them regular and valid. It is strange that in some of these the spirit of the code is directly violated, forms of complaints or petitions being sanctioned which are identical with the ancient common counts, and therefore allege fiction instead of facts. See, for example, statutes of Indiana. [Weston *v.* Brown (1899), 158 N. Y. 360, 53 N. E. 36.]

SECTION SECOND.

THE COMBINATION BY THE PLAINTIFF OF LEGAL AND EQUITABLE PRIMARY RIGHTS AND OF LEGAL AND EQUITABLE REMEDIES IN ONE ACTION.

§ 16. * 76. **Principles of Unity Applied to Particular Cases.** The general principles of unity developed in the preceding section will now be applied to the several cases which are constantly arising in the practical administration of justice, for the purpose of ascertaining how far the abolition of all distinctions between actions at law and suits in equity has affected the process of stating causes of action, and praying for and obtaining remedies by the plaintiff. It was in this very feature of the judicial process — the stating of causes of action, and the obtaining of relief thereon — that the distinction spoken of was exhibited in the most marked manner; and it is in this feature, therefore, that the change must be the most sweeping and radical, if the distinction has in truth been abolished. Under the former system a legal primary right, when invaded, could only be redressed by an action at law, and a legal judgment alone was possible; while an equitable primary right must be redressed or protected in an equity suit and by an equitable remedy. A union or combination of the two classes, either wholly or partially, in one action was unknown, unless permitted by some express statute, and was utterly opposed to the theory which separated the two departments of the municipal law. The new system not only permits but encourages — and in its spirit, I believe, requires — such a union and combination; for one of its elementary notions is that all the possible disputes or controversies arising out of, or connected with, the same subject-matter or transaction should be settled in a single judicial action.[1]

[1] The code does not require legal and equitable causes of action and reliefs to be united in the same action, even when growing out of the same transaction or subject-matter; a previous decree awarding equitable relief does not, it is held, bar the subsequent recovery of legal relief. Bruce *v.* Kelly, 5 Hun, 229, 232.

[See Hahl *v.* Sugo (1901), 169 N. Y. 109, 62 N. E. 135, in which it is held that a previous recovery of legal relief bars the subsequent recovery of equitable relief based on the same cause of action. In this case the facts were as follows: Plaintiffs and defendant were the respective owners of adjoining lots in the city of Buffalo. Defendant in erecting a brick house on her lot encroached on plaintiffs' lot. In 1896 plaintiffs brought an action to recover the land thus encroached upon.

§ 17. *78. **Both Equitable and Legal Relief Awarded. Illustrations.** When the plaintiff is clothed with primary rights, both legal and equitable, growing out of the same cause of action or the same transaction, and is entitled to an equitable remedy, and also to a further legal remedy, based upon the supposition that the equitable relief is granted, and he sets forth in his complaint or petition the facts which support each class of rights, and which show that he is entitled to each kind of remedy, and demands a judgment awarding both species of relief, the action will be sus-

Plaintiffs recovered in this action and upon a second trial recovered again, and in 1898 judgment was entered in their favor establishing their title in fee to the land in dispute. The execution issued on the judgment was returned "by the sheriff with an endorsement thereon stating in substance that the strip of land described therein was occupied by a portion of the stone foundation and brick wall of defendant's house, and that it was impracticable for him to remove the same." A motion by plaintiffs at "a Special Term for an order directing the defendant to remove that portion of the wall of her house which encroaches upon the plaintiffs' land" having been denied, plaintiffs thereupon brought an "action in equity to compel the defendant to remove said encroaching wall from their land." The judgment recovered by plaintiffs in the former action was pleaded in bar. The Supreme Court sustained the action and granted the relief prayed for, and this judgment "was unanimously affirmed by the Appellate Division." The Court of Appeals, in its opinion reversing the judgment, among other things, said: "Let us now see whether the plaintiffs have more than one cause of action arising out of the wrong of the defendant, and if not, what that cause of action is. The plaintiffs are the owners of a strip of land upon which the defendant has wrongfully entered and erected a wall which is a portion of her house. The facts alleged show one primary right of the plaintiffs and one wrong done by the defendant which involves that right. Therefore the plaintiffs have stated but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. . . . The plaintiffs' right is to recover possession of their land. The defendant's wrong consists in the entry upon and use of the land without the plaintiffs' consent. The particular nature of that wrong may require the application of different remedies for the enforcement of the right. But that does not change the nature of the cause of action, nor entitle the plaintiffs to split it into several causes of action. The complaint in the first action stated the facts upon which the plaintiffs based their claim of title and right to possession. Under its allegations the title as well as the right to possession could be tested. (Cagger *v.* Lansing, 64 N. Y. 417.) The right to possession involved the removal of the encroaching wall, for without such removal there could be no real transfer of possession. This in turn required equitable relief, which, under proper pleadings and an appropriate method of trial, could have been granted in the same action in which the title and right to possession were adjudicated. (Corning *v.* Troy Iron & Nail Factory, 40 N. Y. 191; Broiestedt *v.* S. S. R. R. Co., 55 id. 220.) The fact that plaintiffs' complaint lacked the averments which would have apprised the court of their right to equitable relief, and that the course of the trial furnished no indication that they intended to claim such relief, is no excuse for the commencement of a separate and independent action upon the single cause involved in the prior action. It would be novel practice, indeed, to permit the correction of errors in that summary and extra-judicial manner." Pringle *v.* Hall (1899), Ariz., 56 Pac. 740: An action for the reformation of a contract may be joined with an action on the contract. Text, § *76, quoted at length.]

tained to its full extent in the form thus adopted. He may, on the trial, prove all the facts averred, and the court will in its judgment formally grant both the equitable and the legal relief.[1] It will be noticed that this proposition embraces only those cases in which the legal relief demanded rests upon and flows as a consequence from the prior equitable relief, but the principle of the rule is not confined to such cases; it extends also to those in which the two remedies, although connected with the same transaction or subject-matter, are not connected as cause and effect.[2] This is the most complete union of legal and equitable primary rights and remedies in one action which can be made; but it is limited and restricted to those cases in which these rights and remedies arise from the same transaction or subject-matter. It is not generally possible to join one legal cause of action with another entirely independent equitable cause of action, there being no antecedent connection between the two. In the cases described above, where the union is permitted, there is, in fact, no joinder of different causes of action;[3] there is only the union

[1] Laub *v.* Buckmiller, 17 N. Y. 620, 626; Lattin *v.* McCarty, 41 N. Y. 107, 109, 110; Davis *v.* Lamberton, 56 Barb. 480, 483; Brown *v.* Brown, 4 Robt. 688, 700, 701; Walker *v.* Sedgwick, 8 Cal. 398; Welles *v.* Yates, 44 N. Y. 525; Henderson *v.* Dickey, 50 Mo. 161, 165; Guernsey *v.* Am. Ins. Co., 17 Minn. 104, 108; Montgomery *v.* McEwen, 7 Minn. 351. See, however, Hudson *v.* Caryl, 44 N. Y. 553, which holds that, in an action brought to remove a nuisance, damages can only be awarded by the verdict of a jury, *sed qu.* See also Kewaunee Cy. Sup. *v.* Decker, 30 Wis. 624, 626–630, per Dixon C. J., for a very elaborate opinion in opposition to the doctrine of the text and of the cases cited above in this note. Further illustrations of the text are Stewart *v.* Carter, 4 Neb. 564; Turner *v.* Althaus, 6 Neb. 54; Weinland *v.* Cochran, 9 Neb. 480; Wa Ching *v.* Constantine, 1 Idaho, 266; Young *v.* Young, 81 N. C. 91; Kahn *v.* Kahn, 15 Fla. 400; Leidersdorf *v.* Flint, 50 Wis. 401; Anderson *v.* Hunn, 5 Hun, 79; Stevens *v.* The Mayor, etc., 84 N. Y. 296, 305; Wheelock *v.* Lee, 74 N. Y. 495, 500; Margraf *v.* Muir, 57 N. Y. 159; Hale *v.* Omaha Nat. Bank, 49 N. Y. 626; Madison Av. Bap. Ch. *v.* Oliver St. Bap. Ch. 73 N. Y. 83; Cone *v.* Niagara Fire Ins. Co., 60 N. Y. 619.

[Hahl *v.* Sugo (1901), 169 N. Y. 109, 62 N. E. 135; Vaughn *v.* Georgia Land Co. (1896), 98 Ga. 288, 25 S. E. 441; Harp *v.* Abbeville Investment Co. (1899), 108 Ga. 168, 33 S. E. 998; Brown *v.* Latham (1893), 92 Ga. 280, 18 S. E. 421.] Butler *v.* Barnes, 61 Conn. 399; Bowen *v.* State, 121 Ind. 235; Jaseph *v.* People's Sav. Bk. (Ind. Sup. 1889), 22 N. E. 980; Jennings *v.* Reeves, 101 N. C. 447; Paddock *v.* Somes, 102 Mo. 226. But see Lawe *v.* Hyde, 39 Wis. 345.

[2] See N. Y. Ice Co. *v.* N. W. Ins. Co., 23 N. Y. 357, 359; Cahoon *v.* Bank of Utica, 7 N. Y. 486; Broiestedt *v.* South Side R. Co., 55 N. Y. 220, 222; Turner *v.* Pierce, 34 Wis. 658, 665, per Dixon C. J.; Linden *v.* Hepburn, 3 Sandf. 668, 671; Gray *v.* Dougherty, 25 Cal. 266. The legal and equitable causes of action should be separately stated. Gates *v.* Kieff, 7 Cal. 124; Magwire *v.* Tyler, 47 Mo. 115, 127.

[3] [The following cases support the doctrine of the text, but they all assume that there are two distinct causes of action,

of remedial rights flowing from one cause of action, as will be seen from the judgments of the court in several of the cases cited in the note, and as will be more fully shown in a subsequent chapter. This rule, which has been firmly established by the court of last resort in New York, and which is adopted in all the States with one or two exceptions, has been applied in the following cases among others: [1] in an action by the holder of the legal title to correct his title deed, to recover possession of the land according to the correction thus made, and to recover damages for withholding such possession; [2] in an action by one holding the equitable title to procure defendant's deed to be cancelled, and a conveyance by defendant to himself, to recover possession and damages, and to restrain defendant from conveying away the land; [3] in an action by the grantor of land to correct his deed by the insertion of an exception of the growing timber, and to recover damages for trees embraced in the exception, wrongfully cut by the grantee; [4] in an action to abate a nuisance, to restrain its further commission, and to recover damages therefor; [5] in an action by a widow to establish her right of dower, to procure it to be assigned, to recover possession and damages; [6] and in an action by the vendor of land to recover a money judgment on notes given him for the price, and to foreclose his lien on the land itself.[7]

§ 18. *79. **Doctrine in Missouri and Wisconsin.** In Missouri, however, the judiciary for a long time denied the correctness of this rule, and rejected it under all circumstances in which it could possibly be applied. The doctrine was asserted and maintained in a long series of adjudications that the holder of an equitable title, or the possessor of an equitable primary right, can obtain none but an equitable remedy prosecuted in an equitable form of action. The Supreme Court of that State even

one legal and the other equitable. Brown *v.* Wilson (1895), 21 Colo. 309, 40 Pac. 688; Mulock *v.* Wilson (1893), 19 Colo. 296, 35 Pac. 532; Stock-Growers' Bank *v.* Newton (1889), 13 Colo. 245, 22 Pac. 444.]

[1] For additional instances, see *post*, §§ *452–*462.

[2] Laub *v.* Buckmiller, 17 N. Y. 620. [Imperial Shale Brick Co. *v.* Jewett (1901), 169 N. Y. 143, 62 N. E. 167, in an action to reform a contract of insurance and to recover thereon, as reformed, against joint insurers.]

[3] Lattin *v.* McCarty, 41 N. Y. 107; Henderson *v.* Dickey, 50 Mo. 161.

[4] Welles *v.* Yates, 44 N. Y. 525.

[5] Davis *v.* Lamberton, 56 Barb. 480. But see Hudson *v.* Caryl, 44 N. Y. 553, that a jury trial is necessary to the recovery of damages. Parker *v.* Laney, 58 N. Y. 469.

[6] Brown *v.* Brown, 4 Robt. 688.

[7] Walker *v.* Sedgwick, 8 Cal. 398.

went so far as to reject the familiar principle of equity jurisprudence, which permitted the Court of Chancery, having acquired jurisdiction by means of some equitable right, to go on and administer full legal relief in order that the party should not be put to the trouble and expense of a second action at law. In accordance with this narrow view of equity and this narrow construction of the reformed legislation, it was settled that the holder of an equitable title who seeks to enforce his right and to acquire a legal title by means of a specific performance, a cancellation, or a reformation of deeds, must, after obtaining that relief, bring a second action at law to recover the possession. If he unite his equitable claim for cancellation and the like with the legal claim for possession, he was actually to be turned out of court. This remarkable interpretation put upon the language of the statute, and so completely defeating its plain intent, was resorted to in the following, among other instances, which are selected as illustrations merely: in actions brought to set aside and cancel deeds of conveyance made to the defendant, alleged to be fraudulent, and to vest the legal title in the plaintiff, and to recover possession of the premises in question;[1] in an action of partition, where defendant was in possession of the whole land, claiming title therein, it being held that the plaintiff must first establish his legal right by ejectment, and then bring an equity action of partition.[2] The Supreme Court of Missouri has, however, in a very recent decision, receded from this very extreme position, and has partly, at least, overruled the authority of the cases referred to in this and the subsequent paragraph. Although the single judgment does not in its reasoning and conclusions accept the liberal views of the New York Court of Appeals in their full scope and extent, yet it plainly tends in that direction, conferring the reliefs of reformation or correction of a deed of conveyance and recovery of possession of the land included in such deed as corrected.[3] The judiciary of Wiscon-

[1] Curd *v.* Lackland, 43 Mo. 139; Wynn *v.* Cory, 43 Mo. 301; Gray *v.* Payne, 43 Mo. 203; Bobb *v.* Woodward, 42 Mo. 482; Peyton *v.* Rose, 41 Mo. 257; Walker's Adm'r *v.* Walker, 25 Mo. 367; Magwire *v.* Tyler, 47 Mo. 115, 127; Rutherford *v.* Williams, 42 Mo. 18, 23; Fithian *v.* Monks, 43 Mo. 502, 517.

[2] Gott *v.* Powell, 41 Mo. 416; Moreau *v.* Detchemendy, 41 Mo. 431.

[3] Henderson *v.* Dickey, 50 Mo. 161, 165, per Wagner J. The judgment in this case comments on and condemns the leading decisions referred to in the two preceding notes; and, although it deals too leniently with the gross mistakes into

sin seem now alone, among the tribunals of the several States, to reject this liberal theory of interpretation, and to require separate actions for the assertion of legal and equitable rights, and the procurement of legal and equitable remedies. The principle of unity approved and adopted by the highest tribunal of New York has been deliberately rejected after a most thorough examination, and the opposite principle, which distinguishes between the two classes of action, and retains their separate use, and prohibits the recovery of legal and equitable remedies in one suit, is avowedly accepted as being the correct construction of the legislative provisions.[1]

which Holmes J. had fallen in announcing the doctrine of those prior cases, yet it squarely overrules their central principle, and destroys their authority. Henderson *v.* Dickey has been followed in numerous cases in Missouri. See Paddock *v.* Somes, 102 Mo. 226.

[The view now entertained by the Supreme Court of Missouri respecting some of the matters referred to in the text is shown by the following recent cases: Nalle *v.* Thompson (1903), 173 Mo. 595, 73 S. W. 599; Nalle *v.* Parks (1903), 173 Mo. 616, 73 S. W. 596; Martin *v.* Turnbaugh (1899), 153 Mo. 172, 54 S. W. 515; Lewis *v.* Rhodes (1899), 150 Mo. 498, 52 S. W. 11; Dunn *v.* McCoy (1899), 150 Mo. 548, 52 S. W. 21; Springfield, etc. Co. *v.* Donovan (1899), 147 Mo. 622, 49 S. W. 500; Kingman *v.* Sievers (1898), 143 Mo. 519, 45 S. W. 266; O'Day *v.* Conn (1895), 131 Mo. 321, 32 S. W. 1109; Kerstner *v.* Vorweg (1895), 130 Mo. 196, 32 S. W. 298; Sampson *v.* Mitchell (1894), 125 Mo. 217, 28 S. W. 768; Crawford *v.* Whitmore (1893), 120 Mo. 144, 25 S. W. 365; Morrison *v.* Herrington (1894), 120 Mo. 665, 25 S. W. 568. In these cases a greater degree of liberality is shown than the author ascribes to the court. In Martin *v.* Turnbaugh it is said that "every one admits that it is elementary law that when a court of equity obtains jurisdiction of a cause it has power to retain jurisdiction until it does complete justice between the parties," and further that "the petition may now have a count at law and a count in equity, . . . the answer may contain a legal defence, an equitable defence, and an equitable cross bill or counterclaim, . . . and the reply may set up legal or equitable defences to the new matter set up in the answer. . . . The object of all of which is to simplify proceedings, and to settle the whole controversy between the parties in one action.]

[In Morrison *v.* Herrington, an action of ejectment, the court said: "Here the causes of action, one legal and the other equitable, arose out of transactions connected with the same subject of action. The parties being the same also, there was no misjoinder. Though the court could have granted full and complete relief on the equity cause of action, *even to awarding a writ of possession*, still it is quite common practice to join an ejectment count with an equity cause of action in such cases."]

[It is held in Lewis *v.* Rhodes, Dunn *v.* McCoy, Martin *v.* Turnbaugh, and O'Day *v.* Conn, that "where the answer admits the facts constituting the plaintiff's legal cause of action and sets up other facts of an equitable character in avoidance, the whole case is converted into a suit in equity triable by the court." Likewise if the answer seeks affirmative equitable relief. See, however, Kersten *v.* Vorweg, in which it is said: "This is an action at law. The fact that the answer contained an equitable defence did not change the character of the action and convert it into a case in equity."]

[1] Noonan *v.* Orton, 21 Wis. 283; Kewaunee Cy. Sup. *v.* Decker, 30 Wis. 624, 626, per Dixon C. J.; Horn *v.* Luddington, 32 Wis. 73. The first of these cases was an action brought to compel the specific

§ 19. *80. **Legal Relief only actually Awarded. Illustrations.** The next case to be considered is the same in principle, and nearly so in all its features, with the one just discussed. The plaintiff, as in the last instance, possesses primary rights, both legal and equitable, arising from the same subject-matter or transaction, and is entitled to some equitable relief, reformation, cancellation, specific performance, and the like, and to legal relief based upon the assumption that the former relief is awarded; he avers all the necessary facts in his pleading, and demands both the remedies to which he is entitled. The court, instead of formally conferring the special equitable remedy and then proceeding to grant the ultimate legal remedy, may treat the former as though accomplished, and render a simple common-law judgment embracing the final legal relief which was the real object of the action.[1] This proceeding is plainly the same in principle with the one stated in the foregoing paragraph; but it is a more complete amalgamation of remedies, a more decided departure from the notions which prevailed under the former system. By the omission of the intermediate step, the actual result is reached of a legal remedy based upon an equitable primary right or title. No doubt this omission of the intermediate step is often as advantageous to the plaintiff as though it had been taken in the most formal manner; but, on the contrary, it will sometimes happen that the formal change of his equitable title into a legal one by a decree of cancellation, or of specific performance or reformation, will be necessary to secure and protect his rights in the future. As a matter of safety and prudence, the particular form of judgment just described should only be used in actions

performance of an agreement to give a lease. The complaint also alleged a breach of a covenant which was to have been contained in the lease, and demanded a judgment for the damages arising therefrom as well as for the specific performance. Held, that the two could not be combined; that the plaintiff must first obtain the lease, and then bring his action for a breach of the covenant in it. The judgment of Dixon C. J. in Supervisors *v.* Decker is an exhaustive discussion of this subject, with a review of the leading authorities. Although there is much in his opinion that is correct and admirable, he reaches, as his main conclusions, positions which are in direct conflict with the letter as well as the spirit of the codes. See also Lawe *v.* Hyde, 39 Wis. 345; Williams *v.* Lowe, 4 Neb. 382; Paxton *v.* Wood, 77 N. C. 11; Mattair *v.* Payne, 15 Fla. 682.

[But see Draper *v.* Brown (1902), 115 Wis. 361, 91 N. W. 1001, in which the Wisconsin court cites the New York cases of Reubens *v.* Joel, Goulet *v.* Asseler, and Gould *v.* Bank, to sustain it in the distinction which it makes between legal and equitable actions.]

[1] Bidwell *v.* Astor Ins. Co., 16 N. Y. 263, 267; Phillips *v.* Gorham, 17 N. Y. 270; Caswell *v.* West, 3 N. Y. Sup. Ct. 383.

upon executory contracts where a pecuniary payment exhausts their efficiency; in actions involving titles to land, the full judgment — embracing the equitable relief as well as the legal remedy of possession — would generally be far preferable. The rule permitting such a single legal remedy has been applied in the following among other instances: in an action upon an insurance policy which by mistake was so drawn that the plaintiff — the assured — had no claim for damages, he demanded judgment (1) reforming the instrument, (2) recovering $7,000 for a loss embraced within its terms as thus reformed, and the court ordered a judgment merely for the amount of the loss as claimed;[1] in an action to recover lands of which the plaintiff had the equitable title only, the legal title being in the defendant by means of a deed of conveyance from the plaintiff's ancestor, the former owner, regular on its face, but alleged to have been obtained by fraudulent representations, instead of directing a cancellation of this deed and a reconveyance to the plaintiff, the court granted a judgment for the recovery of possession directly;[2] in an action upon a contract for the building of a house according to certain specifications, the complaint alleging a mistake in the specifications as set out in the written instrument, and averring a performance according to the specifications actually agreed on by the parties, and demanding judgment for the amount due for such services without praying for any reformation of the contract, the action in this form was sustained, and it was expressly held that no prayer for a correction was necessary.[3] The rule here stated, and the decisions which sustain it, are plainly in direct opposition to the doctrine which originally prevailed in the Missouri courts, and which still receives the approval of the Wisconsin judges.

§ 20. *81. **Legal Relief Awarded, but Equitable Relief Denied. Illustrations.** Another case, varying in some of its circumstances from the two which have been described, and yet depending upon the same principle, remains to be considered. If the plaintiff possesses, or supposes himself to possess, primary rights, both legal and equitable, arising from the same subject-matter or transaction, and avers the necessary facts in his pleading, and

[1] Bidwell *v.* Astor Ins. Co., 16 N. Y. 263. See also Cone *v.* Niagara Fire Ins. Co., 60 N. Y. 619, 3 T. & C. 33; Maher *v.* Hibernia Ins. Co., 67 N. Y. 283, 291; Williams *v.* Slote, 70 N. Y. 681; Whiting *v.* Root, 52 Iowa, 292.

[2] Phillips *v.* Gorham, 17 N. Y. 270.

[3] Caswell *v.* West, 3 N. Y. Sup. Ct. 383.

prays for both the remedies corresponding to the two different rights, but on the trial fails to establish his equitable cause of action and his consequent right to the equitable remedy, his action should not be therefore dismissed; he should recover the legal judgment which the legal cause of action demands.[1] Thus, in an action on a policy of insurance, all the necessary facts being alleged, the complaint demanded a money judgment on account of a loss, and also that the instrument should be reformed by reason of an alleged mistake, which reformation, if made, would increase the sum insured, and enable the plaintiff to recover a larger amount. On the trial he failed to prove the averments respecting the mistake, and was not, therefore, entitled to any equitable relief. The New York Court of Appeals held that judgment should have been recovered on the legal cause of action for the sum which was actually insured, and

[1] McNeady *v.* Hyde, 47 Cal. 481, 483, — action to recover possession of land, and for an injunction; Sternberger *v.* McGovern, 56 N. Y. 12, 21, 15 Abb. Pr. N. S. 257, 271, — specific performance and damages.

[Michener *v.* Springfield, etc. Co. (1895), 142 Ind. 130, 40 N. E. 679: "Not only does the same judge under [our reformed] system exercise both law and equity powers, but he exercises both legal and equitable jurisdiction and administers both legal and equitable relief in each case, when the facts pleaded and proved warrant it. How, then, can the cause be dismissed for want of jurisdiction merely because the plaintiff asks for equitable relief while the facts show that he is entitled to legal relief? The court being clothed by the code with power and jurisdiction to administer both, or either legal or equitable relief in the same case, its jurisdiction is not and cannot be defeated by it appearing from the facts stated that the equitable relief sought cannot be awarded because such facts show that the only relief the plaintiff is entitled to is purely legal relief, or *vice versa*; nor is the jurisdiction defeated because the facts stated in the complaint are not sufficient to entitle the plaintiff to either legal or equitable relief. The remedy in such a case is a demurrer for want of sufficient facts." Latham *v.* Harby (1897), 50 S. C. 428, 27 S. E. 862: Where a complaint filed as a bill in equity does not entitle plaintiff to equitable relief, but does show a legal cause of action, it is error to dismiss it. The cause should be transferred to the law calendar. Mordecai *v.* Seignious (1898), 53 S. C. 95, 30 S. E. 717: When a complaint states a good cause of action, either at law or in equity, it should not be dismissed. Simon *v.* Sabb (1899), 56 S. C. 38, 33 S. E. 799: A complaint entitling plaintiff to relief either on the law or equity side of the court is not subject to demurrer on the ground that it does not state facts sufficient to constitute a cause of action. Ferst's Sons *v.* Powers (1902), 64 S. C. 221, 41 S. E. 974; Gillis *v.* Hilton & Dodge Co. (1901), 113 Ga 622, 38 S. E. 940: Where a legal and an equitable cause of action is alleged, and evidence establishes only the legal cause of action, judgment should be given on that. Alter *v.* Bank of Stockham (1897), 53 Neb. 223, 73 N. W. 667: "To maintain a civil action under our code, it is not essential that the action be denominated either an action at law or in equity, nor that it be given any particular name. If the litigant pleads the facts, and they constitute a cause of action or defence, the courts are bound to award the relief due." Meyers *v.* Smith (1899), 59 Neb. 30, 80 N. W. 273.]

reversed the ruling below which had dismissed the action.[1] As another illustration: in an action by the grantor of land against the grantee to set aside the deed of conveyance on the ground that it was procured by false and fraudulent representations, after setting out all the facts which constituted the transaction, the complaint prayed for two remedies in the alternative, — (1) damages for the deceit, (2) cancellation and a reconveyance. A reconveyance was found to be impossible on the trial, because the defendant had conveyed the premises to *bona fide* purchasers. A simple legal judgment for the damages caused by the deceit was granted, and was held to be proper by the general term of the New York Supreme Court.[2] This rule is now established, except in the one or two States which retain the distinctions between legal and equitable actions; but there are some earlier *dicta*, and even decisions opposed to it,[3] which, however, must be considered as overruled.[4]

§ 21. *82. **Where Equitable Remedy only is demanded and Legal Remedy only is granted. Doctrine in Missouri and Wisconsin.** In each of the foregoing instances the complaint has stated all the necessary facts constituting both grounds for relief, and has actually demanded both remedies in the prayer for judgment. Another case presents itself with a change of features. The averments of fact are the same, but the plaintiff demands only the special equitable remedy to which he deems himself entitled. On the trial he fails to prove the alleged grounds for equitable relief, but does establish a case for the legal relief which was not demanded in the prayer for judgment, although all the necessary facts, from which the remedial right arose, were averred. It is now, after some hesitation, settled that even in this case the plaintiff is not to be dismissed from court, but should be permitted to recover the legal remedy supported by the allegations of fact contained in the complaint or petition.[5] There are *dicta*

[1] N. Y. Ice Co. *v.* N. W. Ins. Co., 23 N. Y. 357, 359.

[2] Graves *v.* Spier, 58 Barb. 349, 383, 384; and see Sternberger *v.* McGovern, 15 Abb. Pr. N. S. 257, 271, 56 N. Y. 12.

[3] See Penn. Coal Co. *v.* Del. & Hudson Canal Co., 1 Keyes, 72. The reporter's head-note is not sustained by the decision of this case. A *dictum* of Mr. J. Emott, at p. 76, is the sole ground for it; and even this *dictum* is not so broad as the head-note.

[4] See Davis *v.* Morris, 36 N. Y. 569.

[5] [South Carolina, etc. R. R. Co. *v.* Augusta R. R. Co. (1900), 111 Ga. 420, 36 S. E. 593: A petition mainly in the form of an equitable petition is maintainable as an action at law if it sets forth a legal cause of action.] Marquat *v.* Marquat, 12 N. Y. 336; Barlow *v.* Scott, 24 N. Y. 40,

in opposition to this rule,[1] but they are all overruled by the subsequent and more authoritative decisions in the same States. In Missouri this liberal doctrine has not been adopted, since, as has been already seen, the principle of uniting legal and equitable causes of action and remedies in one suit has been rejected in all its phases. The modification of its earlier notions, which the Supreme Court of that State has made in its latest decisions, does not necessarily extend to the case under consideration.[2] The Supreme Court of Wisconsin seems, also, to have abandoned the position which it originally occupied in reference to the particular subject in question, and now refuses to award a legal remedy to a plaintiff who has only demanded equitable relief.[3]

§ 22. *83. **Where Allegations and Proof entitle to Equitable Relief only, but only Legal Relief is prayed for, Equitable Relief will be awarded. Rule in Missouri.** The phases and combinations to which the liberal principle has thus far been applied have resembled each other in this, that in all of them the plaintiff was clothed with a double remedial right and both a legal and an equitable cause of action; in those which are now to be examined, the plaintiff claims but one remedial right, and sets up but one cause of action. When the complaint or petition

45; Cuff *v.* Dorland, 55 Barb. 481; Graves *v.* Spier, 58 Barb. 349; Tenney *v.* State Bank, 20 Wis. 152; Foster *v.* Watson, 16 B. Mon. 377, 387; Leonard *v.* Rogan, 20 Wis. 540; White *v.* Lyons, 42 Cal. 279. In Leonard *v.* Rogan, Dixon C J. said (p. 542): "If the plaintiff demands relief in equity when upon the facts stated he is only entitled to a judgment at law, or *vice versa*, his action does not as formerly fail because of the mistake. He may still have the judgment appropriate to the case made by the complaint." See also Hamill *v.* Thompson, 3 Colo. 518, 523; Harrall *v.* Gray, 10 Neb. 186; Herrington *v.* Robertson, 71 N. Y. 280; 7 Hun, 368; Williams *v.* Slote, 70 N. Y. 601; Lewis *v.* Soule, 52 Iowa, 11; Whiting *v.* Root, 52 Iowa, 292.

[1] See, for example, Mann *v.* Fairchild, 2 Keyes, 106, 111; Heywood *v.* Buffalo, 14 N. Y. 534, 540.

[2] Myers *v.* Field, 37 Mo. 434. As to the extent of the recent modification, see Henderson *v.* Dickey, 50 Mo. 161; (followed in numerous subsequent cases; Paddock *v.* Somes, 102 Mo. 226.)

[3] Horn *v.* Luddington, 32 Wis. 73. The complaint alleged moneys advanced and services rendered by plaintiff to defendant under an oral agreement that the latter would convey certain lands, and demanded judgment for a specific performance. Deciding that no case was made out for a specific performance, the court also held that the plaintiff could not recover for the moneys advanced and the services rendered; and that in such an equitable action a legal remedy could not be obtained, relying upon the authority of Kewaunee Cy. Sup. *v.* Decker, 30 Wis. 624, 626. The conflict between this ruling and that of the same court in Leonard *v.* Rogan, 20 Wis. 540, 542, is direct. I make no attempt to reconcile them. See Dickson *v.* Cole, 34 id. 621, 625; Turner *v.* Pierce, 34 id. 658, 665; Deery *v.* McClintock, 31 id. 195; Wrigglesworth *v.* Wrigglesworth, 45 id. 255.

alleges a case which entitles the plaintiff to equitable relief, but no basis for legal relief is stated, and prays a common-law judgment, but no equitable remedy of any kind, if the case as alleged is proved upon the trial the equitable remedy which is appropriate to it should be awarded. Disregarding the prayer or demand of judgment, the court will rely upon the facts alleged and proved as the basis of its remedial action. This application of the general principle has been made in a case where the complaint or petition stated facts entitling the plaintiff to an accounting as against the defendant in respect of a joint undertaking, but not to a judgment for a sum certain. The prayer, however, was for the ordinary money judgment. The New York Court of Appeals held that this action should not have been dismissed, but that a judgment for an accounting should have been granted.[1] The rule in Missouri seems to have been settled in an entirely different sense.[2]

§ 23. *84. **Where Allegations entitle to Equitable Relief and not to Legal Relief, and Equitable Relief alone is asked, and Proof fails to establish Case Alleged, but does establish Legal Cause of Action, Suit must be dismissed. Converse of this Rule. Principle herein.** If, however, the complaint or petition contains a case entirely for equitable relief, stating no facts upon which a legal remedial right arises, and prays a judgment awarding the equitable relief alone, but on the trial the plaintiff fails to prove the case as thus alleged, but does establish a legal cause of action not averred in his pleading, his suit must be dismissed; he cannot recover the legal remedy appropriate to the facts which he succeeds in proving.[3] There is no conflict between this and

[1] Emery *v.* Pease, 20 N. Y. 62, 64. See, however, Russell *v.* Ford, 2 Cal. 86; Buckley *v.* Carlisle, 2 Cal. 420; Stone *v.* Fouse, 3 Cal. 292; Barnstead *v.* Empire Min. Co., 5 Cal. 299. In all these cases, the court, while holding that the plaintiff could not recover a judgment for a certain sum, did *not* give judgment for an accounting. The question, however, was not raised. Blood *v.* Fairbanks, 48 id. 171, 174. See also Schilling *v.* Rominger, 4 Colo. 100; Hamill *v.* Thompson, 3 id. 518, 523; Harrall *v.* Gray, 10 Neb. 186; Parker *v.* Jacobs, 14 S. C. 112; Smith *v.* Bodine, 74 N. Y. 30; Williams *v.* Slote, 70 id. 601; Mackey *v.* Auer, 8 Hun, 180; Hurlbutt *v.* N. W. Spaulding Saw Co., 93 Cal. 55, rule stated in the text followed.

[2] Maguire *v.* Vice, 20 Mo. 429; Richardson *v.* Means, 22 Mo. 495; Meyers *v.* Field, 37 Mo. 434.

[3] Bradley *v.* Aldrich, 40 N. Y. 504. This case is important, as it lays down the proper limitations upon the doctrine of some prior decisions which I have cited. See also Stevens *v.* The Mayor, etc., 84 N. Y. 296, 305; Arnold *v.* Angell, 62 id. 508; People's Bank *v.* Mitchell, 73 id. 406, 415; Bokes *v.* Lansing, 74 id. 437; Wintermute *v.* Cooke, 73 id. 107; Smith *v.*

any of the preceding propositions; in fact, the one principle governs them all. This principle is that the court looks to the facts *alleged* and proved, and not to the prayer for relief.[1] If the facts entitling a party to a remedy, legal or equitable, are *averred* and proved, he shall obtain that remedy, notwithstanding his omission to ask for it in his demand of judgment; and, if the facts were not averred, he shall not obtain the remedy, although he demanded it in the most formal manner. The reform legislation has not dispensed with the allegations of fact constituting a cause of action; on the contrary, it has made them, if possible, more necessary than under the old system. The converse of the rule above stated is also true. If the plaintiff sets forth a case entirely for legal relief, and prays a legal judgment alone, and at the trial fails to prove the averments actually made, he cannot establish an equitable cause of action not pleaded, and recover an equitable remedy thereon.[2]

§ 24. *85. **May invoke Equitable Right in Aid of Legal Action.** The principle may be applied in still another form or combination of circumstances. In a purely legal action, or, to speak more

Bodine, 74 id. 30; Lawe *v.* Hyde, 39 Wis. 345; Meyer *v.* Dubuque County, 43 Iowa, 592; Schilling *v.* Rominger, 4 Colo. 100; Hamill *v.* Thompson, 3 id. 518, 523. [See to the same effect Anderson *v.* Chilson (1895), 8 S. D. 64, 65 N. W. 435, where the court said: "When a complaint is framed for equitable relief, and it appears upon the trial that the pleader is not entitled thereto, judgment at law inconsistent with the allegations of the complaint, for damages upon a breach of contract to pay a stipulated amount of money, cannot be entered, and the complaint must be dismissed."]

[1] [Metropolis Mfg. Co. *v.* Lynch (1896), 68 Conn. 459, 36 Atl. 832. But see Steed *v.* Savage (1902), 115 Ga. 97, 41 S. E. 272, where it *seems* to be held that "whether a petition is based upon an equitable or a legal cause of action depends upon the character of the relief sought, as shown by the prayers, which indicate whether the alleged cause of action is intended by the pleader as founded upon legal or equitable principles; and upon general demurrer it will be determined whether the averments of the petition are such as to authorize the relief called for by the prayers. When a petition contains some averments which are appropriate to a legal cause of action and the prayers of the same call for equitable relief only, the court upon general demurrer will decide whether the petition as a whole authorizes the equitable relief prayed for; and if it does not, the demurrer will be sustained, notwithstanding there may be averments in the petition which as against a general demurrer might constitute a legal cause of action."]

[2] Drew *v.* Ferson, 22 Wis. 651. This case resembles Emery *v.* Pease, 20 N. Y. 62, and might be confounded with it. The distinction, however, is plain upon examination, and at once removes any appearance of conflict. In Emery *v.* Pease, the complaint stated facts showing that the plaintiff was entitled to an accounting, although it prayed for a money judgment. In Drew *v.* Ferson, the pleading set out simply a case to recover money laid out and expended; it did not contain any allegation upon which to base a judgment for accounting. In the former case, therefore, it was proper to grant the equitable remedy, and in the latter it was proper to dismiss the suit; there is no conflict.

correctly, in an action where the plaintiff sets forth and mainly relies upon a legal primary right or title, and asks a remedy which is purely legal, he may still invoke the aid of an equitable right or title which he holds, or of which he may avail himself, in order to maintain his contention, and obtain the legal relief which he seeks. This is a more indirect union of legal and equitable rights and causes of action than exists in any of the instances heretofore discussed; but it is none the less such a union.[1]

§ 25. *86. **Mode of Trial when both Legal and Equitable Causes of Action are alleged. How waive Right to Jury Trial.** As to the mode of trial when the complaint or petition sets forth an equitable and a legal cause of action, there is some diversity in the practice of the several States.[2] The constitutions protecting

[1] Sheehan *v.* Hamilton, 2 Keyes, 304; 3 Abb. Pr. N. S. 197. This was an action to recover possession of land. Livingston, the original owner, had demised the land to one Taylor by a perpetual lease, reserving a rent-charge with a clause of re-entry. L. assigned this rent-charge and all his rights to Dr. Clarke, who died in 1846, and the plaintiff is his heir-at-law. The action is brought to recover the land on account of failure to pay the rent. The defence was as follows: Taylor had given a mortgage on the land which had been foreclosed, and the land was bought by Dr. Clarke in 1831, and was by him conveyed to one Risley and from him by mesne conveyances to the defendant. The defendant's contention was that Dr. Clarke in 1831 being owner both of the land and of the rent-charge, the latter merged and was extinguished. In reply, the plaintiff proved that Dr. Clarke did not intend that the rent-charge should merge, but that it should be kept alive. The General Term of the Supreme Court held that this doctrine of non-merger was purely equitable, and could not be invoked by the plaintiff in this legal action, and that the plaintiff should have first established the rent-charge in an equitable action, and then brought this action of ejectment. The Court of Appeals reversed this decision, and laid down the doctrine of the text. See, also, Arthur *v.* Homestead Ins. Co., 78 N. Y. 462, 467. [Home Ins. Co. *v.* Railroad Co. (1893), 19 Colo. 46, 34 Pac. 281.]

[2] [United Coal Co. *v.* Canon City Coal Co. (1897), 24 Colo. 116, 48 Pac. 1045: "The question whether an issue of fact can be tried by a jury or by the court is not to be determined from the nature of the issue, but from the character of the action in which such issue is joined." Kuhl *v.* Pierce County (1895), 44 Neb. 584, 62 N. W. 1066; Angus *v.* Craven (1901), 132 Cal. 691, 64 Pac. 1091: Per Henshaw J. (concurring). "Under our system, equitable and legal rights are determined in the same forum. It is within the discretion of the court to control the order of proof upon the issues joined. In the natural order, before defendant was entitled to a hearing upon the legal issues tendered, she must defeat plaintiffs upon the equitable issues presented by them. This was the view of the trial court, and in pursuance of it, it took to itself, as was proper, the determination of these equitable matters. The result was that it found defendant's deeds to have been forgeries. Had it reached the opposite conclusion, then defendant might with right have insisted that the remaining issues of law be tried before a jury. But that time never arrived, and I do not concede the right of a litigant to oust a court of equitable jurisdiction in an action of purely equitable cognizance, merely by tendering additional issues which are triable at law before a jury. It is sufficient if a jury be had when those issues come to trial." This was an action to quiet title brought by a plaintiff in possession, and

the jury trial in common-law cases in which it had been customarily used, the defendant may, of course, insist that the legal issues shall be passed upon by a jury. He may waive this right by a stipulation in writing, by an oral stipulation made in open court, by failing to appear on the trial, and perhaps by permitting the trial to be actually entered upon without objection. If the litigant parties, or either of them, assert their rights as thus stated, it is settled in New York that the legal issues must be tried at a circuit court, or at a trial term of the court in which the action is pending;[1] and it seems that all the issues, legal and equitable, must thereupon be tried together in the same manner, for it is said that "no provision is made for two trials of the issues joined in the same action." If a cause is brought on to trial before the court sitting without a jury — in New York, the special term — as an equity cause, and the trial is commenced under that supposition, the defendant not waiving his right by acquiescence, and the court, in the course of the investigation, discovers that it involves separate legal issues, the complaint should not be dismissed on that account; the trial should be suspended, and the case sent to the Circuit or other court possessing a jury.[2] The same rule prevails generally in other

defendant answered by a cross complaint in the nature of ejectment. See also Ridgeway *v.* Herbert (1899), 150 Mo. 606, 51 S. W. 1040, quoted at length in note 2, p. 47, and other cases cited in the same note. Thomas *v.* Walker (1902), 115 Ga. 11, 41 S. E. 269: "It has always been the practice, especially since the passage of the procedure act of 1887, when both legal and equitable rights are united in one petition, for the court to apply legal principles to the legal rights and equitable principles to the equitable rights." Ford *v.* Holloway (1900), 112 Ga. 851, 38 S. E. 373.]

[1] Davis *v.* Morris, 36 N. Y. 569; People *v.* Albany, etc. R. Co., 57 N. Y. 161, 174.

[2] [Hahl *v.* Sugo (1901), 169 N. Y. 109, 62 N. E. 135. Homuth *v.* Metropolitan St. Ry. Co (1895), 129 Mo. 629, 31 S. W. 903: It is the general rule in this State and elsewhere that the issues raised by a reply impeaching the integrity of a release pleaded by way of answer in an action at law, may be tried at law without recourse to a court of equity. But where defendant has performed his part of the contract of release pleaded, and interposed it as a bar to the action, and plaintiffs admit its execution, knowing at the time thereof its legal effect, they cannot escape the legal bar created thereby. To get rid of such an instrument resort must be had to a court of equity. Hancock *v.* Blackwell (1897), 139 Mo. 440, 41 S. W. 205: Defendant was charged with having uttered slanderous words respecting plaintiff. For a valuable consideration plaintiff executed to defendant her release in full satisfaction of all claims against defendant. Subsequently the consideration was tendered back and the present action was brought for the same slander, and defendant pleaded the release in bar. Plaintiff replied alleging fraud in procuring the release. Held that the release must first be set aside by an action in equity or plaintiff must add a count to her petition to have the release set aside. Parker *v.* Beasley (1895), 116 N. C. 1, 21

States. A mistake in bringing on the cause for trial is to be corrected by simply sending it to the proper court or placing it upon the proper docket.[1] In some of the States provision is made for the trial of the issues separately and at different times. The equitable issues may be tried first and the legal issues afterwards, or the order may be reversed as the nature of the case and the relations of the issues seem to require.[2]

SECTION THIRD.

EQUITABLE DEFENCES TO ACTIONS BROUGHT TO ENFORCE LEGAL RIGHTS AND TO OBTAIN LEGAL REMEDIES.

§ 26. * 87. **Former System. Illustration. Criticism. Subject Matter of Section Third.** Another practical effect of removing the distinction between actions at law and suits in equity is shown in the employment of equitable defences to actions brought to enforce legal rights and to obtain legal remedies. The ancient system knew of no such union, and a thorough-paced lawyer of the old school would have deemed it incestuous. Legal rights set up by the plaintiff must be met in the same action by legal rights set up by the defendant. If the defendant, when prosecuted in an action at law, had an equity which, if

S. E. 955: "The moment either party by his pleadings sets out and asks equitable relief, the court of equity acquires jurisdiction, clears the deck, and adjusts all equities between the parties."]

[1] Lebanon Trs. *v.* Forrest, 15 B. Mon. 168; Foster *v.* Watson, 16 B. Mon. 377, 387; Sale *v.* Crutchfield, 8 Bush, 636, 644. If an action is wrongly transferred to the equity docket when no valid equitable issues are presented by the pleadings, this is error which requires a new trial. Creager *v.* Walker, 7 Bush, 1, 3. [Carder *v.* Weisenburgh (1893), 95 Ky. 135, 23 S. W. 964: "If the equitable right depends upon the decision of legal issues, concerning which the party is entitled to a jury trial, the case, on motion, should be transferred as matter of right to the common law docket to be tried by jury." Where an equitable defence is interposed, the cause is transferred to the equity docket: Peel *v.* January, 35 Ark. 331; Sandel & Hill Dig. § 5804.]

[2] Massie *v.* Stradford, 17 Ohio St. 596; Petty *v.* Malier, 15 B. Mon. 591, 604; Smith *v.* Moberly, 15 B. Mon. 70, 73; Bennett *v.* Titherington, 6 Bush, 192. See Guernsey *v.* Am. Ins. Co., 17 Minn. 104, 108; Harrison *v.* Juneau Bank, 17 Wis. 340; Du Pont *v.* Davis, 35 Wis. 631, 639; and see Richmond *v.* Dubuque, etc. R. Co., 33 Iowa, 422, 489–491. [See p. 6, note 1.] On the mode of trial, see also McPherson *v.* Featherstone, 37 Wis. 632 (equitable issue may be tried by the court *after* the legal issue is determined in favor of the plaintiff by the jury); Lewis *v.* Soule, 52 Iowa, 11; Davison *v.* Associates of the Jersey Co., 71 N. Y. 333; Wheelock *v.* Lee, 74 id. 495, 500, and cases cited; Hughes *v.* Dunlap, 91 Cal 385; Donahue *v.* Meister, 88 Cal. 121; Downing *v.* Le Du, 82 Cal. 471. An equitable defence set up does not change the nature of the action. Wisner *v.* Ocumpaugh, 71 N. Y. 113, 117.

worked out, would defeat the recovery, his only mode of redress was to commence an independent suit in chancery by which he might enforce his equitable right, and in the mean time enjoin his adversary from the further prosecution of the action at law. A single familiar example will illustrate the situation. A. has entered into a contract with B. to convey to the latter a farm on payment of the price, and lets him into possession. The price is paid in full, so that the vendee is fully entitled to his deed. A., in this position of affairs, commences an action of ejectment to recover possession of the land. By the common-law system B. would have no defence whatever to *that* action; the *legal* title is in the plaintiff, and his own title and right to a deed, being equitable, were not recognized by courts of law as any defence. Of course a municipal law which did not furnish *some* means of enforcing B.'s right and defeating A.'s action would be incomplete, and unfitted for a civilized people. The common law provided a means, but it was cumbrous, dilatory, and expensive. B. commences a suit in the Court of Chancery, sets forth the agreement to convey and all the other facts from which his equitable title arises, alleges the pending ejectment brought by the vendor, and prays for the proper relief. It is important to notice the extent and nature of this relief, because it throws light upon questions which now arise concerning the doctrine of equitable defences. The vendee might content himself with asking and obtaining an injunction which would stay the pending ejectment, and leave him in possession undisturbed by that action, but would plainly not be a perfect and lasting protection in the future. To end the matter and to secure himself absolutely, he must ask and obtain the affirmative remedy of a specific performance and a conveyance from A. to himself. This being done, he is armed with the *legal* title, and can defend *any legal* action brought against him by the vendor or his heirs or grantees. Nothing could be devised more cumbrous than this double litigation to enforce one right and to end one controversy.[1]

[1] [South Portland Land Co. *v.* Munger (1900), 36 Ore. 457, 60 Pac. 5: In an action of ejectment defendant filed a cross-bill in equity, and it was held that plaintiff was entitled to have the bill stricken out on motion, since the action at law should be tried out before the cross suit in equity. Each action, that at law and that in equity, was a distinct proceeding belonging to a different forum, and the proper practice was to try out the action at law and then institute a separate suit in equity to obtain the relief sought in the cross-bill.]

Nothing could be more simple, natural, and necessary than the reform which permits the equitable right to be pleaded and proved in the action at law; and yet, when the change was made by the legislature, experienced and learned lawyers and judges denounced it, and strove to render it merely nominal. Even at the present day, and in States where the liberal doctrine has been accepted and has received the sanction of the highest tribunals, individual members of the bench will occasionally raise their voices in strenuous opposition; and in one or two of the States an interpretation has been placed upon the statute which confines its beneficial operation within the narrowest limits. The subject-matter of the present section naturally separates itself into three divisions, and the discussion will follow that order: (1) What is an equitable defence? (2) When may an equitable defence be interposed in an action purely legal, which will include the joinder of equitable and legal defences in the same suit? and (3) When can affirmative relief against the plaintiff be granted to the defendant upon the equitable defence which he sets up?

§ 27. * 88. **Meaning of the Terms "Equitable" and "Defence." Restriction Imposed by some Courts herein.** What is an equitable defence? It is to be observed that this term contains two distinct words, and that the separate meaning of each is essential to the complete and accurate conception of the whole, — "equitable" and "defence." Equitable is used in its technical sense as contrasted with legal; that is, the right which gives it its efficacy is an equitable right, — a right formerly recognized and enforced only in courts of equity, and not in courts of law. The notion involved in the word "defence" is, however, the most important to observe. In its judicial signification, a defence is something which simply prevents or defeats the recovery of a remedy in an action or suit, and not something by means of which the party who interposes it can obtain relief for himself. If the codes had merely in express language authorized the defendant to set up equitable *defences*, but had not enacted any further provisions in reference to the subject-matter, the granting of affirmative equitable remedies to the defendant could not have been inferred from such permission. A "defence" is essentially negative, and not affirmative. The facts from which the defensive right arises, may perhaps, in a proper occasion and when employed for that purpose, be made the basis of affirmative relief; but, when so

employed, they would not be a defence. In short, a defence is not to be conceived of as the means of acquiring positive relief or any remedy, legal or equitable. When, therefore, the statute permits an equitable defence to be interposed in a legal action, it merely contemplates the fact that the equitable right averred shall prevent the plaintiff from recovering the legal remedy he is pursuing by his action. If to this negative effect is added the privilege of obtaining an affirmative judgment against the plaintiff, based upon the same equitable right, the latter so far ceases to be a "defence," and becomes in turn a cause of action. The action itself thus assumes a double aspect; each litigant party in this respect becomes an actor, and each a defendant. This analysis may appear to be, and certainly is, elementary and familiar; but it is needed to clear up some confusion and difficulties into which certain courts have fallen in reference to the subject under consideration. These courts, as will be seen in the sequel, would restrict the operation of the reform to those cases in which the defendant asks and obtains some specific affirmative equitable relief against the plaintiff; in other words, to those cases in which the equitable right relied upon by the defendant *is not used as a defence at all*, but is averred as a true cause of action. This construction is, as it seems to me, a palpable error, and it deprives the legislative provision of half its efficacy.

§ 28. * 90. **Meaning of Equitable Defence. Definition by New York Court of Appeals.** A defence is a right possessed by the defendant, arising from the facts alleged in his pleadings which defeats the plaintiff's claim for the remedy which he demands by his action. An equitable defence is such a right which was originally recognized by courts of equity alone. A concise and accurate definition was given by one of the members of the New York Court of Appeals in an early case. "Under the head of equitable defences are included all matters which would before have authorized an application to the Court of Chancery for relief against a legal liability, but which at law could not be pleaded at bar. The facts alleged by way of defence in this action would have been good cause for relief against the judgment in a court of chancery, and under our present system are, therefore, proper matters of defence."[1] Another judge said in the same

[1] Dobson *v.* Pearce, 12 N. Y. 156, 166, per Allen J. See Webster *v.* Bond, 9 Hun, 437; Wisner *v.* Ocumpaugh, 71 N. Y. 113, 117; Wa Chung *v.* Constantine, 1

case: "An equitable defence to a civil action is now as available as a legal defence. The question now is, Ought the plaintiff to recover? and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or of legal cognizance."[1] I need not pursue this analysis further; the instances in which equitable defences have been sustained, as given in the cases hereafter cited, will explain and illustrate their nature more clearly than any abstract definition or description.

§ 29. *91. **Cases holding that Facts entitling to Equitable Relief against Legal Cause of Action can be interposed only upon the Condition that Affirmative Relief is demanded. Criticism.** Express as is the language of the statutes, and well established as is the juridical nature of "defence" in general, the doctrine has been strenuously maintained, and is supported by the decisions of respectable courts, that a defendant cannot avail himself, as a defence, of facts entitling him to equitable relief against the plaintiff's legal cause of action, unless he does it by demanding and obtaining that specific remedy which, when granted, destroys the cause of action; in other words, he cannot invoke the right *as long as he treats it and relies upon it as a defence.* If he does not institute a separate action based upon his equitable right, and recover the specific relief therein, and restrain the pending action at law, he must, at least, in the answer pleaded to that action at law, affirmatively demand the equitable remedy, and this remedy must be conferred upon him. If he simply avers the facts as a negative defence, he will not be permitted to rely upon them and to defeat the plaintiff's recovery by that means. Certain of the cases which announce this doctrine, will be found in the footnote.[2] The error of this doctrine has already been demonstrated.

Idaho, 266; Pennoyer *v.* Allen, 51 Wis. 360; 50 Wis. 308; Holland *v.* Johnson, 51 Ind. 346. As to whether an equitable defence *must* or only *may* be set up, see Erie R. Co. *v.* Ramsay, 45 N. Y. 637, per Folger J.; Giles *v.* Austin, 62 id. 486 (such defence need not be set up when the defendant's right is not absolute, and when it rests in the discretion of the court to grant the relief or not); Ricker *v.* Pratt, 48 Ind. 73.

[1] Dobson *v.* Pearce, 12 N. Y. 156, 168, per Johnson J.

[2] Follett *v.* Heath, 15 Wis. 601; Conger *v.* Parker, 29 Ind. 380; Hicks *v.* Sheppard, 4 Lans. 335, 337; Cramer *v.* Benton, 60 Barb. 216. See also Kenyon *v.* Quinn, 41 Cal. 325; Lombard *v.* Cowham, 34 Wis. 486, 492; Dewey *v.* Hoag, 15 Barb. 365; Cadiz *v.* Majors, 33 Cal. 288; Clark *v.* Lockwood, 21 Cal. 220; Bruck *v.* Tucker, 42 Cal. 352; Miller *v.* Fulton, 47 Cal. 146. Kent *v.* Agard, 24 Wis. 378, does not conflict with this doctrine. See Du Pont *v.* Davis, 35 Wis. 634, 639; Hills *v.* Sherwood, 48 Cal. 386, 392; McClane *v.*

A defence is a *negative* resistance, an obstacle, a something which prevents a recovery, whether it be equitable or legal. If every equitable defence, in order to be available, must consist in an affirmative recovery of specific relief against the plaintiff, or at least in the right to recover such relief if the defendant choose to enforce it, for exactly the same reasons, and with exactly the same force, it might be said that every legal defence, in order to be available, must consist of an off-set or counter-claim. In fact, the codes, without exception recognize the correctness of the rule stated in the text. The sections which prescribe the form and contents of the answer enumerate "defences," legal and equitable, and counter-claims. A recovery of equitable relief by defendant is as truly a counter-claim as the recovery of pecuniary damages;[1] and the statute thus expressly distinguishes between equitable *defences* as such and the recoveries of affirmative equitable relief. The cases which will be referred to in subsequent paragraphs show that the overwhelming weight of authority sustains the doctrine which I have stated as the correct construction of the codes.

§ 30. * 92. **Correct Construction. Limitation upon the Interposition of Equitable Defences to Legal Causes of Action.** I now pass to the consideration of the cases in which equitable defences have been admitted.[2] It will be impossible to state any exhaustive

White, 5 Minn. 178, 190. See Webster *v.* Bond, 9 Hun, 437; Ten Broeck *v.* Orchard, 74 N. C. 409; Quebec Bank *v.* Weyand, 30 Ohio St. 126; Hatcher *v.* Briggs, 6 Ore. 31; Pennoyer *v.* Allen, 51 Wis. 360; 50 id. 308; Lawe *v.* Hyde, 39 id. 345; Henkle *v.* Margerum, 50 Ind. 240; Winslow *v.* Winslow, 52 id. 8; Thompson *v.* Fall, 64 id. 382; Kentfield *v.* Hayes, 57 Cal. 409; Scott *v.* Norris (Ind. App. 1892), 32 N. E. 332; Mason *v.* Mason, 102 Ind. 38. [Weld *v.* The Johnson Mfg. Co. (1893), 86 Wis. 549, 57 N. W. 378.]

[1] Affirmative relief will of course be given in proper cases. As an illustration, see Blake *v.* Buffalo Creek R. R., 56 N. Y. 485, 493, 494; Bailey *v.* Bergen, 4 N. Y. Sup. Ct. 642.

[2] [Sachleben *v.* Heintze (1893), 117 Mo. 520, 24 S. W. 54: "Under our system of law, in which legal and equitable rights and remedies are recognized and applied in the same forum, a party who is brought into court to respond to a promise contained in a note may defend successfully by showing that its consideration has failed because of facts creating the equitable barrier to its enforcement just stated." The barrier stated was misrepresentation. Wendover *v.* Baker (1893), 121 Mo. 273, 25 S. W. 918: An answer setting up equitable defences and praying for affirmative equitable relief, converts the case into a proceeding in equity to be governed by principles and rules of procedure applicable to such cases. Swon *v.* Stevens (1897), 143 Mo. 384, 45 S. W. 270; Kostuba *v.* Miller (1896), 137 Mo. 161, 38 S. W. 946: An equitable defence will not convert an action at law into one in equity where no affirmative relief is asked. Ridgeway *v.* Herbert (1899), 150 Mo. 606, 51 S. W. 1040: "When an answer in a law suit admits the plaintiff's cause of action, and sets up purely an equitable defence, it con-

rule derived from the decisions thus far made by the courts; for it cannot be supposed that they have exhausted the instances in which this species of defence is proper. There does not seem to be any limit to the use of such defences other than is found in the very nature of equity jurisprudence itself. Whenever equity confers a right, and the right avails to defeat a legal cause of action, — that is, shows that the plaintiff ought not to recover in his legal action, — then the facts from which such right arises may be set up as an equitable defence in bar. There can be no other limitation, unless we would defeat the plain intent of the statute, and return to the old method of granting to the defendant a decree in equity from which a *legal* defence may arise. The following cases are intended as illustrations and examples rather than as a full enumeration of the possible instances in which the defence may be interposed.

§ 31. * 93. **Illustrations and Examples.** In an action brought to recover damages for the breach of covenants contained in a deed of conveyance, the defendant may set up, as an equitable defence, a mistake in the instrument which should be corrected; as, for example, in such an action on a covenant against incumbrances, the alleged breach being an outstanding mortgage, the defendant may show the original agreement to except such mortgage from the operation of the covenant, and that by mistake the exception was omitted.[1] In an action upon a judgment recovered against the defendant, the latter pleaded that the judgment was

verts the whole case into a suit in equity triable by the chancellor. A plaintiff is not thereby deprived of his right of trial by jury, because the defendant by his answer concedes the plaintiff's right to recover unless the equity defence prevails." But where in such an action defendant presents two defences, one legal and the other equitable, the legal issues are triable by a jury and the equitable issues are for the chancellor. Martin *v.* Turnbaugh (1899), 153 Mo. 172, 54 S. W. 515: "If the action is one at law, and the answer seeks affirmative equitable relief or pleads a legal defence and the reply raises an equitable defence to the affirmative legal defence set up in the answer, the equitable claim or defence must be tried by the court, sitting in equity, before the action at law can be tried; and this is the statutory substitute for the relief formerly afforded by courts of law and courts of equity collectively." Hamill *v.* Bank of Clear Creek County (1896), 22 Colo. 384, 45 Pac. 411: In an action of forcible detainer, equitable defences may be interposed which show that, while the title to the property is in the plaintiff, the defendant has a better right to possession. Neal *v.* Wideman (1894), 59 Ark. 5, 26 S. W. 16: Defendant in an action to recover possession of land was allowed to take advantage of fraud by answer and cross-complaint.]

[1] Haire *v.* Baker, 5 N. Y. 357. The New York Court of Appeals held in this case that the defendant could set up this matter *as a defence*, but *could not have* any affirmative relief. This latter position has been since abandoned by the court.

originally obtained by fraud, and that he had instituted a suit in equity against the judgment creditor in the State of Connecticut, in which the judgment had been decreed to be void, and its enforcement had been enjoined. These facts constituted a perfect equitable defence and complete bar to the action.[1] In an action to recover damages for the non-performance of an executory contract to run a steamboat on a certain route for the plaintiff, the answer alleged a mistake in drawing the contract by which a proviso was omitted that would have excused the defendant's failure to perform, and prayed a reformation. The New York Court of Appeals sustained the defence, saying: "The court below clearly erred in holding that the equitable defence could not be tried in this action. That it could be is too thoroughly settled to admit of further dispute."[2] The defence may arise from facts occurring subsequent to the joinder of issue, and require to be interposed in a supplemental answer. On the day of trial of an action for work and labor, the parties met, had a negotiation, and settled the controversy, by the terms of which settlement the suit was to be abandoned. The plaintiff afterwards repudiating the compromise and proceeding with the trial of the cause, the defendant, after tendering performance, was permitted to set up the facts in a supplemental answer; and it was held that they constituted a perfect equitable bar.[3]

§ 32. * 94. **In Actions to recover Land. Three Classes of Cases. Illustrations.** The action to recover possession of land — analogous to ejectment — is the one in which the equitable defence is the most frequent; and here, of course, it assumes a great variety of shapes.[4] Those, however, which are the most common are the

[1] Dobson *v.* Pearce, 12 N. Y. 156, 165; Pennoyer *v.* Allen, 51 Wis. 360; 50 id. 308.

[2] Pitcher *v.* Hennessey, 48 N. Y. 415, 422. In this case the defendant asked and obtained the reformation.

[3] Kelly *v.* Dee, 2 N. Y. Sup. Ct. 286.

[4] Harrington *v.* Fortner, 58 Mo. 468, 474; Hubble *v.* Vaughan, 42 Mo. 138; Maxwell *v.* Campbell, 45 Ind. 360, 363; Hammond *v.* Perry, 38 Iowa, 217. See also Collins *v.* Rogers, 63 Mo. 515; Ten Broeck *v.* Orchard, 74 N. C. 409; Heermans *v.* Robertson, 64 N. Y. 332; McManus *v.* Smith, 53 Ind. 211; Thompson *v.* Fall, 64 id. 382; Hoppough *v.* Struble, 60 N. Y. 430; Spect *v.* Spect, 88 Cal. 437.

[The following cases hold that an equitable defence may be interposed in an action of ejectment: Wanser *v.* Lucas (1895), 44 Neb. 759, 62 N. W. 1108; Sutton *v.* Sutton (1900), 60 Neb. 400, 83 N. W. 200; Davis *v.* Holbrook (1898), 25 Colo. 493, 55 Pac. 730; Cheney *v.* Crandell (1901), 28 Colo. 383, 65 Pac. 56; Power *v.* Sla (1900), 24 Mont. 243, 61 Pac. 468; Goldberg *v.* Kidd (1894), 5 S. D. 169, 58 N. W. 574; Freeman *v.* Brewster (1897), 70 Minn. 203, 72 N. W. 1068. In Freeman *v.* Brewster the court holds that in such case the defendant must set up and allege his

right to a correction of either the plaintiff's or the defendant's muniments of title because of mistakes therein; the right to a specific performance by the plaintiff of his contract to convey the land; and the right to a cancellation of a conveyance on the ground of fraud. These three classes of defences are found in numerous forms according to the different circumstances which may arise in the transactions of life and the affairs of business; but they may all be reduced to the same general principle. In some instances the equitable rights have been admitted in a purely defensive character, and in others the judgment has awarded affirmative relief to the defendant. In one case, the plaintiff having proved title in himself by means of a deed from the conceded original owner, the defendant, by way of an equitable bar, alleged that, prior to the plaintiff's conveyance, he had purchased of the said owner several parcels of land, including the one in question, that the deed from such original owner should have contained a description of the premises claimed by the plaintiff, but by mistake it was omitted. This defence was sustained as an equitable bar without an actual reformation of defendant's deed;[1] and in the same manner a mistake in a deed from the plaintiff to the defendant, by which the land in suit was omitted, may be made the basis of an equitable defence without any actual reformation asked or granted.[2] The title of the plaintiff in another similar action being claimed under a sheriff's deed given in pursuance of a sale on execution against the original owner, the defence was that at the sale the sheriff expressly excepted the parcel of land in question therefrom, that his certificate and deed omitted such exception and included a description of the premises by mistake, and that the owner subsequently conveyed to the defendant. The court, on the defendant's demand, reformed the plaintiff's deed, and admitted the defence.[3] In a

equities in his answer so fully and completely that a court of equity would, under the old practice, have granted him adequate relief and have confirmed his right of possession as against the holder of the adverse title, citing Williams *v.* Murphy, 21 Minn. 534. In the Montana case it is said: "In such cases, however, the answer is in the nature of an original bill in equity, and must contain all the allegations necessary to constitute the defence or warrant the relief sought. In Duke *v.* Griffith (1894), 9 Utah, 469, 35 Pac. 512, it is held that the defendant in ejectment may set up in his answer and prove any facts constituting an equitable estoppel.]

[1] Crary *v.* Goodman, 12 N. Y. 266, 268. See also Guedici *v.* Boots, 42 Cal. 452, 456.

[2] Hoppough *v.* Struble, 2 N. Y. Sup. Ct. 664, 60 N. Y. 430; Glacken *v.* Brown, 39 Hun, 294; Rogers *v.* Castle (Minn. 1892), 53 N. W. 651.

[3] Bartlett *v.* Judd, 21 N. Y. 200, 203.

similar action, where the plaintiff's title was through a sheriff's deed, executed to him as purchaser at an execution sale against the person who was the admitted source of title, the defendant pleaded, as an equitable defence, an equitable mortgage arising prior to the inception of the judgment lien, and his own possession under the same. These facts were held to constitute a good defence without affirmative relief asked or granted.[1]

§ 33. *95. **In Actions by Vendors against Vendees to recover Possession of Lands. Illustrations.** Equitable defences are very frequent in actions brought to recover possession of lands by the vendors against the vendees, when an agreement to convey the land in question has been entered into.[2] As illustrations, the following have been upheld: when the complaint alleged the non-payment of the purchase price at the stipulated time, and a consequent forfeiture, the defence that the time of payment had been extended by an oral agreement, and that a tender had been duly made in compliance with such agreement;[3] in an action in all respects the same on the part of the plaintiff, the defence that a tender had been made and kept good, the court expressly refusing to grant the affirmative relief of specific performance to the defendant.[4] The vendee's right to possession under a contract to convey is a very familiar species of equitable defence to actions brought to recover the land by the vendor.[5] In an action by the

[1] Chase *v.* Peck, 21 N. Y. 581. The court having first decided that the facts alleged constituted the defendant an equitable mortgagee, so that his possession under it would be a good equitable defence, stated the rule in a very accurate and condensed manner, per Denio J. (p. 586): "But, since the blending of legal and equitable remedies, a different rule must be applied. The defendant *can defeat the action* upon equitable principles; and if, upon the application of these principles, the plaintiff *ought not to be put into possession of the premises, he cannot recover in the action.*" The principle so concisely and clearly enunciated is a complete answer to the reasoning of Mr. Justice Talcott, in Cramer *v.* Benton, cited *supra*, note 2, p. 46. See McClane *v.* White, 5 Minn. 178; Richardson *v.* Bates, 8 Ohio St. 257, 264.

[2] In Cavalli *v.* Allen, 57 N. Y. 508, 514, it was held that the vendee in possession may set up, as an equitable defence, the same equitable rights which he could have enforced had he brought an action for a specific performance. Duffy *v.* O'Donovan, 46 N. Y. 227; Leaird *v.* Smith, 44 id. 619; Hubbell *v.* Von Schoening, 49 id. 330, 331; Giles *v.* Austin, 62 id. 486; Ingles *v.* Patterson, 36 Wis. 373; Morton *v.* Dickson, (Ky. 1890), 14 S. W. 905; Hyde *v.* Mangan, 88 Cal. 319; Southern Pac. R. Co. *v.* Terry, 70 Cal. 484.

[3] Cythe *v.* La Fontain, 51 Barb. 186, 188.

[4] Harris *v.* Vinyard, 42 Mo. 568.

[5] Petty *v.* Malier, 15 B. Mon. 604; Onson *v.* Cown, 22 Wis. 329; Creager *v.* Walker, 7 Bush, 1, 3. Possession of defendant under an oral contract to convey by plaintiff or his vendor: Chandler *v.* Neil, 46 Kan. 67; Newkirk *v.* Marshall, 35 Kan. 77; Ingles *v.* Patterson, 36 Wis. 373; Kenyon *v.* Youlen, 53 Hun, 591; Ford *v.* Steele, 31 Neb. 521 (parol gift).

grantee of the vendor, who took with constructive notice of the defendant's interest, the right of the vendee's assignee to possession and to a deed of conveyance is a good equitable defence in bar.[1] To an action for the foreclosure of a mortgage executed by the defendant to the plaintiff's assignor, the answer alleged a mistake in the instrument in relation to the terms and times of payment, claiming that, when corrected, nothing would be due, and demanded the affirmative relief of a reformation. This remedy was granted by the court, although the mortgagee was not a party to the action.[2] In pleading an equitable defence, all the facts should be averred which are necessary to the existence of the equitable right. In many instances this right is, from the nature of the case, a right to affirmative remedy; and, whether this remedy is demanded or not, the answer should contain all the substantial facts that would be found in a cross-bill in chancery.[3]

§ 34. *96. **Other Actions to which such Defences are Applicable.** These defences are not, however, confined to actions involving the title to lands, or those brought upon contracts relating to land; they are proper in actions based upon mercantile agreements, and in all others where an equity may arise and affect the rights of the parties. The complaint in an action upon a promissory note demanded judgment for a certain balance unpaid. A defence that the note was given upon a settlement, and that by mistake the amount was made too large by a certain sum which was more than the unpaid balance claimed by the plaintiff, was held a good equitable bar to the action, without any specific relief demanded or awarded;[4] and in an action upon a policy of reinsurance the recovery was defeated by the fact, set up in defence, that the same person acted as agent for both the parties in procuring the policy to be issued, and that his agency

[1] Talbert *v.* Singleton, 42 Cal. 390, 395, 396; Cavalli *v.* Allen, 57 N. Y. 508.

[2] Andrews *v.* Gillespie, 47 N. Y. 487, 490; Cox *v.* Ratcliffe, 105 Ind. 374; Dobbs *v.* Kellogg, 53 Wis. 448.

[3] See Bruck *v.* Tucker, 42 Cal. 346, 352; Estrada *v.* Murphy, 19 Cal. 272; Lestrade *v.* Barth, 19 Cal. 660; Weber *v.* Marshall, 19 Cal. 447; Blum *v.* Robinson, 24 Cal. 127; Downer *v.* Smith, 24 Cal. 114. See Hughes *v.* Davis, 40 Cal. 117; Arguello *v.* Edinger, 10 Cal. 150; Clark *v.* Huber, 25 Cal. 593, 597. See also Hinton *v.* Pritchard, 102 N. C. 94; Dorris *v.* Sullivan, 90 Cal. 279; Swasey *v.* Adair, 88 Cal. 179; Dale *v.* Hunneman, 12 Neb. 221.

[4] Seeley *v.* Engell, 13 N. Y. 542, reversing s. c. 17 Barb. 530. See Becker *v.* Sandusky City Bk., 1 Minn. 311. Also in actions on notes, see Holland *v.* Johnson, 51 Ind. 346; Henkle *v.* Margerum, 50 id. 240.

for the plaintiff was unknown to the defendant at the time.[1] Here, also, no affirmative relief was granted; nor could any have been given except cancellation of the policy, which would certainly have been entirely useless. The assignee of a lease bringing an action for the rent, the defendant averred that the assignment to the plaintiff, although absolute in form, was in fact given as collateral security for the payment of a note, that the note had been paid, and that the interest of the plaintiff had thereby ended. This defence was sustained, and here, also, no affirmative relief could have been essential to the defendant's security or protection under any circumstances; the judgment in his favor was a bar to all possible further action on the lease by the plaintiff or his assigns.[2] In all the foregoing instances the single equitable defence has been spoken of as though it stood alone, unconnected with any others. An equitable defence, however, may be joined with any other defences, legal or equitable, which may possibly arise in the action. In many of the cases referred to in the text and cited in the notes, other defences were spread upon the record. Thus, in the action upon a policy of insurance, any of the customary legal defences of misrepresentations, breach of warranties, non-compliance with provisions of the policy in regard to proofs, and the like, might have been pleaded and proved in connection with the equitable defence which was interposed.[3]

§ 35. * 97. **Affirmative Relief upon Facts Alleged in Answer. Cross-Complaints. Different Positions Contrasted.** The remaining question to be considered is, When will affirmative equitable relief be granted to the defendant upon the facts which he alleges in his answer as constituting an equitable bar to the plaintiff's recovery? The New York Court of Appeals, in an early case, expressly held that in an action upon a covenant against incumbrances in a deed of lands, brought to recover damages for a breach thereof by means of an outstanding mortgage, the defendant may show, by way of equitable defence in bar, a mistake in the deed by which an exception of that very

[1] N. Y. Central Ins. Co. *v.* Nat. Protection Ins. Co., 14 N. Y. 85; 20 Barb. 468.

[2] Despard *v.* Walbridge, 15 N. Y. 374, 378; Struman *v.* Robb, 37 Iowa, 311, 313; Hablitzel *v.* Latham, 35 id. 550.

[3] [A legal defence may be interposed to an equitable cause of action: Hanna *v.* Reeves (1900), 22 Wash. 6, 60 Pac. 62.] See Bennett *v.* Titherington, 6 Bush, 192; Dorsey *v.* Reese, 14 B. Mon. 157; Smith *v.* Moberly, 15 B. Mon. 70, 73; Bosley *v.* Mattingly, 14 B. Mon. 89, 91.

mortgage was omitted from the covenant, but that he could not have, in that action and upon an answer setting up all these facts, the affirmative relief of reformation. The case was decided, and the judgment sustained, expressly upon this distinction.[1] This decision, however, cannot be regarded as correct in the light of other subsequent adjudications made by the same court and referred to in the foregoing paragraphs. Affirmative relief may certainly be given to the defendant upon his answer in all cases where, from the nature of the subject-matter and from the relations of the parties, a specific remedy in his favor is possible according to the doctrines of equity jurisprudence, certainly in all cases where the answer can be considered as setting up a counter-claim. There are undoubtedly instances in which no such relief is possible.[2] Where, however, the nature of the subject-matter and of the relations between himself and the plaintiff are such that he could have maintained an independent suit in equity against the plaintiff and procured specific relief thereby, or could have filed a cross-bill under the old practice, he may now obtain the same remedy upon his answer, at all events, as was before remarked, if the demand alleged in the answer constitutes a valid counter-claim. This is undoubtedly the general rule. In a very few States, however, cross-complaints or petitions are expressly recognized by the codes in addition to counter-claims;[3] and the rule in those States may be that, if the demand for equitable relief do not constitute a proper counter-claim, it must be made in a cross-complaint or cross-petition, and not in an answer. Subsequently to the decision of Haire *v.* Baker,[4] in New York, the Court of Appeals held, by way of *dictum* in Dobson *v.* Pearce,[5] that the defendant *may* obtain affirmative relief upon the answer which he pleads to the

[1] Haire *v.* Baker, 5 N. Y. 357 (1851).

[2] The case of Despard *v.* Walbridge, cited *supra*, seems to be such a one. The defendant had a right to prevent a recovery against himself by one who had no interest in the lease; but he certainly could not have enforced a reassignment of the lease from the plaintiff to his assignor, nor a cancellation of that assignment, because he had no interest in or power over the instrument in question; much less could he have obtained any relief against the lease. His right was purely *defensive*.

[3] [Crosby *v.* Clark (1901), 132 Cal. 1, 63 Pac. 1022: In an action of ejectment for land purchased by plaintiff, the defendant in possession may by cross-complaint enforce a trust against the plaintiff, for fraud in procuring the title. Board of School Commissioners *v.* Center Township (1895), 143 Ind. 391, 42 N. E. 808; Cocke *v.* Clausen (1900), 67 Ark. 455, 55 S. W. 846. See also §682 *et seq.*]

[4] Haire *v.* Baker, 5 N. Y. 357.

[5] Dobson *v.* Pearce, 12 N. Y. 156, 165, per Allen J.

plaintiff's cause of action. Finally, the doctrine was expressly established as the basis of the decision. In an action to recover possession of land, where the plaintiff held his title by a sheriff's deed given upon a sale under execution against the original owner, the defendant not only defeated the recovery by proving a mistake in the sheriff's deed, but obtained a judgment reforming that deed by correcting the mistake.[1] While in some States the answer may be turned into a cross-petition, and affirmative relief obtained,[2] yet this proceeding does not seem to be necessary, even in those States where the practice provides for such cross-petition or cross-complaint; the defendant may have the proper affirmative relief to which he is entitled upon his answer.[3] In Missouri, however, it would seem that affirmative equitable relief can never be granted to the defendant upon his mere answer.[4] In extreme contrast with this position is the doctrine, already discussed, which refuses to the defendant the benefit of an equitable defence as a bar to a legal cause of action, unless the facts relied upon are such that he would be awarded an affirmative remedy if he elected to demand a judgment conferring it.[5] The general subject of affirmative relief to defendants will be treated more at large in the subsequent sections upon "Counter-claim" and "Union of Defences in One Answer."

SECTION FOURTH.

A LEGAL REMEDY OBTAINED UPON AN EQUITABLE OWNERSHIP OR EQUITABLE PRIMARY RIGHT.

§ 36. *98. **Statement of Question Discussed herein. Ejectment at Common Law.** A special case, arising from the general union of legal and equitable forms produced by the new system,

[1] Bartlett *v.* Judd, 21 N. Y. 200, 203.

[2] Massie *v.* Stradford, 17 Ohio St. 596; Hablitzel *v.* Latham, 35 Iowa, 550; Hammond *v.* Perry, 38 id. 217.

[3] Klonne *v.* Bradstreet, 7 Ohio St. 322. Defendant can have no affirmative relief upon an answer by way of *defence* merely; it must be demanded by a cross-complaint, or by a counter-claim. Earle's Adm. *v.* Hale, 31 Ark. 473; Tucker *v.* McCoy, 3 Colo. 284; Abbott *v.* Monti, 3 id. 561; Monti *v.* Bishop, 3 id. 605; Sisty *v.* Bebee, 4 id. 52; Mills *v.* Buttrick, 4 id. 53, 123; Nippel *v.* Hammond, 4 id. 211; Reed *v.* Newton, 22 Minn. 541; Quebec Bank *v.* Weyand, 30 Ohio St. 126; Douglas *v.* Haberstro, 25 Hun, 262. Relief on a cross-complaint or cross petition. Marr *v* Lewis, 31 Ark. 203; Abbott *v.* Monti, 3 Colo. 561; Hatcher *v.* Briggs, 1 Ore. 31; Kellogg *v.* Aherin, 48 Iowa, 299. [See discussion of cross-complaints, §§ *806–*808.]

[4] Harris *v.* Vinyard, 42 Mo. 568. See State *v.* Meagher, 44 Mo. 356.

[5] See *supra*, § 29.

requires a particular examination. It may be properly presented under the form of the question whether the holder or possessor of a purely equitable primary right, or the owner of a purely equitable estate or interest, can maintain an action to recover a remedy which, before the change in procedure, was purely legal; or, to express the same thought in terms not entirely accurate, but which are, nevertheless, in constant use, whether such holder of a purely equitable primary right, or owner of a purely equitable estate or interest, can maintain upon it an action at law to recover an ordinary legal judgment, either for possession or for damages; to put the same question in a concrete form by limiting it to a particular class of rights and remedies, whether the owner of an equitable estate in land can maintain an action analogous to ejectment? The action of ejectment was originally invented to enable a tenant for years to recover possession of the demised premises during the term, the ancient real action being confined to freehold estates. It was, during its existence and use as a strict common-law instrument, a possessory action; and a judgment rendered in it never determined the question of title. Its use in trying titles was wholly a matter of convenience: no rule of the common law made it a means of settling a disputed controversy as to title. Nothing but the voluntary acquiescence of the defeated party enabled it to produce even the semblance of such a result. Action after action might be brought, and the common law placed no obstacle in the way of such a succession of attacks. Equity alone devised the cumbrous method of an injunction suit to restrain the further prosecution, and to quiet the title of the party who had succeeded in several trials at law. Since the common law paid the most rigid adherence to external forms, it is true that the action of ejectment, until changed by statute, was never used except for the recovery of demised premises; and this form was preserved in the absurd fiction of making John Doe, as tenant of the real claimant, the plaintiff on the record. As the estate for years, to protect which the action was originally invented, was a legal estate, the rule grew up, and was followed without exception, and from the very necessities of its form, that the action of ejectment could only be employed as a means of recovering possession of a legal estate. The common law undoubtedly knew no such thing as ejectment by the owner of an equitable estate, or the holder of an equi-

table title; such estate or title could only be protected by a court of equity.

§ 37. *99. **Arbitrary and Technical Character of Old Rule. Distinction Abolished by Code. View still Entertained by some Courts. Criticism.** This rule, however, was always a matter of mere external form; it was one of the formal incidents of the action, as arbitrary and technical as the fiction of the plaintiff being a lessee. When the statute abolished all the distinctions between actions at law and suits in equity and between the forms of such actions, one might naturally have supposed that the formal rule thus described would have been at once abandoned. On the contrary, the courts of certain States, in which the new procedure has been adopted, continue to speak of actions of ejectment as though they were existing and fully recognized judicial instruments, with all their ancient and arbitrary incidents and requirements; as though, in fact, there had been no great change sweeping away the very foundations of the ancient system. It is true, this reform legislation has not altered any primary rights nor final remedies; an equitable right or estate is not turned into a legal right or estate; and the remedies of pecuniary compensation and of possession of lands or chattels which were called legal because they could only be obtained by actions at law, and the other specific kinds of relief which were called equitable because they could only be obtained by suits in equity, are left unaffected. One great change, however, has taken place which some courts seem at times to have forgotten; all these remedies are now to be obtained by a single civil action, which it is neither appropriate to call legal nor equitable, because the distinctions between legal and equitable actions have been destroyed. It may be well enough, in order to avoid circumlocution, to describe one class of remedies as legal and another as equitable, if it be constantly remembered that this nomenclature no longer depends upon the kind of action used in the pursuit of these remedies, and that they are all pursued and obtained by means of one action which has no distinctive and peculiar features depending upon the species of remedy granted through its instrumentality.

§ 38. *100. **Question Stated in Paragraph Thirty-six Answered upon Principle. Argument.** Assuming these elementary doctrines of the new system of procedure, I am enabled, by applying them, to answer the proposed question upon principle; I shall then com-

pare the results thus obtained with the rules laid down by judicial decision. It must be conceded at the outset that every primary right, whether legal or equitable, when invaded, should have a remedy or remedies appropriate to its nature and extent. When the right is possessory, there should be a remedy which restores possession; when the right involves the ownership or title, there should be a remedy which establishes the ownership or title, or which restores the owner to his full dominion by removing obstructions to or clouds upon his title. The law gives these classes of remedies; and the confusion into which some of the courts have fallen in reference to this subject results from a failure to distinguish between these two kinds of primary rights, and the two corresponding kinds of remedies; from an utter confounding of possessory rights with rights of ownership, and possessory remedies with remedies going to the ownership. Now, it cannot be doubted that where the question is concerning ownership, where the primary right invaded is one of ownership or title, and the remedy sought is correlative thereto, the equitable right must have an equitable remedy. If a person is clothed with an equitable title or ownership, from the very nature of the case his remedy must be equitable, because the positive relief which he needs in almost all cases is the conversion of this equitable ownership or title into a legal one, which can only be done by a remedy within the competency of equity tribunals, — by a specific performance, a reformation, a re-execution, a cancellation, and the like. The only exception to the kind of relief described — the turning the equitable title into a legal one — is the remedy of injunction, which is often necessary, and which does not change the nature of the title, but leaves it as it was. When, therefore, the object of the action and of the remedy demanded relates to ownership or title, unquestionably the equitable title must be judicially protected and aided by a remedy that is purely equitable, and cannot be thus protected and aided by a remedy which is in form legal.

§ 39. *101. **Conclusion.** This, however, is not true when the right is possessory, and the remedy demanded is a mere transfer or restoration of possession. There are equitable primary rights, titles, and ownerships which entitle the holder thereof to the undisturbed possession of the land which is the subject-matter of the right or title. This proposition cannot be

denied. A large part of the remedies once given by the Court of Chancery alone, and the whole range of equitable defences now allowed in legal actions, are based upon the conception that the equitable owner is entitled to possession as a part of his right. To deny this is to turn many of the familiar rules of the law into absurdity, and to render much of the relief given by the courts self-contradictory. When the vendor under a land contract sues the vendee in possession to recover the premises, and the latter interposes his equitable right as a defence, and succeeds in defeating the action brought against him, that success is entirely due to the fact that he is entitled to the possession by virtue of his equitable title. Now, what the law permits to be done *defensively*, for the same reason, and by the application of the same principle, it should permit to be done *affirmatively*. There is no distinction in principle between the two cases. It is simply absurd to say that a person in possession under an equitable title may defend and be kept in his possession by exhibiting that title in a legal action, but that, if he is out of possession, he shall not be allowed to recover his rightful possession by exhibiting his title in the same kind of action. In fact, when the courts, with almost perfect unanimity, decided that the equitable owner may rely on his title as an absolute bar — a merely negative defence — to the so-called action of ejectment brought against him, they decided in principle that he may obtain possession in the like action. Whenever, therefore, a person clothed with an equitable title or ownership which by its nature entitles him to the immediate possession of the land as against the party actually in possession, and he desires simply to obtain the possession, there is nothing in principle which can forbid him to maintain an action for that purpose, and recover the possession. To call such an action "legal" is no answer; for the rule which forbade an equitable right or title to be enforced or even recognized in a court of law was a mere arbitrary matter of form, and has been expressly abolished. To call the action "ejectment" is no answer, because there is no such action, and all the technical rules which prevailed in respect to it at the common law have been swept away by the legislative command. The courts which now speak of "ejectment" as an existing species of action, and which apply its rules to an action now brought to recover possession of land, are so far disregarding the

express terms of the statute and thwarting its plainest design. It is true that all equitable ownerships and titles do not carry with them the right of immediate possession of the land, and this argument is carefully limited to those which do involve this element in their proper nature. It might seldom happen that the equitable owner would be satisfied with a mere possessory remedy, but there are circumstances and situations in which, and parties against whom, such remedy may be very important, and may perhaps be the only one practicable. To illustrate by the most familiar and plain example, that of a vendee under a contract to convey land. Assume such an agreement completely fulfilled by the vendee. He is the equitable owner, and entitled to possession as against the vendor, and therefore as against all the world. Beyond a doubt as against the vendor, this equitable owner would prefer to bring an action to obtain a specific performance, and thus at one blow to consummate his title and remove all obstacles to the full enjoyment of his ownership; but if he chooses to ask for a part instead of the whole, upon what grounds of principle, upon what reasons of policy, shall the courts refuse to award him the possession by compelling the vendor, who wrongfully withholds, to surrender it up? To say that the vendor has the legal title is no answer, and is a mere arguing in a circle, because the action and the remedy do not concern the title, and by the conceded rules of the law his legal title does not enable the vendor to retain possession from the vendee. If, however, a third person without color of right, and not the vendor, withholds the possession, the reasons in favor of the vendee's maintaining the action are still stronger. Is it answered that in ejectment the defendant may succeed by proving legal title out of the plaintiff, because the plaintiff must recover upon the strength of his own title, and not upon the weakness of the defendant's? This, again, is a mere formula of words without any real meaning. There is no action of ejectment. The action supposed to have been brought is simply one to recover the possession to which the plaintiff is entitled from a defendant who has no right or color thereof; and at best the rule invoked is the arbitrary result of external and technical forms clustered about the common-law action, all of which have been swept out of existence with the action itself. Unless, therefore, it is established that the common-law form of action called

"ejectment," with all of its incidents, still remains in full force and effect, notwithstanding the peremptory provisions of the statute which have in terms abrogated them, I have demonstrated that there is no reason or ground in principle for refusing to permit the owner of an equitable estate, which entitles him to immediate possession, to maintain an action for the purpose of recovering that possession. We may call the action legal or equitable, and it makes no difference. The sum of the whole matter is, a person is clothed with a right over land which by its essential nature confers upon him the right of immediate possession; he should be, and on principle is, permitted to enforce that right and obtain possession, if that remedy is all he demands, even though he might, if he chose, avail himself of a higher and more efficient remedy. The same course of argument applies with equal force to rights over chattels as well as over lands, wherever there can be an equitable ownership of chattels.

§ 40. *102. **Result of Discussion upon Principle Compared with Doctrine of Decisions. Concession by Author. Rule in Missouri, Wisconsin, Indiana, California, and Iowa.** I have now to compare the result of a discussion of the question upon principle with the doctrine which is established upon the authority of decisions thus far made; and I concede at the outset that in numbers the judicial decisions are decidedly opposed to my conclusions. In accordance with its general theory, that a distinction between legal and equitable actions is still preserved, the Supreme Court of Missouri has held, in a long series of cases, that the owner of an equitable title can under no circumstances obtain legal relief, but shall be driven to two actions, — the first to turn the equitable into a legal estate, and the second to obtain possession.[1] The

[1] Reed *v.* Robertson, 45 Mo. 580, and cases cited in the notes to § *79. See, however, Henderson *v.* Dickey, 50 Mo 161. In Reed *v.* Robertson the defendant was a trustee, and held the legal title in trust to convey the same to the plaintiff. It was adjudged that the plaintiff could not maintain a simple action for possession, — called by the court ejectment, — but must resort to a suit in equity to compel a performance of his trust by the defendant. The other case cited shows that the court of Missouri has modified its views in relation to relief of possession accompanying other specific equitable relief, but goes no farther.

[See Martin *v.* Turnbaugh (1899), 153 Mo. 172, 54 S. W. 515. This was an action of ejectment, the petition being in the usual form. The answer was a general denial, and an equitable defence and cross action. The reply raised equitable defences to the claim for equitable relief asked by defendant in his answer. The court below heard defendant's equitable defence, but held that the equitable reply thereto of the plaintiff could not be heard in this action, and that plaintiffs "must be reverted to a separate bill in equity." In reversing the case the Supreme Court said: "This case is a

same doctrine has been established in Wisconsin, and has been extended to waste, on the ground that the actions of ejectment

strong illustration of the difference between proceedings at common law and under our code. It is a plain suit in ejectment. When it was begun, the title was in the plaintiffs and the defendant was in possession, without any right of record. But by his answer the defendant asks the court, on its chancery side, to raise up or restore an equitable right to the possession, by cancelling the entry of satisfaction of the deeds of trust, and reinstating them. Unless and until the court does so, which it can only do after a trial, the defendant has shown no defence to the plaintiffs' right to the possession of the land. At common law the defendant could not have interposed such a defence or asked such relief in the ejectment suit. The defendant would have been compelled to ask the aid of a court of equity, and the proceedings in the ejectment suit would have been stayed until the determination of the equity suit. When the defendant went into a court of equity and asked to have the entry of satisfaction annulled and the deeds of trust reinstated, the plaintiff could have defended on the grounds stated in his reply; that is, that the defendant had lost his right to have the relief asked because of his fraud, by virtue of the merger or by reason of the payment of the debt secured by the deeds of trust. If the plaintiffs herein (who would, of course, be the defendants in such a suit in equity) established any of these defences, the defendant herein (the plaintiff in such an equity suit) would be denied the relief sought, the equity suit would be ended, and the defendant would have no further defence in the ejectment suit, and hence the judgment would be for the plaintiffs.

"No one denies that in such a suit in equity the plaintiffs could interpose the defences named. No one will contend that if this defendant had commenced a suit in equity to have his entry of satisfaction annulled and his deeds of trust reinstated, as soon as the warranty deed from Wells to him was set aside, that the plaintiffs herein (who would be the necessary defendants in such an action) could plead the defences here set up or could ask for an accounting and for leave to redeem. Every one admits that it is elementary law that when a court of equity obtains jurisdiction of a cause it has the power to retain jurisdiction until it does complete justice between the parties.

"It was the very purpose of the code, when the common law and equity powers were centred in the same court, to abolish this circumlocution, and hence the petition may now have a count at law and a count in equity (R. S. 1889, sec. 2040), the answer may contain a legal defence, an equitable defence, and an equitable cross bill or counter-claim (R. S. 1889, sec. 2050), and the reply may set up legal or equitable defences to the new matter set up in the answer (R. S. 1889, sec. 2052). The object of all which is to simplify proceedings, and to settle the whole controversy between the parties in the one action. If the action is one at law, and the answer seeks affirmative equitable relief or pleads a legal defence, and the reply raises an equitable defence to the affirmative legal defence set up in the answer, the equitable claim or defence must be tried by the court, sitting in equity, before the action at law can be tried; and this is the statutory substitute for the relief formerly afforded by courts of law and courts of equity collectively. In this case the court has stayed the plaintiffs' suit at law while it heard defendant's cross action in equity; but it has refused to hear the plaintiffs' defence to the defendant's cross action in equity, and thus it has granted defendant the equitable relief he asked, and denied the plaintiffs the right to defend in equity against the defendant's equitable claim, and also denied the plaintiffs the relief at law they asked.

"The conditions thus presented in this case are that when this ejectment suit was begun the defendant had no defence at law and the plaintiffs were entitled to a judgment. But by his answer the defendant stayed the suit at law until his claims for equitable relief were heard. The court, sitting in equity, heard defendant's claim and refused to hear the plaintiffs' equitable defences thereto; awarded the defendant the equitable relief he asked,

and waste must be brought by one having the legal ownership, and that he must recover on the strength of his own title.[1] It would seem that the same rule has been adopted in Indiana, although this is by no means certain. A series of cases have held that a plaintiff, *alleging a legal* ownership and right of possession, cannot recover upon proof of an equitable ownership; that an action to recover possession of lands, where the pleading contains such averments, is analogous to the common-law ejectment, and the plaintiff "must recover on a legal title, and not on an equitable title."[2] In California, the doctrine is established in the most general form, that the holder of an equitable title cannot maintain an action to recover the possession, because, in the language of the courts, "in ejectment the legal title must prevail;"[3] and a like rule seems to prevail in Iowa.[4]

§ 41. *103. **Conflict in New York. Phillips v. Gorham. Rule in Kansas.** In New York there is a conflict of opinion, as shown by the reported cases. The Supreme Court has held, in accordance with the doctrine laid down in Missouri, Wisconsin, and

and denied the plaintiff any kind of relief either legal or equitable. Thus a suit at law is converted into a suit in equity so far as the defendant is concerned, but the plaintiffs are reverted to another proceeding in equity to undo what the court sitting in equity has done in this case; and if they succeed, then they must come again into a court of law.

"The error of the trial court was in not dealing with the whole controversy when it tried the case as one in equity. If it was a case in equity so far as the defendant was concerned, it was the duty of the court, in trying defendant's claim in equity, to hear and determine all the equitable defences which a court of equity would or could hear if it had been an original proceeding by Estes to have his entry of satisfaction annulled and his deeds of trust reinstated. In other words, the court did equity for Estes, but refused to do it for Martin, and told him to go into a court of equity to get relief, notwithstanding he was already in a court of equity. This is more circumlocution than existed before the code. For this error the judgment cannot stand."

It is still the rule in Missouri that "to support an action of ejectment the plaintiff must be vested with the legal title to the land in question at the time of the commencement of the action, and that he cannot recover upon a merely equitable title." See Nalle *v.* Thompson (1902), 173 Mo. 595, 73 S. W. 599; Nalle *v.* Parks (1902), 173 Mo. 616, 73 S. W. 596; Kingman *v.* Sievers (1898), 143 Mo. 519, 45 S. W. 266; Clay *v.* Mayr (1898), 144 Mo. 376, 46 S. W. 157; Crawford *v.* Whitmore (1893), 120 Mo. 144, 25 S. W. 365. A similar rule prevails in Kentucky. See Howard *v.* Singleton (1893), 94 Ky. 336, 22 S. W. 337.]

[1] Eaton *v.* Smith, 19 Wis. 537; Gillett *v.* Treganza, 13 Wis. 472, 475; Hammer *v.* Hammer, 39 Wis. 182.

[2] Groves *v.* Marks, 32 Ind. 319; Rowe *v.* Beckett, 30 Ind. 154; Stehman *v.* Crull, 26 Ind. 436.

[3] Emeric *v.* Penniman, 26 Cal. 119, 124; Clark *v.* Lockwood, 21 Cal. 222. See Hartley *v.* Brown, 46 Cal. 201; Buhne *v.* Chism, 48 Cal. 467, 472; also Morton *v.* Green, 2 Neb. 441; Percifull *v.* Platt, 36 Ark. 456; Tarpey *v.* Deseret Salt Co., 5 Utah, 205.

[4] Walker *v.* Kynett, 32 Iowa, 524, 526. But see Brown *v.* Freed, 43 Ind. 253, 254–257.

California, that the holder of an equitable title cannot recover possession, even against a mere intruder, but that he must first procure his equitable to be changed into a legal ownership by the judgment rendered in an equity action, and thus put himself in a condition to maintain ejectment.[1] The Court of Appeals in New York has reached a conclusion directly the contrary in a case where the facts and the form of the proceeding made the decision necessary and final. The ruling was, therefore, not a *dictum*, but was the very *ratio decidendi*, and involved a *principle* which fully sustains the reasoning and doctrine of the text, although the case did not in form present the naked question under discussion. A plaintiff who had only an equitable title was permitted to recover a judgment for possession, based upon a verdict, where no other relief was granted, against a defendant who held the legal title under a deed regular on its face. This decision goes to the full length of the doctrine which I have advocated; for, although the complaint demanded the specific equitable relief of cancellation and reconveyance as well as possession, yet on the trial, which was had before a jury, and was conducted in all respects like the trial of a legal action, these demands for relief were entirely ignored; the single question of the plaintiff's right to possession was submitted to the jury, and upon their verdict a judgment for possession was rendered, which was affirmed by the tribunal of last resort.[2] In Kansas, under an express provision of the code, the holder of an equitable title may maintain an action to recover possession of the land.[3]

§ 42. *104. **Another Class of Actions herein. Partner against Copartner. Familiar Rule herein. Holding in Indiana. In Missouri. In Most of the States. Case herein Referred to Contrasted with one previously Discussed. Argument. Conclusion Reached.** There is another class of actions which have been admitted by some courts as a consequence of the reform legislation, which could not have

[1] Peck *v.* Newton, 46 Barb. 173.

[2] Phillips *v.* Gorham, 17 N. Y. 270. Also, Murray *v.* Blackledge, 71 N. C. 492.

[3] Kansas Pac. R. *v.* McBratney, 12 Kan. 9.

[Pope *v.* Nichols (1899), 61 Kan. 230, 59 Pac. 257. The Kansas statute was adopted in Oklahoma, and under it the court held, in Laughlin *v.* Fariss (1897), 7 Okla. 1, 50 Pac. 254, that an equitable title was sufficient to maintain ejectment. In Westfelt *v.* Adams (1902), 131 N. C. 379, 42 S. E. 823, it is said: "It seems to be settled by the decisions of our court that a plaintiff may recover in ejectment upon an equitable title." Citing Taylor *v.* Eatman, 92 N. C. 601; Condry *v.* Cheshire, 88 N. C. 375; Geer *v.* Geer, 109 N. C. 679.]

been maintained prior to the change. It was a familiar doctrine that one partner could not maintain an action at law against a copartner to recover any sum which was a portion of the firm assets, or to recover any sum claimed to be due by virtue of their common partnership dealing or joint undertakings, unless there had been prior to the suit an account stated and a balance agreed upon between them, or unless the defendant had expressly promised to pay the sum sought to be recovered. In other words, the plaintiff in his declaration was obliged to aver either the accounting together and the balance struck, or the express promise. If he did not, he would be either nonsuited at the trial or his pleading would be held insufficient on demurrer. If there had been no such account stated or express promise, his only remedy was by an action in equity for an accounting; and, having obtained jurisdiction of the matter, the Court of Chancery would decree payment of the amount due. This doctrine is too familiar to require the citation of authorities in its support. The Supreme Court of Indiana has held that this rule is abrogated by the code of procedure, and that a partner may maintain an action to recover a sum due from his copartner, by reason of their joint business, without averring or proving any settlement or express promise.[1] The same doctrine has been applied in Missouri to owners in common generally who are not partners.[2] The old rule is retained, however, in most of the States; and an action by a partner to recover a sum of money from his copartner, alleged to have become due by reason of their joint undertakings, is not permitted, unless based upon a mutual settlement or an express promise.[3]

[1] Heavilon *v.* Heavilon, 29 Ind. 509; Shalter *v.* Caldwell, 27 Ind. 376; Duck *v.* Abbott, 24 Ind. 349. See also Jemison *v.* Walsh, 30 Ind. 167. But, *per contra*, Briggs *v.* Daugherty, 48 Ind. 247, 249, seems to abandon this position. See also Crossley *v.* Taylor, 83 Ind. 337; Lang *v.* Oppenheimer, 96 Ind. 47; both cases conforming to the general rule.

[2] Rogers *v.* Penniston, 16 Mo. 432, 435. [But see Bambrick *v.* Simms (1895), 132 Mo. 48, 33 S. W. 445, where the court said: "It is well settled that one partner may sue another in an action at law where the transaction relates to but one single unadjusted matter growing out of the partnership transactions."]

[3] [For a thorough discussion of this principle, see Miller *v.* Freeman (1900), 111 Ga. 654, 36 S. E. 961: It is a well "recognized rule that one partner cannot, before a final winding up of the partnership, maintain against his copartner an action at law based upon partnership transactions." To this rule there is the exception thus stated by Judge Story: "Whenever there is an express stipulation in the partnership articles which is violated by any partner, an action at law, either assumpsit or covenant as the case may require, will ordinarily lie to recover damages for the breach thereof. . . . A careful consideration of the statement and of the authorities cited to sustain it will

It is so held in California,[1] and in New York,[2] and in other States;[3] and this is beyond doubt the correct interpretation of the codes. The contrast between this case and the one previously discussed is plain; and an analysis of these contrasting features will do much toward elucidating the general principles which regulate the union of legal and equitable actions and remedies. When a person has an equitable ownership of land of a kind which entitles him to immediate possession, his *remedial* right to possession is in exact conformity with his primary right of ownership. The denial of this remedy of simple possession under the former system was based solely upon technical and arbitrary notions incidental to the mere external forms of actions and modes of adjudication which prevailed in the two classes of courts; and when these external forms, with their incidents, were removed, a way was opened for redressing the primary equitable right in a manner exactly conforming with its own nature and extent; that is, a primary equitable right or interest calling for

show that the cases falling within this exception are of three classes: (1) those in which the partnership is inchoate and has never been launched; (2) those in which the partnership is at an end, and (3) those in which the stipulation which is violated, and for the breach of which the action is brought, is one between the partners individually and 'the damages from which belong exclusively to the other partner and can be assessed without an accounting.'"]

[1] Russell *v.* Byron, 2 Cal. 86; Buckley *v.* Carlisle, 2 Cal. 420; Stone *v.* Fouse, 3 Cal. 292; Barnstead *v.* Empire Mining Co., 5 Cal. 299; Ross *v.* Cornell, 45 Cal. 133; Pico *v.* Cuyas, 47 Cal. 174, 179; Fisher *v.* Sweet, 67 Cal. 228.

[2] Emery *v.* Pease, 20 N. Y. 62.

[3] Wood *v.* Cullen, 13 Minn. 394, 397; Lower *v.* Denton, 9 Wis. 268; Shields *v.* Fuller, 4 Wis. 102; Smith *v.* Smith, 33 Mo. 557; M'Knight *v.* M'Cutchen, 27 Mo. 436; Springer *v.* Cabell, 10 Mo. 640; Bean *v.* Gregg, 7 Colo. 499; Bishop *v.* Bishop, 54 Conn. 232; O'Brien *v.* Smith, 42 Kan. 49, Stone *v.* Mattingly (Ky. 1892), 19 S. W. 402; McDonald *v.* Holmes, 22 Or. 212; Stevens *v.* Baker, 1 Wash. 315. But see, for examples where an action may be maintained, Whitehill *v.* Shickle, 43 Mo. 537; Seaman *v.* Johnson, 46 Mo. 111; Russell *v.* Grimes, 46 Mo. 410; Buckner *v.* Ries, 34 Mo. 357; Jepsen *v.* Beck, 78 Cal. 540.

[The rule in Ohio is stated in Kunneke *v.* Mapel (1899), 60 O. St. 1, 53 N. E. 259. It was here held that it was a "well established rule that one partner cannot, in the absence of a showing that, by some special agreement, the particular matter has been withdrawn from the partnership account, maintain an action at law against another to recover an amount claimed by him by reason of partnership transactions, until there has been a final settlement of the business of the partnership."

Nebraska, also, follows the general rule. Lord *v.* Peaks (1894), 41 Neb. 891, 60 N. W. 353. But a partner may sue his copartner where the cause of action is not connected with the partnership accounts: Halleck *v.* Streeter (1897), 52 Neb. 827, 73 N. W. 219. And in Glade *v.* White (1894), 42 Neb. 336, 60 N. W. 556, it was said that "where a partnership has been dissolved and in the settlement of the partnership affairs one partner has become owner of the accounts and debts payable to the partnership, such partner may maintain an action at law against the other for money collected on such account by such other partner and withheld by him without the knowledge of the plaintiff."]

possession can be redressed by granting possession. In other words, the ancient rule denying to an equitable owner the remedy of bare possession in the cases described was one of the "distinctions" and "forms" in express terms abolished by the legislature in enacting the new procedure. Courts which continue the denial because "ejectment could not be brought by a holder of an equitable title," or because "the legal title must prevail," overlook the real nature both of the right to be redressed and of the remedy to be conferred, and pay a regard only to the technical notions of form which hampered the common-law courts in all their movements, and which became at last so grievous a restraint upon the administration of justice that the legislature was compelled to intervene. In the other case, however, the reasons of the rule were very different, and were founded upon the nature of the primary right itself, and not upon any formal incidents of the judicial proceeding by which it was redressed. A partner is not suffered to maintain the action in question because his primary right, flowing from the fact of partnership, is not of such a nature as to call for a remedy of that kind; that is, a judgment for the payment of a certain sum. The right to the recovery of a certain sum of money, unless arising from tort, must, according to the common-law, be based upon a promise express or implied. It does not affect this principle to say that the common-law doctrine of implied promises was itself largely founded upon a fiction. Granting this to be true, as it undoubtedly was, still the theory was firmly established that the liability spoken of arose either from an express promise or from acts, events, or relations which created a duty to pay, and which duty the law conceived of as springing from an implied promise. If we discard the notion of an implied promise, therefore, as fictitious, there must still be a relation existing between the parties, from which the duty takes its origin; and without the existence of such a relation there was no duty on the one side, and no primary right on the other. Now, it was an elementary doctrine of the law pertaining to partnership that, resulting from their mutual dealings with their joint assets, no promise is ever implied that one partner shall pay to the other any definite sum as the amount due from the proceeds of the undertaking, or as his share of the joint assets. No promise is ever implied from the existence of this relation, from the mere fact of there being a joint business, joint profits, or joint property.

Or, to express the same doctrine without the use of fictitious terms, from the relation of partnership and the joint undertakings and assets thereof, the law imposed no duty upon one partner to pay to the other any definite sum in respect of his share therein, and gave no corresponding primary right to that other to demand such payment. If, however, there has been an accounting, so that a balance in favor of one is ascertained, a promise is implied on the part of the other — or a duty arises on his part — to pay that sum. The right to maintain the action by one partner against another, and to recover a definite sum, depended therefore, and still depends, not upon anything connected with the form of the action, or upon the distinctions between legal and equitable actions, but upon the very nature of the primary right. Those courts which have held that, under the new procedure, a partner may recover a definite sum from a copartner without an accounting and without an express promise, have in effect decided that the new procedure has materially changed the primary rights of parties, has, in this instance, created a primary right which did not before exist at all, which is a conclusion in direct antagonism with the plainest and best-settled principles of interpretation. In fact, this primary right of a partner against his fellow has not been modified by the reform in the modes of procedure; and under the new system, as under the old, there should be no recovery of a definite sum in any action, unless the facts which create the primary right have occurred, — unless there has been or is an accounting and balance ascertained, or an express promise to pay the sum. It is not the case of an equitable primary right being supported by a legal remedy, because the equitable primary right of the partner does not involve the payment of a certain sum; its only remedy is an accounting, and this is preserved in full force and effect. The analysis above given may not be very important in itself; but it will aid in distinguishing primary from remedial rights, and the substances of rights which have not been changed from the formal incidents which have been abolished; it will enable us to determine the exact limits of the modifications made by the reform legislation.

§ 43. *105. **Additional Instances.** A few instances of other actions will bring this inquiry to an end.[1] It has been held in

[1] That an action brought to recover a money judgment alone may be equitable and based upon purely equitable rights, see Rindge *v.* Baker, 57 N. Y. 209, 219.

Nevada that a person claiming to be tenant in common with others of land may maintain an action for partition, whether his title be legal or equitable.[1] On the other hand, the Supreme Court of Missouri has decided that the owner of chattels by an equitable title cannot recover damages for their conversion in an action analogous to trover.[2]

§ 44. * 106. **Importance of Subject-Matter Dwelt upon in Section Fifth. Final Object of Reformed System. Author's Prediction.** I have thus dwelt at length upon the particular case of combining legal and equitable rights and remedies which forms the subject of the present section, because more than any other it involves and expresses the true intent and design of the new system; it is the crucial test of the manner in which the spirit of the reform is accepted by the courts. Probably nothing connected with the practical administration of justice could be more startling to the lawyer of the old school than the suggestion that the owner of a purely equitable estate in lands should be able to bring an action of ejectment to recover possession of the premises; it would be opposed to all his conceptions of law and of equity and of the uses of actions and courts. And yet these conceptions were plainly artificial and arbitrary, and the familiar rules as to the employment of actions as plainly had no foundation in the nature of things, but rested upon words alone. The final object of the reformed American system was to sweep away all of these technicalities, and to allow every primary right to be maintained and every remedial right enforced in the same manner and by a single judicial instrument, untrammelled by the restrictions and limitations which made the practical administration of justice in England and in the United States seem so absurd to the cultivated jurists of Europe. That the numerical weight of authority is at present opposed to my views in relation to the particular matter in question, I fully concede. I believe, however, that in time the influence of an education in the technicalities of the common-law system will cease to be felt on the bench and among the members of the bar, and that the practical rules of procedure in all the States will be brought into a perfect harmony with the letter and the spirit of the reformatory legislation.

[1] Crosier *v.* McLaughlin, 1 Nev. 348.

[2] Walker's Adm. *v.* Walker, 25 Mo. 367; S. P. Johannesson *v.* Borschenius, 35 Wis. 131, 134.

SECTION FIFTH.

THE NATURE OF CIVIL ACTIONS AND THE ESSENTIAL DIFFERENCES BETWEEN THEM.

§ 45. *107. **Features of Civil Actions that are really Different and which the New System does not change.** Notwithstanding the sweeping language of the codes and practice acts, which abolishes all distinctions between the forms of actions heretofore existing, many judges, in construing the provisions, have declared in most emphatic terms that the change is confined to the external forms alone of actions at law, and that in their essential features certain distinctions and peculiar elements remain which cannot be removed by legislation. This statement is to a certain extent true, if it be confined to what is really the substance of each action, and is not extended so as to include many incidents which, although appearing to be substantial, are really the results of arbitrary conceptions relating to the form; for example, the old rule discussed in the preceding section, which confined the action of ejectment to the recovery of possession of lands in which the plaintiff had a legal estate. If this doctrine, however, is carefully examined, and the examples and authorities in its support are closely analyzed, it will be found that all the unchangeable features and elements which are said to inhere in different actions, and which cannot be reduced to an identity, pertain to the primary rights sought to be maintained by their means, to the delicts or wrongs by which these rights are invaded, to the remedial rights which thereupon accrue to the injured party, and to the remedies themselves which are the final objects of the judicial proceeding. These features and elements in actions are indeed different, and the difference between them the new system does not propose to abolish nor change. The doctrine itself is, therefore, no more than the statement in another form of the conceded fact that the reformed procedure has not affected the primary rights or the remedies which the municipal law creates and confers.

§ 46. *108. **Actions still differ in Substance. Statement of this Doctrine by the Courts.** As all actions are brought to maintain some primary right invaded by a wrong, and as they result in some one of the many kinds of remedies prescribed by the law, and

as in each action the facts from which the primary right arises, and the facts which constitute the wrong, must be stated, and as the plaintiff must demand and seek to obtain some remedy appropriate to the right and the delict, it follows, as a necessary consequence, that the actions, although constructed and carried on according to the one uniform principle of alleging the facts as they actually are and praying for the relief legally proper, must differ in their substance, because the rights, the delicts, and the remedies differ. This necessary feature of civil actions under the codes has been dwelt upon and explained in numerous cases, some of which are cited in the note.[1] This doctrine was very clearly stated in a recent case as follows: "Although all forms of action were abolished by the code, the principles by which the different forms of action were governed still remain, and now, as much as formerly, control in determining the rights of the parties. In pleading, a party is now to state the facts on which he relies to sustain a recovery; and, if issue be taken thereon, he will be entitled to just such a judgment as the facts established will by the rules of the law warrant, without regard to the name or the form of his action."[2] This judge would, however, have expressed his meaning more accurately if he had said, "The principles by which the different actions were governed still control," instead of "The principles by which the different *forms of action* were governed still control." The true effect of the reform was well stated by the Court of Appeals of Kentucky in the following extract: "The code makes no change in the law which determines what facts constitute a cause of action, except that, by reducing all forms of action to the single one by petition, it changes the question whether the plaintiff's statement of his cause shows facts constituting a cause of action in 'trespass,' or 'assumpsit,' or other particular form, into the more general question whether it shows facts which constitute a cause of action at all; that is, whether the facts stated are sufficient to show a

[1] Goulet *v.* Asseler, 22 N. Y. 225, 227, 228, per Selden J.; Eldridge *v.* Adams, 54 Barb. 417, 419, per James J.; Hord *v.* Chandler, 13 B. Mon. 403; Hill *v.* Barrett, 14 B. Mon. 83, 85, per Marshall J.; Payne *v.* Treadwell, 16 Cal. 220, 243, per Field C. J.; Lubert *v.* Chauviteau, 3 Cal. 458, 462, per Wells J.; Jones *v.* Steamship Cortes, 17 Cal. 487, 497, per Cope J.; Sampson *v.* Shaeffer, 3 Cal. 196, 205, per Wells J.; Miller *v.* Van Tassel, 24 Cal. 458, 463, per Rhodes J.; Richmond & L. Turnp. Co. *v.* Rogers, 7 Bush, 532, 535; Howland *v.* Needham, 10 Wis. 495.

[2] Eldridge *v.* Adams, 54 Barb. 417, 419, per James J.

right in the plaintiff, an injury to that right by the defendant, and consequent damage. What facts do in this sense establish a cause of action is determined by the general rules or principles of law respecting rights and wrongs, and by a long course of adjudication and practice applying these rules to particular actions under the long-established rule of pleading, that the declaration must state the facts which constitute the plaintiff's cause of action. . . . The code does not authorize a recovery upon a statement of facts which did not constitute a cause of action in *some* form before the code was adopted. And therefore the former precedents and rules and adjudications may now be resorted to as authoritative, except so far as they relate to the distinctions between the different forms of action, or to merely formal or technical allegations."[1] To this clear and accurate exposition I can add nothing which will increase its efficacy as the enunciation of the general principle. The final effect produced by the reform legislation in abolishing all distinctions between actions may be expressed in the following manner: No inquiry is now to be made whether the action is "trespass," or "trover," or "assumpsit," or any other of the ancient common-law forms, nor, except for the single purpose of determining the proper tribunal for its trial, whether it is legal or equitable; all these forms and classes are utterly abrogated.[2] For this reason, the various rules which pertain to each of these common-law forms of action, which distinguished one from the other, which determined the peculiar nature and object of each, and which regulated the proceedings in each, are no longer to be invoked.

[1] Hill *v.* Barrett, 14 B. Mon. 83, 85. See Johannesson *v.* Borschenius, 35 Wis. 131, 135; Haughton *v.* Newberry, 69 N. C. 456, 459–461.

[2] [In the case of Draper *v.* Brown (1902), 115 Wis. 361, 91 N. W. 1001, whether a demurrer should be sustained was held to depend upon the answer to the inquiry whether the action was legal or equitable. The ground urged for sustaining the demurrer in this case was that "two or more causes of action have been improperly united in the complaint." It was overruled by the court below, and this was affirmed by the Supreme Court; but the opinion shows that if the action had been a legal one, the demurrer would have been sustained. See also Bates *v.* Drake (1902), 28 Wash. 447, 68 Pac. 961, in which the court refers to the "form" of the action in a different sense than that suggested in the text. Seals *v.* Augusta Ry. Co. (1897), 102 Ga. 817, 29 S. E. 116; Hamilton *v.* Mandle (1898), 103 Ga. 788, 30 S. E. 658. But see Casgrain *v.* Hamilton (1896), 92 Wis. 179, 66 N. W. 118; Rood *v.* Taft (1896), 94 Wis. 380, 69 N. W. 183; State, *ex rel. v.* Helms (1898), 101 Wis. 280, 77 N. W. 194; Joseph Dessert Lumber Co. *v.* Wadleigh (1899), 103 Wis. 318, 79 N. W. 237; Francisco *v.* Hatch (1903), 117 Wis. 242, 93 N. W. 1118. See also note 1, p. 9, *supra*.]

It is simply an abuse of language to say that the ancient forms of action have been abolished, and that any of the rules which were based upon the existence of these forms, and had no relevancy except in connection therewith, are retained. The only question is, Would the facts stated have enabled the plaintiff to maintain any of the common-law actions or a suit in equity? This is, however, identical with the rule already given, that the primary rights created by the law, and the wrongs committed against them, and the remedial rights resulting from such wrongs, are unaffected by the legislation which only aims at a reform in the procedure.

§ 47. *109. **Illustrative Examples of Doctrine Reached. Difference in Form of Discussion under the Old System and the New. Danger herein.** The general doctrine thus reached may be properly illustrated by one or two examples which will serve to fix its exact meaning and application. Under the former system, the person who had the actual possession, or the immediate right to the possession, of a chattel which had been taken and carried away or destroyed by the wrong-doer, might recover his compensatory damages in the action of "trespass." To maintain it, the possession or immediate right thereof was an essential element, and the plaintiff recovered the value of the article as the measure of his damages. If, however, the plaintiff had merely a contingent or prospective interest, without right of immediate possession, in a chattel which was at the time the general property of another, *his* appropriate action for the taking, destruction, or conversion of the chattel by a wrong-doer, was "case," and his damages were a compensation for the pecuniary loss actually sustained. The distinctions between these two actions have been abolished; but the distinctions between the primary rights and the wrongs which constitute the two causes of action cannot be removed. Now, as before, if the owner in possession sues for the taking or destruction of his chattel, he will recover its value as his damages, while if the holder of a contingent future interest, unaccompanied by possession, sues for the taking or destruction, he will recover the value of his interest. In the one case the plaintiff must establish his possessory right if he seeks to obtain the value of the chattel as his compensation; in the other case the value of his contingent interest will be proved and fixed by the jury. These elements and features, however, *do not belong*

to the action as a judicial instrument for establishing a right; they belong to the primary and remedial rights themselves, which are unchanged by the codes. In the former system of procedure, in the works of text-writers, and in the judgments of courts, the discussion and determination of these unchangeable primary and remedial rights was always intimately connected with, and made an essential part of, the discussion and determination of the rules as to external form in the action itself, so that it was difficult, if not impossible, to distinguish them. From the very nature of the common-law system of procedure, as well as from the judicial habit of mind which it produced, the courts seldom, if ever, passed upon the existence of the primary or the remedial right in the abstract; they decided rather whether the action was of the proper form, or the averments of the pleadings were of the proper nature, to maintain the primary right asserted, and to enforce the remedial right claimed to have arisen. The result was that, in the standard treatises and digests, primary and remedial rights were classified and arranged under the various forms of action known to the common-law procedure. These forms, with all their incidents, have been swept away; but there is danger lest the technical rules which have been abrogated should be confounded with the principles relating to rights and remedies which remain unaffected by the reform.[1]

§ 48. *110. **Distinction between Actions ex contractu and those ex delicto Preserved. Election. This Distinction relates to Cause of Action.** A particular feature of distinction between actions — or rather between the rights upon which actions are based — which existed under the common-law system has been preserved under the new procedure. The general classification being made of actions *ex contractu* and those *ex delicto*, there were many cases in which a party who had suffered a wrong by the conversion or the taking and carrying away of his chattels might waive the tort, and bring an action of *assumpsit* upon the wrong-doer's implied promise to pay the price of the articles taken. The same election still exists. Wherever the plaintiff who could sue in "trespass" or "trover" might, if he chose, bring "assumpsit," he may now waive the tort, and maintain an action upon an implied promise and recover the price of the goods as though there had been a sale. This choice, however, does not relate to the external form

[1] See Clark *v.* Bates, 1 Dak. 42; Frout *v.* Hardin, 56 Ind. 165.

of an action; it relates to the very cause of action itself, — to the unchangeable rights which are to be protected and enforced by the judicial proceeding. In one instance, the plaintiff is permitted to view the transaction as an injury to his property by which he has sustained damages which amount to the entire value of that property. In the other, he views the transaction as a sale, by which the title to the property has passed to the defendant, and a duty to pay the price rests upon him. For reasons of public policy, the law allows the injured party to make his choice between these two quite different versions of the same transaction; and, although one of them may be a fictitious view, substantial justice is done thereby. It is plain, however, that this rule has no connection with the external forms of action; it has reference only to the rights and delicts which lie back of all actions.[1]

§ 49. *111. **Conclusion. Criticism of the Author. Difference in the Two Systems of Procedure.** In conclusion, as the distinctions between the common-law forms of action are abolished, the practice since the codes, sometimes indulged in even by courts in their solemn judgments, of retaining the ancient nomenclature, and of describing a given cause as "trespass," "trover," "assumpsit," and the like, is productive of confusion, and of confusion alone. No practical rules or doctrines in the administration of justice according to the reformed system of procedure result from these old forms; no practical aid in the decision of a cause is to be obtained from regarding it as "trespass," or "trover," or "assumpsit," or from the giving it any other name; no difficulties are removed nor doubts cleared up by a resort to this method of description. On the other hand, there is a constant tendency to associate with these names the rules and doctrines which were once inseparable from them, but which have been in the most positive manner abrogated by the legislature; in fact, much of the doubt and confusion which even yet accompany the administration of justice in those States which have adopted the reformed

[1] As to actions *ex contractu* and *ex delicto*, see Goss *v.* Board of Commissioners, 4 Colo. 468; Pierce *v.* Carey, 37 Wis. 232; Frout *v.* Hardin, 56 Ind. 165; Greentree *v.* Rosenstock, 61 N. Y. 583, 588–590; Fields *v.* Bland, 81 id. 239; Neudecker *v.* Kohlberg, 81 id. 296; Neftel *v.* Lightstone, 77 id. 96; Harrington *v.* Bruce, 84 id. 103; Sparman *v.* Keim, 83 id. 245, 249; Lockwood *v.* Quackenbush, 83 id. 607; Conaughty *v.* Nichols, 42 id. 83; Ledwich *v.* McKim, 53 id. 307, 316; Ross *v.* Mather, 51 id. 108; Matthews *v.* Cady, 61 id. 651; Graves *v.* Waite, 59 id. 156; Lataillade *v.* Orena, 91 Cal. 565; and *post*, §§ *554–*564, *567–*573.

system of procedure, is due to a retention of these names by the bench and the bar; and I believe that the reform itself will never produce its full results in simplicity and scientific accuracy until the ancient nomenclature is utterly forgotten or banished from the courts. The two systems of procedure are so entirely different, they are based upon notions so absolutely unlike, that any intermingling of their elements is impossible; the one which has been introduced by the legislative will must be left to be developed according to its own distinctive principles, without any interference from that which has been abandoned and discarded.

CHAPTER SECOND.

THE PARTIES TO THE CIVIL ACTION.

SECTION FIRST.

THE STATUTORY PROVISIONS AND THEIR GENERAL PRINCIPLES.

§ 50. * 112. **Introductory. Fundamental Difference between Legal and Equitable Actions in respect to Parties. Intention Shown in the Codes to adopt Equitable Theory.** The second of the distinctive features which belong to and characterize the single civil action of the American system consists of the principles and rules adopted in respect of the parties thereto. Under the old procedure the rules which governed the parties to actions at law, and those which regulated the parties to suits in equity, stood in marked contrast with each other; in fact, the fundamental conception of these two judicial instruments was radically unlike. It will be sufficient to mention one of these essential differences. In an action at law the plaintiff must be a person in whom is vested the whole legal right or title; and, if there were more than one, they must all be equally entitled to the recovery. So far as the mere recovery is concerned, the right must dwell in them all as a unit, and the judgment must be in their favor equally. The defendants, on the other hand, must be equally subject to the common liability, so that, even if it were possible for the jury to find a separate verdict against each, the same and single judgment must be rendered against them all in a body. In other words, whatever might be the nature of the antecedent right or liability, whatever antecedent power there might be of electing to sue by one or all and against one or all, after the election is made to sue by or against all, the recovery is necessarily joint, and the burden of the remedy is necessarily joint. The suit in equity was hampered by no such arbitrary requirements. Two general and natural principles controlled its form: *first*, that it should be prosecuted by the party really in interest, although with him might be joined all others who had an interest in the subject-

matter and in obtaining the relief demanded; and, *secondly*, that all persons whose presence is necessary to a complete determination and settlement of the questions involved shall be made parties, so that in one decree their various rights, claims, interests, and liabilities, however varying in importance and extent, may be determined and adjudicated upon by the court. As the methods adopted by the chancellor did not require him to pronounce a judgment in favor of all the plaintiffs, nor indeed in favor of plaintiffs alone, and against all the defendants, nor indeed against defendants alone, it was not a matter of vital importance whether a particular person who was made a party should be a plaintiff or a defendant. It was possible to give relief to defendants as against each other or against plaintiffs. It must not be understood that no order or method was observed in the disposition of parties; but, without discussing the various rules in detail, it is sufficient for my present purpose to point out this fundamental difference in conception between legal and equitable actions. The intention plainly shown in the various State codes of procedure is to adopt the general equity theory of parties, rather than the legal theory, and to apply it to the single civil action in all cases, whatever be the nature of the primary right to be protected or of the remedy to be obtained. How far this intention has been expressed, how completely it has been carried out in the legislation of the several States, will be seen from the provisions themselves to be immediately quoted. After making these extracts and grouping them properly, I shall very briefly point out their general similarity and their special divergencies from the common type, and shall then proceed in the succeeding sections of the present chapter with a careful discussion of each separate provision. It will be seen that there is an almost complete identity in many of these statutory rules as they are expressed in the various codes, although in some of them the equitable theory has been more fully carried out in detail.

§ 51. *113. **General Code Provisions.** "Every action must be prosecuted in the name of the real party in interest except as otherwise provided . . . ., but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." [1] The same appears slightly varied in a few States,

[1] [Indiana, Burns' St., 1901, § 251.] § 4; [Kentucky, § 18; Washington, Bal. Code, § 4824; Oklahoma, St., 1893, § 3898; Kansas, § 26; Oregon, §§ 27, 379; Nevada,

as follows: "Every action must be prosecuted in the name of the real party in interest, except as is otherwise provided by law."[1] In some codes the form is that first given above, but to it is added the following clause: "But an action may be maintained by the grantee of land in the name of the grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision."[2] In Nebraska the following provision is added: "The assignee of a thing in action may maintain an action thereon in his own name and behalf without the name of the assignor."[3]

§ 52. *114. **Same Subject.** "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defence existing at the time of or before notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before maturity."[4] "When the action is brought by the assignee of a claim arising out of contract not assigned by indorsement in writing, the assignor shall be made a defendant to answer as to the assign-

Wisconsin, St., 1898, § 2605; Minnesota, St., 1894, § 5156; Missouri, Rev. St., 1899, § 540.]

[1] Ohio, § 25; Cal. § 367; Iowa, § 2543; [Utah, Rev. St., 1898, § 2902; North Dakota, Rev. Codes, 1899, § 5221; Montana, § 570; Washington, Bal. Code, § 4824; Idaho, Code Civ. Pro., 1901, § 3155; Wyoming, Rev. St., 1899, § 3467; Colorado, § 3; Arkansas, Sand. & Hill's Dig., § 5623; Nebraska, § 29; New York, Code Civ. Pro., § 449, but see provisions cited in following note. Arizona, Rev. St., 1901, § 1299.

[2] New York, § 111 (1501, 449, 1909, 1910); South Carolina, § 134; N. C. § 55. [South Dakota, Ann. St., 1901, § 6070.]

[3] [Nebraska, § 30; Connecticut, Gen. St., 1902, § 631, where the following is the entire statute on the subject, without the provision as to the real party in interest: "The assignee and equitable and *bona fide* owner of any chose in action, not negotiable, may sue thereon in his own name; but he shall, in his complaint, allege that he is the actual, *bona fide* owner thereof, and set forth when and how he acquired title thereto."]

[4] New York, § 112 (502, 1909, 1910); Ohio, § 26; Kansas, § 27; California, § 368; South Carolina, § 135; Oregon, §§ 28, 382; Nevada, § 5; Iowa, § 2546, somewhat different in form from the text; N. C. § 55; [Utah, Rev. St., 1898, § 2903; North Dakota, Rev. Codes, 1899, § 5222; South Dakota, Ann. St., 1901, § 6071; Arizona, Rev. St., 1901, § 1301; Oklahoma, St., 1893, § 3899; Washington, Bal. Code, § 4835; Montana, § 571; Idaho, Code Civ. Pro., 1901, § 3156; Wyoming, Rev. St., 1899, § 3467; Colorado, § 4; Connecticut, Gen. St., 1902, § 650, in a form somewhat different from that given in the text; Indiana, Burns' St., 1901, § 277; Nebraska, § 31; Wisconsin, St., 1898, § 2606; Minnesota, St., 1894, § 5157; Kentucky, § 19.]

ment or his interest in the subject of the action;" and this is followed by the provision in reference to set-off or other defences contained in the last citation.[1]

§ 53. *115. **Same Subject.** "An executor, an administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."[2] The same as slightly varied: "An executor, administrator, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."[3]

§ 54. *116. **Same Subject.** "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title."[4] "Any person may be made a defendant who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein."[5] In a few codes the

[1] [Indiana, Burns' St., 1901, § 277.]

[2] New York, § 113 (449); California, § 369; South Carolina, § 136; Oregon, § 29; Nevada, § 6; North Carolina, § 57; [Utah, Rev. St., 1898, § 2902; North Dakota, Rev. Codes, 1899, § 5223; South Dakota, Ann. St., 1901, § 6072; Arizona, Rev. St., 1901, §§ 1299, 1300; Washington, Bal. Code, § 4825; Montana, § 570; Idaho, Code Civ. Pro., 1901, § 3157; Colorado, § 5; Arkansas, Sand. & Hill's Dig., § 5626; Connecticut, Gen. St., 1902, § 620, where only the first sentence quoted in the text appears; Wisconsin, St., 1898, § 2607; Missouri, Rev. St., 1899, § 541; Minnesota, St., 1894, § 5158; Indiana, Burns' St., 1901, § 252.]

[3] Ohio, § 27; Kansas, § 28; Iowa, § 2544; [Oklahoma, St., 1893, § 3900; Wyoming, Rev. St., 1899, § 3469; Kentucky, § 21, in a somewhat different form; Nebraska, § 32.]

[4] New York, § 117 (446); Ohio, § 34; Kansas, § 35; California, §§ 378, 381; Iowa, § 2545; South Carolina, § 140; Oregon, § 380, but limited to equitable actions; Nevada, § 12; N. C. § 60; [Utah, Rev. St., 1898, § 2913; North Dakota, Rev. Codes, 1899, § 5229; South Dakota, Ann. St., 1901, § 6077; Oklahoma, St., 1893, § 3907; Washington, Bal. Code, § 4833, in somewhat different form; Montana, § 580; Idaho, Code Civ. Pro., 1901, § 3166; Wyoming, Rev. St., 1899, § 3479; Colorado, § 10; Arkansas, Sand. & Hill's Dig., § 5629; Connecticut, Gen. St., 1902, § 617; Indiana, Burns' St., 1901, § 263; Nebraska, § 40; Wisconsin, St., 1898, § 2602; Missouri, Rev. St., 1899, § 542; Kentucky, § 22.]

[5] Ohio, § 35; Kansas, § 36; Iowa, § 2547; Nebraska, § 38; Nevada, § 13; Oregon, § 380, limited to equitable actions; [Oklahoma, St., 1893, § 3908;

same provision appears, but added to it is the following clause: "And in an action to recover possession of real estate the landlord and tenant thereof may be joined as defendants; and any person claiming title or a right of possession to real estate may be made a party plaintiff or defendant as the case may require to any such action." [1]

§ 55. *117. **Same Subject.** "Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint.

"When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." [2]

§ 56. *118. **Same Subject.** "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff." [3] The

Washington, Bal. Code, § 4833, in somewhat different form; Wyoming, Rev. St., 1899, § 3480; Colorado, § 11; Arkansas, Sand. & Hill's Dig., § 5630; Connecticut, Gen. St., 1902, § 618; Wisconsin, St., 1898, § 2603; Indiana, Burns' St., 1901, § 269; Kentucky, § 23.]

[1] New York, § 118 (447, 1503, 1598); California, §§ 379, 380; South Carolina, § 141; N. C. § 61; [Utah, Rev. St., 1898, § 2914; North Dakota, Rev. Codes, 1899, § 5230; South Dakota, Ann. St., 1901, § 6078; Montana, § 581; Idaho, Code Civ. Pro., 1901, § 3167; Missouri, Rev. St., 1899, § 543.]

[2] This provision is thus given in one section in New York, § 119 (448); California, § 382; S. C. § 142; N. C. § 62; Oregon, § 381, limited to equitable actions; Nevada, § 14, adding, however, to the section as given in the text the following clause: "Tenants in common, joint tenants, and copartners, or any number less than all, may jointly or severally bring, or defend, or continue, the prosecution or defence of any action for the enforcement of the rights of such person or persons." The same provision is found in the California code, § 384, except that "coparceners" is substituted in place of "copartners." [Utah, Rev. St., 1898, § 2917; North Dakota, Rev. Codes, 1899, § 5232; South Dakota, Ann. St., 1901, § 6079; Arizona, Rev. St., 1901, § 1313; Montana, § 584, Idaho, Code Civ. Pro., 1901, § 3170; Colorado, § 12; Indiana, Burns' St., 1901, § 270; Wisconsin, St., 1898, § 2604.] In the following States it is separated into two sections corresponding to the two paragraphs of the text: Ohio, §§ 36, 37; Kansas, §§ 37, 38; Iowa, §§ 2548, 2549; [Kentucky, §§ 24, 25; Oklahoma, St., 1893, §§ 3909, 3910; Washington, Bal. Code, §§ 4833, 4834; Wyoming, Rev. St., 1899, §§ 3481, 3482; Arkansas, Sand. & Hill's Dig., §§ 5631, 5632; Connecticut, Gen. St., 1902, §§ 617, 619, with a separate provision, § 589, allowing several actions by joint tenants and tenants in common; Nebraska, §§ 42, 43. In Missouri, the first paragraph only is enacted, and is Rev. St., 1899, § 544.]

[3] New York, § 120 (454); Kansas, § 39; Ohio, § 38; California, § 383, adding, "and sureties on the same or separate instrument," after the words "promissory

corresponding provision in some of the States is much more full, and more explicitly alters the common-law rules in respect to joint debtors. "Persons severally liable on the same contract, including the parties to bills of exchange and promissory notes, common orders and checks, and sureties on the same or separate instruments, may all or any of them, or the representatives of such as may have died, be sued in the same action at the plaintiff's option."[1] "Every person who shall have a cause of action against several parties, including parties to bills of exchange and promissory notes, and be entitled by law to a satisfaction therefor, may bring suit thereon jointly against all, or as many of the persons liable as he may think proper; [and he may, at his option, join any executor or administrator or other person liable in a representative character, with others originally liable."][2] "When two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, including the parties to negotiable paper, common orders or checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may at the plaintiff's option be brought against all or any of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents or against any or all of such representatives. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others."[3]

notes;" S. C. § 143; N. C. § 63; Oregon, § 36, 382; Nevada, § 15; [Minnesota, St., 1894, § 5166, "and sureties on the same instrument;" Utah, Rev. St., 1898, § 2918; North Dakota, Rev. Codes, 1899, § 5223, in somewhat different form; South Dakota, Ann. St., 1901, § 6080, same form as in North Dakota; Arizona, Rev. St., 1901, § 1306, in somewhat different form; Oklahoma, St., 1893, § 3911; Washington, Bal. Code, § 4836; Montana, § 585; Idaho, Code Civ. Pro., 1901, § 3171; Wyoming, Rev. St., 1899, § 3483; Colorado, § 13; Indiana, Burns' St., 1901, § 271; Nebraska, § 44; Wisconsin, St., 1898, § 2609.]

[1] [Kentucky, § 26; Arkansas, Sand. & Hill's Dig., § 5633.]

[2] [Missouri, Rev. St., 1899, § 545.]

[3] [Iowa, Code, 1897, § 3465; Kentucky, § 27, in slightly different form; Arkansas, Sand. & Hill's Dig., § 5634, same as Kentucky.] In Kansas all joint contracts are declared to be joint and several; on the death of one or more of the joint promisors or obligors, the right of action exists against the representatives of the deceased and against the survivors; when all die the right of action exists against the representatives of all the deceased debtors: in all cases of joint obligations or joint "assumptions" of partners or others, the action may be prosecuted against any one or more of those who are so liable. [Gen. St., 1901, §§ 1190–1194.]

§ 57. *119. **Same Subject.** "(1) The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in.

"(2) When, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

"(3) A defendant against whom an action is pending upon a contract, or for specific real or personal property, may at any time before answer upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct, and the court may in its discretion make the order." [1]

§ 58. *120. **Special Code Provisions.** The following special provisions, found in several of the States, are quoted, not because they are necessarily involved in the general theory of the re-

[1] In the following States these provisions form a single section, as in the text: South Carolina, § 145, N. C., § 65; Nevada, § 17; [Wisconsin, St., 1898, § 2610.] In these others they are separated into three sections, corresponding to the three subdivisions of the text: Ohio, §§ 40, 41, 42; Kansas, §§ 41, 42, 43; [Oklahoma, St., 1893, §§ 3913–3915; Wyoming, Rev. St., 1899, §§ 3487, 3488, 3490; Arkansas, Sand. & Hill's Dig., §§ 5635–5637; Nebraska, §§ 46–48.] In others still they form two sections, embracing respectively the first and second subdivisions and the third [Kentucky, §§ 28, 29; Utah, Rev. St., 1898, §§ 2921, 2926; Montana, §§ 588, 591; Idaho, Code Civ. Pro., 1901, §§ 3175, 3178; Indiana, Burns' St., 1901, §§ 273, 274, New York, §§ 452, 820.] In California, §§ 389, 386, correspond to the first and third subdivisions of the text. [So in North Dakota, Rev. Codes, 1899, §§ 5238, 5240; South Dakota, Ann. St., 1901, §§ 6085, 6087; Washington, Bal. Code, §§ 4840, 4842.] In the others there is but one section identical with the first subdivision of the text: Oregon, §§ 40, 382; Iowa, § 2551. [Missouri, Rev. St., 1899, § 659. In Arizona, Rev. St., 1901, § 1308, the provision is: "Additional parties may be brought in by proper process either by plaintiff or defendant upon such terms as the court may prescribe; Connecticut, Gen. St., 1902, § 621; Minnesota, Gen. St., 1894, § 5178, in different form.] The provisions of the Iowa and California codes in relation to "intervening," which are very special and unlike that in the text, are quoted in a subsequent section of this chapter.

formed system, but because they will serve to explain a number of cases which will be cited hereafter, and because they show the tendency of the modern legislation away from the arbitrary notions of the common law in respect of parties. "A father, or, in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward is not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there is no loss of service."[1] "When a husband has deserted his family the wife may prosecute or defend in his name any action that he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had."[2] "A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury of the child and the guardian for the injury, of the ward."[3] "An unmarried female may prosecute as plaintiff an action for her own seduction, and recover such damages as may be found in her favor."[4]

§ 59. *121. **Same Subject.** In several of the States a partnership may sue or be sued by its firm-name alone, the judgment being enforceable against the property of the firm and of such members as are personally served, provision being made for extending its effect to the other members by some subsequent proceeding. The following is the type of these provisions, and they are all substantially the same: "An action may be brought by or against a partnership, as such, or against all or either of the individual members thereof; and a judgment against the firm, as such, may be enforced against the partnership property, or that of such members as have appeared or been served with notice. And a new action may be brought against the other

[1] [Minnesota, St., 1894, § 5163]; California, § 375; Oregon, § 34; [Idaho, Code Civ. Pro., 1901, § 3163; Montana, § 577; Utah, Rev. St., 1898, § 2910; Washington, Bal. Code, § 4830; Indiana, Burns' St., 1901, § 265.]

[2] [Minnesota, St., 1894, § 5165]; Iowa, § 2564; [Arkansas, Sand. & Hill's Dig., § 5643; Utah, Rev. St., 1898, § 2906; Indiana, Burns' St., 1901, § 266.]

[3] [Minnesota, St., 1894, § 5164]; California, § 376; Iowa, § 2556. But the last clause, as to the guardian and ward, is not found in the Iowa code: Oregon, § 33; [Idaho, Code Civ. Pro., 1901, § 3164; Montana, § 578; Colorado, § 9; Utah, Rev. St., 1898, § 2911; Arizona, Rev. St., 1901, § 1305; Washington, Bal. Code, § 4829; Indiana, Burns' St., 1901, § 267].

[4] Iowa, § 2555; California, § 374; Oregon, § 35; [Idaho, Code Civ. Pro., 1901, § 3162; Montana, § 576; Utah, Rev. St., 1898, § 2909; Washington, Bal. Code, § 4831; Indiana, Burns' St., 1901, § 264.]

members on the original cause of action."[1] Certain other special provisions in relation to parties will be quoted in subsequent sections, and especially the legislation of the various States concerning suits by and against married women. This legislation in several instances does not form a part of the codes of procedure, but is contained in separate statutes having particular reference to the status of marriage.

§ 60. *122. **Statutory Provisions. Interpretation. Two Views.** The foregoing are all the provisions relative to parties in general. It is plain, upon the most cursory reading, that the language of these sections is so comprehensive, and without exception or limitation, that it appears to include all actions, legal and equitable, and to apply the equitable doctrines alike to both classes. It should be observed, however, in this connection, that in a vast number of actions strictly legal the equitable theory of parties, as stated in these clauses, would determine the proper parties thereto in exactly the same manner as the common-law theory, and there could arise, then, no conflict. The possible conflict which could arise in other cases would result either (1) from the old notion that in a common-law action all the plaintiffs must be equally interested in the recovery, and all the defendants equally liable to the judgment, so that no person could be a plaintiff who did not allege for himself this community of interest, or be made a defendant against whom this community of liability was not charged, or (2) from the common-law doctrine of joint, joint and several, or several rights and liabilities which control to a very great extent the rules as to parties in legal actions. One school of judges, applying to this particular topic the theory of interpretation described in the preceding chapter, have been unable to concede that the general statutory provisions quoted above did repeal and abrogate these long and firmly established rules and doctrines of the common law, and have therefore wished to confine their operation and effect to equitable

[1] Iowa, § 2553; [Minnesota, St., 1894, § 5177]; California, § 388; Nebraska, §§ 24, 27. [In Wyoming, Rev. St., 1899, § 3485, the provision is as follows: "A partnership formed for the purpose of carrying on trade or business in this state, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and in such case it shall not be necessary to allege or prove the names of the individual members thereof." The Colorado statute, § 14, is similar in substance, but differs in form. So in Utah, Rev St., 1898, § 2927; Connecticut, Gen. St., 1902, § 588; Ohio, R. S., 1900, § 5011.]

actions.[1] Another school of judges, regarding the codes as highly remedial statutes, have been inclined to follow out their spirit, and to give their language the fullest meaning of which it is capable, even to the extent of holding that its general expressions abolished and swept away the legal distinctions between joint, joint and several, and several rights and liabilities. The influence and effect of these different systems of interpretation will be shown in the succeeding sections of this chapter.

§ 61. *123. **More Radical Statutes in a Few States. Outline of Treatment of Parties.** In a few of the States the legislation has left no room for any such conflict of opinion, and has pushed the equitable theory to its final results by express enactments which leave nothing to implication. The codes of these States provide for bringing in parties to certain legal actions under some circumstances merely because they have an interest in the event of the suit, although they have no share in the relief, and bear no part of the liability; and they utterly abrogate the common-law rules relative to joint, joint and several, or several liabilities. In these States, therefore, there can be no doubt as to the construction which should be put upon the general statutory provisions quoted; and they are treated as establishing the equity doctrine and applying it to actions of all kinds. In the succeeding sections of this chapter I shall pursue the order of the legislation which is the same in all the States, and shall separately discuss the following subjects: The Real Party in Interest to be made Plaintiff; The Effect of an Assignment of a Thing in Action upon the Defences to it; A Trustee of an Express Trust, etc., to sue alone; Who may be joined as Plaintiffs; Who may be joined as Defendants; When One or More may sue or be sued for All; Parties severally liable on the same Instrument; Bringing in New Parties; Intervening; and Interpleader.

[1] As an illustration of these views, see the opinion of S. L. Selden J. in Voorhis v. Child's Ex., 17 N. Y. 354.

SECTION SECOND.

THE REAL PARTY IN INTEREST TO BE MADE PLAINTIFF.

§ 62. *124. **Statutory Provision as to Real Party in Interest.** "Every action must be prosecuted in the name of the real party in interest,[1] except when otherwise provided . . .," is the sensible and comprehensive form used in Ohio, California, Iowa, Nebraska, Wyoming, Idaho.[2] To this is added: "But this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract," in Indiana, Kansas, Missouri, Wisconsin, South Carolina, Kentucky, Oregon, Nevada, North Carolina, Washington.[3] It was sometimes said that at the common law a thing in action, not negotiable, could not be assigned; but the true meaning of the rule was merely this, that the assignee could not bring an action upon it in his own name. Courts of law had long recognized the *essential* validity of such assignment in a large class of cases, by permitting the assignee, who sued in the name of his assignor, to have entire control of the action, and by treating him as the only person immediately interested in the recovery. Indeed, the assignment gave to the assignee every element and right of property in the demand transferred, except the single one of suing upon it in his own name; it was regarded as assets in his hands and in those of his personal representatives; his rights were completely protected against the interference of the assignor with an action brought in the latter's name. It is true, the property derived from the assignment was said to be equitable, and not legal; but this distinction did not lessen the intrinsic, essential nature of the ownership. It would seem that the property of the assignee is now strictly *legal*, although the question does not require any solution in this work.

[1] [Sheridan *v.* Nation (1900), 159 Mo. 27, 59 S. W. 972: The code requirement that the suit be brought in the name of the real party in interest does not mean that it must be brought in the real name of the party in interest. A party may do business in any name he wishes, and suit may be brought in that name.

Definition: "The real party in interest under section 29 of the code of Civil Procedure, is the person entitled to the avails of the suit:" Kinsella *v.* Sharp (1896), 47 Neb. 664, 66 N. W. 634.]

[2] [Also in New York, Utah, North Dakota, Montana, Washington, Colorado, and Arkansas.]

[3] [Also in South Dakota and Arizona.]

§ 63. *125. **Principal Effect of Statutory Provision.** One effect — and perhaps the principal effect of this statutory provision — is, that all assignees of things in action *which are assignable* may sue upon them in their own names, and are no longer obliged to sue in the names of the original assignors.[1] It is not strictly correct to say that the provision itself renders any thing in action assignable, that it creates any attribute of assignability; but, for the purpose of defeating such possible interpretation, the second clause was added in many of the codes. This limiting clause, however, is only negative in its form and meaning. It merely forbids a certain construction to be placed upon the preceding language. It does not say that no thing in action is assignable unless it arises out of contract. The rules governing this quality of things in action are found in other provisions of the law, and not in this section.

§ 64. *126. **Legal Assignment. Action in Name of Assignee. Illustrations.** The immediate and in some respects the most important consequence of the rule that "every action must be prosecuted in the name of the real party in interest," is this: wherever a thing in action is assignable, the assignee thereof must sue upon it in his own name.[2] I shall therefore, in the first place, discuss this result, and ascertain the extent to which it has been carried, and the cases to which it has been applied. It is abundantly settled that when a thing in action, transferable by the law, is absolutely assigned, so that the entire ownership

[1] This provision only applies to "actions" as defined in the code, and not to special proceedings. The proceeding to enforce a mechanic's lien, in pursuance of certain special statutes in New York, is not an action; and the original holder of the lien who had assigned it is the proper party to institute the proceeding for the benefit of his assignee. Hallahan *v.* Herbert, 57 N. Y. 409. As to actions by the assignee, see Devlin *v.* The Mayor, etc., 63 N. Y. 8, 14–20; Sheridan *v.* The Mayor, etc., 68 id. 30; Fitch *v.* Rathbun, 61 id. 579; Morris *v.* Tuthill, 72 id. 575; Merchants' Bank *v.* Union R. & T. Co., 69 id. 373, 380; Green *v.* Niagara Ins. Co., 6 Hun, 128; Jackson *v.* Daggett, 24 Hun, 204; Browning *v.* Marvin, 22 Hun, 547; Archibald *v.* Mut. Life Ins. Co., 38 Wis. 542; Carpenter *v.* Tatro, 36 id. 297; Hardin *v.* Hilton, 50 Ind. 319; State *v.* Johnson, 52 Ind. 197; Mitchell *v.* Dickson, 53 Ind. 110; Shane *v.* Francis, 30 Ind. 92; Gallagher *v.* Nichols, 60 N. Y. 438, 448.

[2] [Phœnix Ins. Co. *v.* Carnahan (1900), 63 O. St. 258, 58 N. E. 805: Where the owners of a chose in action assign the same absolutely to a third party, the assignee *must* sue on it, even though the contract of assignment contains the further provision that the assignors are to proceed to collect the moneys due on said chose in action in their own names and pay over the same to the assignee. The code is imperative that the action must be brought in the name of the real party in interest.]

passes to the assignee without condition or reservation, and the legal title is fully vested in him, he is the real party in interest, and may sue upon it in his own name, and is, in fact, the only proper party to bring the action,[1] — as in the case of a claim for the use and occupation of land thus assigned;[2] a partnership demand transferred by the other partners to one member of the firm;[3] a delivery bond taken by a constable for the delivering up of property which he had seized on execution and transferred to the plaintiff in the action;[4] the right of action to recover damages for a breach of a covenant of seisin in a deed of conveyance assigned by the grantee;[5] a claim for borrowed money.[6] It was held in Missouri that the assignee of a thing in action arising out of contract must sue in his own name, although there was no specific statutory provision in that State permitting such a demand to be assigned, and the statutory provision to that effect formerly existing had been omitted from the revision of the laws then in force. The clause of the Practice Act was enough to authorize the action because he was the real party in interest.[7]

§ 65. *127. **Equitable Assignment. Same Rule. Illustrations.** Not only does the rule prevail when the assignment is absolute and complete, and the assignee is the legal owner of the demand;

[1] [Crum *v.* Stanley (1898), 55 Neb. 351, 75 N. W. 851: The assignee of a chose in action is the proper and only party who can maintain an action thereon. Wood *v.* Carter (1903), — Neb. —, 93 N. W. 158; Gunderson *v.* Thomas (1894), 87 Wis. 406, 58 N. W. 750: The assignor of a chose in action is not a necessary party. But, as was held in Philip *v.* Durkee (1895), 108 Cal. 300, 41 Pac. 407, the averment that the plaintiff, who is an assignee of a contract, was damaged in a certain sum by its breach, is immaterial and cannot aid a failure to aver how much the assignors were damaged thereby.]

[2] Mills *v.* Murry, 1 Neb. 327, and a claim of damages for waste against a tenant or subtenant in favor of the reversioner, and by him assigned to the plaintiff. Rutherford *v.* Aiken, 3 N. Y. Sup. Ct. 60.

[3] Canefox *v.* Anderson, 22 Mo. 347; Stuckey *v.* Fritsche, 77 Wis. 329; Walker *v.* Steele, 9 Colo. 388. A non-negotiable note payable in work, Schnier *v.* Fay, 12 Kan. 184; Williams *v.* Norton, 3 Kan. 295. [Baxter *v.* Hart (1894), 104 Cal. 344, 37 Pac. 941: Where two partners jointly entered into a contract with defendant, and then, by an agreement between themselves, stipulated that plaintiff should be the recipient of the entire benefit thereof, this constitutes plaintiff the real party in interest and he is the proper and only party plaintiff. All the facts showing it, however, should be alleged.]

[4] Waterman *v.* Frank, 21 Mo. 108; and see Moorman *v.* Collier, 32 Iowa, 138. Where a bond is taken in an action by an officer for the security of any particular person, that person is the real party in interest.

[5] Van Doren *v.* Relfe, 20 Mo. 455; Utley *v.* Foy, 70 N. C. 303 (a land contract). See also Bartholomew Cy. Comm'rs *v.* Jameson, 86 Ind. 154.

[6] Smith *v.* Schibel, 19 Mo. 140; Knadler *v.* Sharp, 36 Iowa, 232, 235 (an open account).

[7] Long *v.* Heinrich, 46 Mo. 603.

it prevails with equal force in cases where the assignment is simply equitable in its character, and the assignee's title would not have been recognized in any form by a court of law under the old system, but would have been purely equitable. Such assignee, being the real party in interest, must bring an action in his own name; for, in respect to this provision of the statute, the equity doctrine which it embodies is, beyond a question, to be applied to all actions.[1] As illustrations: the person to whom an order is given by a creditor upon his debtor for the whole amount of the demand, although the debtor has not accepted nor promised to pay, is an equitable assignee, and must sue in his own name;[2] also, where a creditor assigns part of his claim to the plaintiff, of which the debtor has notice;[3] and when a bond was verbally assigned, and was delivered by the obligee to the plaintiff;[4] and when the assignment, though absolute on the face, was, in fact, partial, the assignee agreeing to account for the remaining portion to the assignor. In this case the assignor might be brought in to protect his own interests, and, in some States, would be an indispensable party.[5] The rule deduced

[1] See Cottle *v.* Cole, 20 Iowa, 481, 485; Lytle *v.* Lytle, 2 Metc. (Ky.) 127. In the first of these cases Mr. Justice Dillon said: "The course of decision in this State establishes this rule; viz., that the party holding the *legal* title of a note or instrument may sue upon it, though he be an agent or trustee, and be liable to account to another for the proceeds of the recovery; but he is open in such case to any defence which exists against the party beneficially interested. Or the party beneficially interested, though he may not have the legal title, may sue in his own name. This may not precisely accord with the line of decisions under other codes, but we think it liberal and right, and conducive to the practical attainment of justice." [Hartzell *v.* McClurg (1898), 54 Neb. 316, 74 N. W. 626: "The equitable owner of a negotiable promissory note in his possession may maintain an action thereon in his own name."]

[2] Wheatley *v.* Strobe, 12 Cal. 92, 98; Walker *v.* Mauro, 18 Mo. 564. Upon facts as stated in the text, Gamble J. says in the last case: "The effect of our new code of practice, in abolishing the distinctions between law and equity, is to allow the assignee of a *chose in action* to bring a suit in his own name in cases where, by the common law, no assignment would be recognized. In this respect, the rules of equity are to prevail, and the assignee may sue in his own name." He goes on to show that this is an equitable though not a legal assignment.

[3] Grain *v.* Aldrich, 38 Cal. 514; Childs *v.* Alexander, 22 S. C. 169. See Shaver *v.* West. Un. Tel. Co., 57 N. Y. 459, 464.

[4] Conyngham *v.* Smith, 16 Iowa, 471, 475; Barthol *v.* Blakin, 34 Iowa, 452, and Moore *v.* Lowry, 25 Iowa, 336. Same decision in case of mortgages verbally assigned. S. P. Green *v.* Marble, 37 Iowa, 95; Andrews *v.* McDaniel, 68 N. C. 385 (an unindorsed note).

[5] Gradwohl *v.* Harris, 29 Cal. 150. The action was brought by plaintiff as assignee of W. & B. of a contract for the payment of money. W. & B. *intervened*, alleging that, though the assignment was absolute on its face, it was actually for one-fourth only of the demand, and they (W. & B.) were entitled to three-fourths

from these authorities is plain and imperative: The assignee need not be the legal owner of the thing in action; if the legal owner, he must of course bring the action; but, if the assignee's right or ownership is for any reason or in any manner equitable, he is still the proper plaintiff, in most of the States the only plaintiff, although, in a few, the assignor should be joined as a plaintiff or as a defendant.[1] The plain intent of the statute is to extend the equity doctrine and rule to all cases.[2]

§ 66. *128. **Effect of Statute in Case of Negotiable Instruments. Conflict in Opinion.** As the statutory provision declares that "every action must be prosecuted in the name of the real party in interest," the defence that the plaintiff is not such real party in interest is, in general, a bar to the suit.[3] This is certainly so when the plaintiff is the assignee of anything in action not negotiable, and the issue raised by an answer setting up such defence would be simply whether the plaintiff was, upon the proof, the real party in interest. If, however, the thing in action

of the recovery. The court held that the action was properly brought, but also that the intervention was proper, and gave a judgment that the plaintiff recover one-fourth and W. & B. three-fourths of the demand. Such an intervention and judgment would doubtless shock a lawyer bred in the old school; but it is convenient, sensible, and every way worthy of universal adoption. The common-law objection that a divided judgment is impossible is simply absurd; the thing *is done*, and is therefore possible. See also Allen *v.* Brown, 44 N. Y. 228, 231; Durgin *v.* Ireland, 14 N. Y. 322; Williams *v.* Brown, 2 Keyes, 486; Paddon *v.* Williams, 1 Robt. 340; Meeker *v.* Claghorn, 44 N. Y. 349, 353; Wetmore *v.* San Francisco, 44 Cal. 294, 300; Lapping *v.* Duffy, 47 Ind. 51; Boyle *v.* Robbins, 71 N. C. 130; Bartholomew Cy. Comm'rs *v.* Jameson, 86 Ind. 154 (where A receives money of B, and in consideration thereof agrees to assign to B any judgment he, A, may recover on a claim held by him against C, there is an equitable assignment of the claim, and C alone can sue thereon); Childs *v.* Alexander, 22 S. C. 169.

[1] [Reynolds *v.* Louisville, etc. R. R. Co. (1895), 143 Ind. 579, 40 N. E. 410, quoting the text.]

[2] McDonald *v.* Kneeland, 5 Minn. 352, 365.

[3] [Iowa and Cal. Land Co. *v.* Hoag (1901), 132 Cal. 627, 64 Pac. 1073: "As was said by this court in Philbrook *v.* Superior Court, 111 Cal. 31, a defendant's right is to have a cause of action prosecuted against him by the real party in interest, but, as has been elsewhere pointed out (Giselman *v.* Starr, 106 Cal. 651), his concern ends when a judgment for or against the nominal plaintiff would protect him from any action upon the same demand by another, and when, as against the nominal plaintiff, he may assert all defences and counterclaims available to him, were the claim prosecuted by the real owner."

So in Sturgis *v.* Baker (1903), — Ore. —, 72 Pac. 744, and Lodge *v.* Lewis (1903), 32 Wash. 191, 72 Pac. 1009, it was held that a defendant could not raise the question whether or not the plaintiff was the real party in interest, unless some right of set-off or counterclaim was affected.

But see also Stewart *v.* Price (1902), 64 Kan. 191, 67 Pac. 553, and Brown *v.* Ginn (1902), 66 Ohio St. 316, 64 N. E. 123, set out at some length in note 1, p. 98.]

is an instrument negotiable in its nature, the subject is complicated by the special doctrines and rules of the law which relate to the quality of negotiability. It is elementary that possession of negotiable paper, payable to bearer, is at least *prima facie* evidence of ownership; and it is also settled that when such paper, payable to order, is indorsed and delivered to the indorsee, the legal title passes to him, and he may maintain an action thereon; while the maker, acceptor, or indorsers cannot question his title, at least in any manner short of impeaching its good faith. This legal title carried with it the right to sue, no matter what arrangements might be made between him and his immediate indorser concerning the use of the proceeds. The question then arises, Has the rule introduced by the code changed these established doctrines? Does the apparent and formal legal ownership resulting from the possession of a negotiable instrument payable to bearer, or from the indorsement and possession of similar paper payable to order, constitute the plaintiff the real party in interest within the meaning of the code? Or may the defendant go behind this formal title, and show that some other person is the real party in interest, and thus defeat the action? If the latter query must be answered affirmatively, it is evident that the statutory provision under consideration has made an important change in the law of negotiable paper. The question thus proposed has given rise to some conflict in opinion, and is not entirely free from doubt. On the one side it has been urged that the language of the section in all the State codes is most general and comprehensive, containing no exception in terms nor by implication, and that it is, in its highest degree imperative, "*must* be prosecuted in the name of the real party in interest," except in the single case of "the trustee of an express trust," and that the real party in interest is the person for whose immediate benefit the action is prosecuted, who controls the recovery, and not the person in whom the mere naked apparent legal title is vested. On the other side it is urged that the rule permitting such a holder or indorsee to prosecute the action is one of the elementary doctrines of the law relating to negotiable paper, — a rule not of practice or procedure, but of the mercantile and commercial law, — and that the legislature cannot have intended, by such a general clause of a statute concerning procedure, to abrogate well-settled principles of the law merchant. I will examine

and compare some of the cases in which the question has been discussed.

§ 67. *129. **New York Decisions.** In Edwards *v.* Campbell,[1] which was an action upon a note payable to bearer, the plaintiff had the note in his possession; but a judgment in his favor was reversed on the ground that he was not the real party in interest. Killmore *v.* Culver[2] was an action upon a promissory note payable to Tanner or bearer. The answer denied the plaintiff's ownership, and alleged that Tanner was the real owner. It was sufficiently established by the evidence that the plaintiff was acting simply as agent for Tanner, and would be immediately accountable to the latter for all the money recovered. These facts were held to constitute a complete defence on the ground that Tanner was the real party in interest, and should have been the plaintiff. In James *v.* Chalmers,[3] it was said by one of the judges of the New York Court of Appeals, in reference to actions upon negotiable paper: "Under the code of procedure, if it appears that the plaintiff is not the real party in interest, it is a bar to the action, and no further defence is necessary." The question was very elaborately discussed by the courts of New York in Eaton *v.* Alger,[4] which was an action by the indorsee of a note. The Supreme Court held that the defendants might prove that the plaintiff had no interest in the note, but was a mere agent of the payee, and was bound to account to him, on demand, for the proceeds, and that these facts would constitute a complete defence to the action.

§ 68. *130. **The Rule in New York.** Cases of higher authority, because decided by the New York Court of Appeals, have established the other rule for that State. In City Bank of New Haven *v.* Perkins,[5] the rule which prevailed prior to the code was reaffirmed and applied to the facts before the court,

[1] Edwards *v.* Campbell, 23 Barb. 423.

[2] Killmore *v.* Culver, 24 Barb. 656, 657.

[3] James *v.* Chalmers, 6 N. Y. 209, 215, per Welles J.

[4] Eaton *v.* Alger, 57 Barb. 179, 189.

[5] City Bank of New Haven *v.* Perkins, 29 N. Y. 554, 568, per Johnson J. The learned judge also said: "It will be time enough to determine whether any other person has a better title when such person shall come before the court to claim the bills in question, or their proceeds, from the plaintiff." The doctrine of City Bank *v.* Perkins is declared to be the settled general rule, but its operation explained and limited in Hays *v.* Hathorne, 74 N. Y. 486. As sustaining the general rule, see also Devol *v.* Barnes, 7 Hun, 342; Green *v.* Niagara Ins. Co., 6 Hun, 128; Davis *v.* Rowlands, 5 Hun, 651. But see Iselin *v.* Reynolds, 30 Hun, 488.

although no allusion was made in its opinion to the provisions of § 111 (1501, 449, 1909, 1910). The doctrine was stated as follows: "Nothing short of *mala fides* or notice thereof will enable a maker or indorser of such paper to defeat an action brought upon it by one who is apparently a regular indorsee or holder, especially when there is no defence to the indebtedness. As to anything beyond the *bona fides* of the holder, the defendant, who owes the debt, has no interest." The same rule was repeated in Brown *v.* Penfield;[1] but in this case also there was no reference made to the provision of the code relating to the real party in interest. It might be considered doubtful whether the question had been put to rest by these two decisions, but all doubt has been removed. The case of Eaton *v.* Alger was carried to the Court of Appeals; the opinion of the Supreme Court was overruled; and the original rule of the law in reference to suits upon negotiable paper was expressly held not to have been changed by the code.[2] In this conflict among the decisions, the judgment of the court of last resort of course prevails; and the question is thus settled in New York by the force of authority, whatever may be thought of the comparative weight of the argument in support of either rule.

§ 69. *131. **Rule in Other States.** The doctrine which prevails in Iowa seems to be the same as that now established in New York.[3] The same doctrine appears to be established in Minnesota;[4] in Missouri;[5] in Nebraska;[6] in Washington;[7] in California.[8] The construction given to the statutory provision

[1] Brown *v.* Penfield, 36 N. Y. 473. The remarks of Davies C. J., in which this doctrine was reasserted, were, however, mere *obiter dicta*.

[2] Eaton *v.* Alger, 47 N. Y. 345; s. c. 2 Keyes, 41.

[3] Cottle *v.* Cole, 20 Iowa, 481, 485, per Dillon J. followed in Abell Note, etc. Co. *v.* Hurd (Iowa, 1892), 52 N. W. 488: "The course of decision in this State establishes this rule; viz., that the party holding the legal title of a note or instrument may sue on it, though he be an agent or trustee, and liable to account to another for the proceeds of the recovery; but he is open in such case to any defence which may exist against the person beneficially interested."

[4] Minnesota Thresher Manuf. Co. *v.* Heipler (Minn.), 52 N. W. 33; Elmquist *v.* Markoe, 45 Minn. 305; Vanstream *v.* Liljengren, 37 Minn. 191; [Struckmeyer *v.* Lamb (1896), 64 Minn. 57, 65 N. W. 930.]

[5] Young *v.* Hudson, 99 Mo. 102.

[6] Herron *v.* Cole, 25 Neb. 692; [Meeker *v.* Waldron (1901), 62 Neb. 689, 87 N. W. 539; Commercial State Bank *v.* Rowley (1902), Neb., 89 N. W. 765.]

[7] McDaniel *v.* Pressler, 3 Wash. 636; Davis *v.* Erickson, 3 Wash. 654; [Riddell *v.* Prichard (1895), 12 Wash. 601, 41 Pac. 905.]

[8] McPherson *v.* Weston, 64 Cal. 275; Curtis *v.* Sprague, 51 Cal. 239; [Cortelyou *v.* Jones (1901), 132 Cal. 131, 64 Pac. 119; Toby *v.* Oregon Pac. Ry. Co. (1893), 98 Cal. 490, 33 Pac. 550.

The same doctrine prevails in North

by the court of Indiana is entirely different, as it is held to include the indorsee and holder of negotiable paper as well as the assignee of any other thing in action. Such indorsee or holder, although possessed of the naked legal title, is not the real party in interest, and is not authorized to sue, if the beneficial interest and the whole right to the proceeds of the recovery are in another party.[1] It is, however, a settled rule of pleading in Indiana, that an answer merely averring that the plaintiff is not the real party in interest, but that some other person named is the real party, without alleging any facts from which these conclusions would arise, presents no issue.[2] In Kentucky, also, the defence that the plaintiff is not the real party in interest may be set up in an action upon a promissory note or other negotiable instrument, brought by the person who is the apparent holder, or who has the naked legal title, although in that State, by virtue of an express provision of the code, the person having the legal title must also be made a party, either plaintiff or defendant.[3] In an action by the assignee of a note against the maker thereof, it is no defence to show that the assignment was made with intent to defraud certain creditors of the assignor. This does not make the plaintiff any the less the real party in interest. As the assignor participates in the fraud, he could not repudiate his transfer, and has parted with all possible interest in the note.[4] Whenever the defence that the plaintiff is not the real party in interest is allowable, it must be pleaded in the answer; if not, it will be regarded as waived.[5]

Dakota. Seybold *v.* Bank (1896), 5 N. D. 460, 67 N. W. 682; Commercial Bank *v.* Red River Bank (1899), 8 N. D. 382, 79 N. W. 859. Also in Montana. Meadowcraft *v.* Walsh (1895), 15 Mont. 544, 39 Pac. 914.]

[1] Swift *v.* Ellsworth, 10 Ind. 205. See also Gillispie *v.* Fort Wayne & So. R. Co., 12 Ind. 398; Deuel *v.* Newlin (Ind. Sup. 1892), 30 N. E. 795; Bartholomew Cy. Comm'rs *v.* Jameson, 86 Ind. 154.

[2] Lamson *v.* Falls, 6 Ind. 309; Mewherter *v.* Price, 11 Ind. 199; Garrison *v.* Clark, 11 Ind. 369; Swift *v.* Ellsworth, 10 Ind. 205; Hereth *v.* Smith, 33 Ind. 514, and cases cited; Hardin *v.* Helton, 50 Ind. 319.

[3] Carpenter *v.* Miles, 17 B. Mon. 598, 602. See Palmer *v.* Mt. Sterling Nat. Bank (Ky. 1892), 18 S. W. 234. [See Power *v.* Hambrick (1903), Ky., 74 S. W. 660, where it was held that the assignee of a note may sue upon it in his own name, whether the assignment was absolute or merely as collateral security.]

[4] Rohrer *v.* Turrill, 4 Minn. 407.

[5] Savage *v.* Corn Exch. Ins. Co., 4 Bosw. 2; Giraldin *v.* Howard, 103 Mo. 40; see also *post*, § *711, and cases cited in note. [Lesh *v.* Meyer (1901), 63 Kan. 524, 66 Pac. 245; Bank of Stockham *v.* Alter (1901), 61 Neb. 359, 85 N. W. 300. An averment in an answer that the plaintiff is not the real party in interest is a mere conclusion of law, and insufficient: Esch *v.* White (1901), 82 Minn. 462, 85 N. W. 238, 718. But an allegation that prior to the commencement of the suit the plaintiff

§ 70. *132. **Absolute Assignment made Conditional or Partial by Contemporaneous and Collateral Agreement.** Analogous to the subject discussed in the preceding paragraph is the question whether an assignee, to whom a thing in action has been transferred by an assignment which is absolute in its terms, so as to vest in him the entire legal title, but which, by means of a contemporaneous and collateral agreement, is, in fact, rendered conditional or partial, is the real party in interest. It is now settled by a great preponderance of authority, although there is some conflict, that if the assignment, whether written or verbal, of anything in action is absolute in its terms, so that by virtue thereof the entire apparent legal title vests in the assignee, any contemporaneous collateral agreement by virtue of which he is to receive a part only of the proceeds, "and is to account to the assignor or other person for the residue, or even is to thus account for the whole proceeds, or by virtue of which the absolute transfer is made conditional upon the fact of recovery, or by which his title is in any other similar manner partial or conditional," does not render him any the less the real party in interest:[1] he is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds.[2] The debtor is completely protected by the assignment, and cannot be exposed to a second action brought by any of the

sold the note sued on, is a good defence: Van Housen *v.* Broehl (1899), 59 Neb. 48, 80 N. W. 260. See also National Distilling Co. *v.* Cream City Importing Co. (1893), 86 Wis. 352, 56 N. W. 864.]

[The defence that the plaintiff is not the real party in interest may be raised by answer or demurrer: Meyer *v.* Barth (1897), 97 Wis. 352, 72 N. W. 748; J. I. Case Threshing Co. *v.* Pederson (1894), 6 S. D. 140, 60 N. W. 747.

Where the defect appears on the face of the complaint, a general demurrer properly raises the objection: Smith *v.* Security Co. (1899), 8 N. D. 451, 79 N. W. 981. See also note, p. 714, on Issues Raised by Demurrers.

An amendment substituting the real party in interest is not allowable: Wilson *v.* Kiesel (1894), 9 Utah, 397, 35 Pac. 488. But an amendment alleging that one of the plaintiffs, originally alleged to be an owner, has no interest in the property injured, may be allowed: Kansas City *v.* King (1902), 65 Kan. 64, 68 Pac. 1093. But see Service *v.* Bank (1900), 62 Kan. 857, 62 Pac. 670, and Hudson *v.* Barratt (1901), 62 Kan. 137, 61 Pac. 737, where such amendments were allowed.

Bowser *v.* Mattler (1893), 137 Ind. 649, 35 N. E. 701: A question as to the real party in interest, and as to the consequent right to sue, cannot be raised for the first time in the Supreme Court, but such a defence must be specially pleaded in bar.]

[1] [Bohart *v.* Buckingham (1901), 62 Kan. 658, 64 Pac. 627, quoting the text.]

[2] [Wines *v.* Rio Grande Ry. Co. (1893), 9 Utah, 228, 33 Pac. 1042, quoting the text; Anderson *v.* Yosemite Mining Co. (1894), 9 Utah, 420, 35 Pac. 502; Guerney *v.* Moore (1895), 131 Mo. 650, 32 S. W. 1132, quoting the text.]

parties, either the assignor or other, to whom the assignee is bound to account. This is the settled doctrine in most of the States.[1] Notwithstanding the general unanimity of the courts in sustaining this doctrine, there are still some indications of a different opinion, although it can hardly be said that this difference has been embodied in an adjudication as the *ratio decidendi*. The opinion to which I refer will be found at large in the note,

[1] Allen *v.* Brown, 44 N. Y. 228, 231 (assignment without consideration, and assignee to be accountable to the assignor for all the proceeds); Meeker *v.* Claghorn, 44 N. Y. 349, 353 (facts similar to the last); Wetmore *v.* San Francisco, 44 Cal. 294 (assignment made as collateral security); Durgin *v.* Ireland, 14 N. Y. 322 (assignment in writing absolute, but by a contemporaneous agreement the assignors were to have one-half the proceeds); Castner *v.* Sumner, 2 Minn. 44; Williams *v.* Norton, 3 Kans. 295; Cottle *v.* Cole, 20 Iowa, 481; Curtis *v.* Mohr, 18 Wis. 615; Hilton *v.* Waring, 7 Wis. 492 (assignment as collateral security); Wilson *v.* Clark, 11 Ind. 385; Gradwohl *v.* Harris, 29 Cal. 150; Saulsbury *v.* Corwin, 40 Mo. App. 373 (assignment of note for collection); Jackson *v.* Hamm, 14 Colo. 58; Brumback *v.* Oldham, 1 Idaho, 709 (assignment of account for collection); Young *v.* Hudson, 99 Mo. 102 (assignment of account for collection); Haysler *v.* Dawson, 28 Mo. App. 531 (same); Sheridan *v.* The Mayor, etc., 68 N. Y. 30; Gates *v.* No. Pac. R. Co., 64 Wis. 64 (assignee to pay certain debts of the assignor from the proceeds of the suit, and account to the assignor for the remainder); Vimont *v.* Chicago & N. W. R. Co., 64 Iowa, 513; Ginocchio *v.* Amador Canal & Min. Co., 67 Cal. 493; Ervin *v.* Oregon Ry. & N. Co., 35 Hun, 544; Walburn *v.* Chenault, 43 Kan. 352. In Castner *v.* Sumner the notes in suit, which were for $3,100, were assigned as security for $1,500, owing by the payee to the plaintiff, the latter giving back a bond to pay over the balance after satisfying his own demand. Upon these facts the court, per Atwater J., said: "There may be a question as to whether the assignment of the notes was absolute, or whether a contingent interest remained in the assignor. But in either case the action is properly brought in the name of the plaintiff." . . . In Williams *v.* Norton a note payable to the order of the payee had been verbally transferred and delivered to the plaintiff without endorsement. The action by such assignee was held to be properly brought, even though he may not be entitled to apply to his own use the whole proceeds. "A delivery by the payee to his surety or indemnitor, with authority to receive the money and pay the principal debt, will enable the surety to sue in his own name. He will, within the meaning of the code, be the real party in interest."

[In Laurence *v.* Congregational Church (1900), 164 N. Y. 115, 58 N. E. 24, it was held that "the assignee of a claim under a written assignment which vests the legal title in him, though as security for a debt, is not bound, in an action against the debtor, to prove the existence of a debt from the assignor to himself, as the state of the accounts between the assignor and assignee does not concern the defendant, or, if it does, the burden is upon him to prove such a state of facts as would render the assignment inoperative or reinvest the assignor in equity with the beneficial ownership of the claim" (Syllabus). In Falconio *v.* Larsen (1897), 31 Ore. 137, 48 Pac. 703, it was held that the assignee of a claim for wages, assigned for collection only, could sue in his own name. In Toby *v.* Oregon etc. R. R. Co. (1893), 98 Cal. 490, 33 Pac. 550, the court said: "A trustee to whom a chose in action has been transferred for collection is, in contemplation of law, so far the owner that he may sue on it in his own name." Reaffirmed in Cortelyou *v.* Jones (1901), 132 Cal. 131, 64 Pac. 119. See also Pratchett *v.* Marsh (1895), 52 Ohio St. 494, 40 N. E. 200; McBrayer *v.* Dean (1897), 100 Ky. 398, 38 S. W. 508.]

as it is an able argument upon that side of the question.[1] Embraced within the same principle, and governed by the same rule,

[1] Robbins *v.* Deverill, 20 Wis. 142. The plaintiff sues an assignee of Peet & Williams. Dixon C. J. gave the following opinion (p. 148): "The statute is imperative that every action must be prosecuted in the name of the real party in interest, except as therein otherwise provided. The proof is that the plaintiff is not the owner of the demand sued upon. It belongs to the firm of R. & L., composed of the plaintiff, his brother, and one Lewis. The demand was transferred to the plaintiff alone by words of absolute assignment, no trust being expressed, but, as the plaintiff himself testifies, he holds it nevertheless in trust for his firm. It was received on account of a debt due the firm of R. & L. from P. & W. Upon these facts it seems to me the plaintiff cannot maintain the action. He is not the real party in interest, nor the trustee of an express trust within the meaning of the statute. His brother and Lewis should have been joined as plaintiffs."

[In Crowns *v.* Forest Land Co. (1898), 99 Wis. 103, 74 N. W. 546, the court seems to have departed somewhat from the doctrine of Robbins *v.* Deverill. This was a suit to foreclose a mortgage, and the defendant attempted to defend on the ground that the plaintiff was not the real party in interest. The court said: "That portion of the answer which alleges that respondent gave no consideration for the note and mortgage presents no issuable fact. It tends in no way to defeat the action. It is a matter of no moment to appellant whether any consideration was paid for the note and mortgage or not. Under subsequent allegations in the answer it appears that respondent became vested with and held the legal ownership of the demand sued upon. The appellant had no legal interest to inquire whether the respondent's interest was actual or colorable, or whether consideration was paid therefor or not." And in Chase *v.* Dodge (1901), 111 Wis. 70, 86 N. W. 548, which was an action by the assignees of a bill of merchandise, the court said: "The assignee of a claim, holding the legal title by a transfer valid as against his assignor, is the 'real party in interest,' and the proper party to sue thereon . . . ; and the fact that such transfer is colorable only is immaterial unless the rights of creditors are involved or the right to interpose some defence or counterclaim supposed to be cut off by the assignment." See also Anderson *v.* Johnson (1900), 106 Wis. 218, 82 N. W. 177; Brossard *v.* Williams (1902), 114 Wis. 89, 89 N. W. 832.]

See also cases cited *ante*, under § *130; and Bostwick *v.* Bryant, 113 Ind. 448 (assignee for collection merely of a note cannot sue thereon in his own name); Hoagland *v.* Van Etten, 22 Neb. 681; s. c. 23 Neb. 462 (where the proceeds of the suit are to be paid to the assignor, and the assignee has no beneficial interest in them, the latter cannot sue on the assigned claim).

[In Kansas the supreme court has wavered in its decisions. In the case of Stewart *v.* Price (1902), 64 Kan. 191, 67 Pac. 553, in a carefully reasoned opinion, a divided court expressly overruled the case of Knapp *v.* Eldridge, 33 Kan. 106, and held that "one holding by written assignment a verified itemized account is not the real party in interest, and cannot maintain an action thereon in his own name where it is shown that, by a contemporaneous oral agreement, he has agreed to pay the full amount thereof, when collected, to his assignor; and this is true notwithstanding the assignor testifies that the defendant in the action does not owe her anything, that the whole amount is due her from the plaintiff, and that he is to pay her provided he recovers in the action." But only two years later, Stewart *v.* Price was itself expressly overruled by the case of Manley *v.* Park (1904), — Kan. —, 75 Pac. 557, the court unanimously approving the doctrine of the minority opinion in Stewart *v.* Price.

The same rule obtains in Ohio. Brown *v.* Ginn (1902), 66 Ohio St. 316, 64 N. E. 123. In this case the court said: "We are aware that the tendency of some courts has been to uphold actions brought upon negotiable instruments, transferred for collection

is the case of an assignee of a thing in action, who, by the terms of the transfer, is not bound to pay the consideration thereof until the debt has been collected; he is the real party in interest, and is fully authorized to sue in his own name.[1]

§ 71. *133. **Instances of Action by Assignee as Real Party in Interest.** The following are particular cases in which the assignee was held by the courts to be the real party in interest within the meaning of the codes, and entitled as such to sue in his own name: Where a bond or a mortgage was assigned verbally;[2] the assignment of a receipt and delivery order, which was in the following words: "1,000 bushels of corn. Received in store, on account of S. F. A., 1,000 bushels of corn, to be delivered to his order at, etc., etc. (signed) W. H. H.;"[3] assignment of a promissory note payable to order without any indorsement;[4] the assignment of a debt evidenced by a lost note;[5] where the assignment of a bond or note was by means of a separate instrument in writing;[6] the assignment of a claim arising from an agreement to pay the defendant in a certain pending suit a stipulated sum of money if he would withdraw his defence;[7] the assignment of a claim for damages resulting from the wrongful conversions of chattels;[8] the assignment by a widow of her right of dower after the death of her husband, but before the dower had been set apart to her.[9] The mere parting

only, on the ground that the plaintiff is the real party in interest, and that there are some authorities which point to that conclusion. Indeed it may be admitted that the trend in some of the Code States is in that direction. But we have found no case which goes to the extent of holding that an assignment of an open account for the mere purpose of collection, one which gives the assignee a contingent interest only, constitutes him the real party in interest within the meaning of the statute."

See cases cited in note 3, p. 91, and note 1, p. 87.

[1] Cummings *v.* Morris, 25 N. Y. 625; s. c. 3 Bosw. 560.

[2] Conyngham *v.* Smith, 16 Iowa, 471; Barthol *v.* Blakin, 34 Iowa, 452; Green *v.* Marble, 37 Iowa, 95; Andrews *v.* McDaniel, 68 N. C. 385; Kiff *v.* Weaver, 94 N. C. 274.

[3] Merchants & Mech. Bank *v.* Hewitt, 3 Iowa, 93.

[4] Carpenter *v.* Miles, 17 B. Mon. 598; White *v.* Phelps, 14 Minn. 27; Pease *v.* Rush, 2 Minn. 107; Pearson *v.* Cummings, 28 Iowa, 344; Hancock *v.* Ritchie, 11 Ind. 48; Rogge *v.* Cassidy (Ky. 1890), 13 S. W. 716; Caldwell *v.* Meshew, 44 Ark. 564; Heartman *v.* Franks, 36 Ark. 501; Kiff *v.* Weaver, 94 N. C. 274.

[5] Long *v.* Constant, 19 Mo. 320.

[6] Thornton *v.* Crowther, 24 Mo. 164; Peters *v.* St. Louis, &c. R. R., 24 Mo. 586.

[7] Gray *v.* Garrison, 9 Cal. 325.

[8] Smith *v.* Kennett, 18 Mo. 154; Lazard *v.* Wheeler, 22 Cal. 139. In this last case an action by the assignee to recover possession of the chattels was sustained.

[9] Strong *v.* Clem, 12 Ind. 37; [Dobberstein *v.* Murphy (1896), 64 Minn. 127, 66 N. W. 204.]

with the possession of a note does not, however, constitute an assignment thereof, and the owner is the proper party to sue, although the instrument is in the hands of another person with whom it has been deposited.[1] The assignee of a foreign executor or administrator may maintain an action in his own name to recover a debt due to the estate from a person residing within the State in which the suit is brought.[2] Upon the same principle, when a demand not arising within the State, in favor of one foreign corporation against another foreign corporation, is assigned to a resident of the State, such assignee may maintain an action upon it against the debtor corporation, although the original creditor is expressly forbidden by statute to sue under such circumstances. The prohibition of an action between the foreign corporations does not affect the assignability of the claim.[3]

§ 72. *134. **Same Subject.** The assignee of a judgment recovered by the defendant in an action brought to recover the possession of chattels may sue in his own name upon a bond given by the plaintiff upon the requisition made for a delivery of the goods to him. The assignment of the judgment carries with it all demands arising upon this bond or undertaking, and the assignee is the real party in interest.[4] In like manner, the assignee of a judgment recovered against a sheriff for official misconduct in seizing the plaintiff's property may bring an action in his own name upon the sheriff's bond.[5] The principle may be stated more broadly. The assignee of any claim or demand may, in general, sue in his own name upon any incidental or collateral security connected with the demand, and by means of which its payment or satisfaction can be enforced. Thus, the assignee of a judgment obtained in a garnishee process may maintain an action in his own name against the garnishees;[6] the assignee of the cause of action in a pending litigation may sue on an appeal bond given to the plaintiff, the assignor, in the course of the

[1] Selden *v.* Pringle, 17 Barb. 458; [Bohart *v.* Buckingham (1901), 62 Kan. 658, 64 Pac. 627, quoting the text.]

[2] Petersen *v.* Chemical Bank, 32 N. Y. 21.

[3] McBride *v* Farmers' Bank, 26 N. Y. 450, 457.

[Further instances: Haupt *v.* Burton (1898), 21 Mont. 572, 55 Pac. 110 (suit to revive a judgment by the assignee thereof; Gerner *v.* Church (1895), 43 Neb. 690, 62 N. W. 51 (assignee of subscription).]

[4] Bowdoin *v.* Coleman, 3 Abb. Pr. 431.

[5] Charles *v.* Haskins, 11 Iowa, 329.

[6] Whitman *v.* Keith, 18 Ohio St. 134. In this case, Mr. Justice Scott gives a very full and clear exposition of the statutory provision under consideration.

proceedings.[1] The assignee of a reversion and also of the covenants contained in the lease is the proper party to bring an action to recover damages arising from a breach of such covenants.[2] When a surviving partner assigns things in action which belonged to the firm, the assignee succeeds to his rights, and must sue in his own name to collect the same.[3]

§ 73. *135. **Joinder of Assignor in Some States.** In Kentucky, if the assignment is equitable, which is defined to be an assignment not expressly authorized by statute to be made, although the assignee must sue in his own name, the assignor must also be joined as a party plaintiff or defendant;[4] as, for example, when an execution is assigned,[5] or a lease.[6] In certain States, where the thing in action is not negotiable, or assignable by indorsement, the assignor may be joined as a defendant to answer to his interest and to the assignment.[7] In other States, however, where similar provisions are not found in the codes or practice acts, the rule is entirely different, and the assignor is not a proper party either plaintiff or defendant. Thus, in Ohio, an assignor having been made a defendant under the general provisions of the code relating to the joinder of parties plaintiff and defendant, it was held that he neither had an interest in the controversy adverse to the plaintiff, nor was he a necessary party to a complete determination or settlement of the questions involved therein, and therefore he had been improperly made a defendant.[8] This is undoubtedly the rule in all the States whose codes do not contain the special provision permitting or requiring the joinder of assignors in order to answer to the assignment. And even though he may retain some residuary, contingent, or equitable interest, the assignor is not the proper party to sue; the legal title is not only in the assignee, but he is

[1] Bennett *v.* McGrade, 15 Minn. 132. Same as to assignment of a contract, Gallagher *v.* Nichols, 60 N. Y. 438, 448, 449; Bolen *v.* Crosby, 49 id. 183.

[2] Masury *v.* Southworth, 9 Ohio St. 340.

[3] Roys *v.* Vilas, 18 Wis. 169.

[4] Dean *v.* English, 18 B. Mon. 132; Gill *v.* Johnson's Adm., 1 Metc. (Ky.) 649; Lytle *v.* Lytle, 2 Metc. (Ky.) 127.

[5] Watson *v.* Gabby, 18 B. Mon. 658, 665.

[6] Hicks *v.* Doty, 4 Bush, 420. By 1 R. S. ch. 22, § 6, "all bonds, bills, or notes for money or property shall be assignable so as to vest the right of action in the assignee."

[7] [Indiana, Burns' St., 1901, § 277.]

[8] Allen *v.* Miller, 11 Ohio St. 374. [Held in Shambaugh *v.* Current (1900), 111 Iowa, 121, 82 N. W. 497, that the defendant cannot require the assignor to be made a party, since any defence as against the assignor could be made against the assignee.]

entitled to receive all the proceeds of the recovery, and whatever possibilities the assignor may have, he is not the real party in interest.[1]

§ 74. *136. **Assignment Pendente Lite. Substitution of Assignee.** The thing in action may even be assigned while a suit upon it is pending, and, by the express provisions of the statute, the assignee may either be substituted as plaintiff, or the suit may be carried on to its termination in the name of the original party.[2] Such substitution, when made, is not the bringing of a new action, and does not require a supplemental com-

[1] Smith *v.* Chicago & N. W. R. Co., 23 Wis. 267, where it appeared that in proceedings supplementary to execution, before instituted against the plaintiff in another State, the demand in suit had been assigned to a receiver; this was held a complete defence. See also Gates *v.* No. Pac. R. Co., 64 Wis. 64; Vimont *v.* Chicago N. W. Ry. Co., 64 Iowa, 513; Smith *v.* Felton, 85 Ind. 223 (note assigned as collateral security); Michael *v.* St. Louis Mut. F. Ins. Co., 17 Mo. App. 23 (the assignor of an insurance policy should not be joined as plaintiff with the assignee, to whom the whole policy has been transferred as collateral security); Cable *v.* St. Louis Marine Ry. Co., 21 Mo. 133; and see insurance cases, *post*, § *226, note.

[2] [McCullough *v.* Dovey (1901), 61 Neb. 675, 85 N. W. 893; Parker *v.* Taylor (1902), Neb., 91 N. W. 537; City of Springfield *v.* Weaver (1896), 137 Mo. 650, 37 S. W. 509; Tuffree *v.* Stearns Ranchos Co. (1899), 124 Cal. 306, 57 Pac. 69.

Whether the assignee shall be substituted or the action shall proceed in the name of the original party, is a matter within the discretion of the court: Brown *v.* Kohout (1895), 61 Minn. 113, 63 N. W. 248; Fay *v.* Steubenrauch (1903), 138 Cal. 656, 72 Pac. 156; Sears *v.* Ackerman (1903), 138 Cal. 583, 72 Pac. 171.

But in Wilson *v.* Kiesel (1894), 9 Utah 397, 35 Pac. 488, it was held that where an action is prosecuted to judgment in the name of the assignor, after an assignment *pendente lite*, no action can thereafter be brought on such judgment in the name of the assignor; and where an action is begun in his name it must be dismissed, an amendment substituting the real party in interest not being allowable. See, however, Service *v.* Bank (1900), 62 Kan. 857, 62 Pac. 670, and Hudson *v.* Barratt (1901), 62 Kan. 137, 61 Pac. 737, where such amendments were allowed.

The statute furnishes no authority for the continuation of the action by the plaintiff where his assignee has settled the claim and demands that the action be discontinued. Hirsheld *v.* Fitzgerald (1898), 157 N. Y. 166, 51 N. E. 997.

In McKnight *v.* Bertram Heating, etc. Co. (1902), 65 Kan. 859, 70 Pac. 345, a part of the claim was assigned pending the action, and it was held that the plaintiff, who sued on a *quantum meruit*, could recover in his own name the amount assigned.

In Matthews *v.* Cantey (1896), 48 S. C. 588, 26 S. E. 894, defendant executed three promissory notes to A. A assigned them to B, and B pledged them to plaintiffs as collateral security for a debt which B owed plaintiffs. Said debt not being paid when due, plaintiffs brought this action on the notes, and it was conceded by all parties that plaintiffs had a good cause of action at that time. But after the commencement of this suit, B paid plaintiffs the debt in full, and assigned the notes to C., such assignment by B. divesting plaintiffs of all interest in the notes, and putting the legal and beneficial title in C. C. did not move to be made a party, and the circuit court dismissed the action on the ground that the suit was not being prosecuted in the name of the real party in interest. This order was affirmed. Section 142 of the code provides that "no action shall abate by the death, marriage

plaint.[1] If an assignee carries on a suit in the name of the assignor, he must show affirmatively that the transfer was made *pendente lite*.[2]

§ 75. * 137. **Assignment of Part of Demand. Action by Grantee on Covenants.** It has been decided in some cases that the assignment of part of an entire claim does not enable the assignee to sue in his own name, but that the assignor must still sue for the whole demand.[3] This rule is based upon the old doctrine of the indivisibility in law of an entire thing in action. Other cases hold that such an assignment conveys an equitable interest, and makes the assignee an equitable owner, so that he may sustain an action brought in his own name, although the

or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the Court may allow the person to whom the transfer is made to be substituted in the action." The court held that the words "any other transfer of interest," under which it was sought to defeat the abatement of the action, meant "such a transfer of interest in the action as would enable the transferee to claim *under the original party*." And since in the case at bar the transferee claimed not under the original party, the plaintiffs, but under B., this statute did not save the action, and it must abate under the provision of section 132, requiring all actions to be prosecuted in the name of the real party in interest.]

[1] [Fish *v.* Smith (1900), 73 Conn. 377, 47 Atl. 711: "An assignment of a claim pending suit thereon calls for no alteration or amendment in the complaint, but only for an application for a change of parties." And in Campbell *v.* Irvine (1895), 17 Mont. 476, 43 Pac. 626, it was held that the substituted plaintiff might prove the assignment by which he became entitled to the subject of the suit, although the assignment was not pleaded in the complaint.

The Supreme Court of Washington, however, has held, in Powell *v.* Nolan (1902), 27 Wash. 318, 67 Pac. 712, that a supplemental complaint must be filed, and that a judgment obtained without the filing of such supplemental complaint is invalid, where the defendant was not present or represented in court at the time the substitution was made.]

[2] St. Anthony Mill Co. *v.* Vandall, 1 Minn. 246; Virgin *v.* Brubaker, 4 Nev. 31; Warner *v.* Turner, 18 B. Mon. 758. See also McGean *v.* Metrop. Elev. Ry. Co., 133 N. Y. 9; Asher *v.* St. Louis, &c. R. Co., 89 Mo. 116; Lowell *v.* Parkinson, 4 Utah, 64; Todd *v.* Crutsinger, 30 Mo. App. 145; Hamilton *v.* Lamphear, 54 Conn. 237; Stewart *v.* Spaulding, 72 Cal. 264; Nichols *v.* Chicago, etc. Ry. Co., 36 Minn. 452; Snyder *v.* Phillips, 66 Ia. 481; Perkins *v.* Marrs, 15 Colo. 262.

[3] Cable *v.* St. Louis Marine Railway Co., 21 Mo. 133; Leese *v.* Sherwood, 21 Cal. 151; Burnett *v.* Crandall, 63 Mo. 410; Beardslee *v.* Morgner, 73 Mo. 22; Loomis *v.* Robinson, 76 Mo. 488. But this rule does not prevent one of two joint payees from transferring the whole of his interest, so that his assignee (in this case the other payee) may sue in his own name; McLeod *v.* Snyder (Mo. 1892), 19 S. W. 494. See Lapping *v.* Duffy, 47 Ind. 51; Boyle *v.* Robbins, 71 N. C. 130; [Smith *v.* Atkinson (1893), 18 Colo. 255, 32 Pac. 425, holding that the common-law rule has not been changed.]

assignors may, upon their own application, be allowed to intervene, in order to protect their interests.[1] The grantee of land cannot sue in his own name to recover damages for the breach of covenants in the deed to his grantor which do not run with the land, unless the covenants themselves have also been assigned, but the grantor is the proper party; as, for example, the grantee cannot sue upon a covenant of seisin in the deed to his grantor, in those States where that covenant is regarded as broken immediately, if at all, upon the execution of the deed, and as not running with the land.[2]

§ 76. *138. **Suing "to the Use of" Another. Beneficiaries under Express Trusts.** It is no longer, consistently with the provisions of the codes, possible for one person to sue "to the use of" another, as was common in some States. The parties beneficially interested must themselves bring the action.[3] There are cases which hold that when there is a trustee of an express trust, *he* must bring the action, and that the beneficiary can in no such case sue in his own name, at least alone.[4] The correctness of this ruling may well be doubted. The section relative to the real party in interest is, in all the codes, imperative;

[1] Grain *v.* Aldrich, 38 Cal. 514; Wiggins *v.* McDonald, 18 Cal. 126. See, also, Childs *v.* Alexander, 22 S. C. 169; Singleton *v.* O'Blenis, 125 Ind. 151 (partial assignee and assignor may join). [It was held in Schilling *v.* Mullen (1893), 55 Minn. 122, 56 N. W. 586, and in Dean *v.* St. Paul, etc. Ry. Co. (1893), 53 Minn. 504, 55 N. W. 628, that an action to recover a duly assigned portion of a demand cannot be maintained by the assignee where the assignor is not made a party, the debtor refusing to recognize the assignment. And in Cook *v.* City of Menasha (1899), 103 Wis. 6, 79 N. W. 26, it was held that the plaintiff was not aggrieved by an order of the court making the assignor a party. The same court held, in Skobis *v.* Ferge (1899), 102 Wis. 122, 78 N. W. 426, that the assignment by a creditor of a portion of a claim is not binding on the debtor unless he consents thereto.]

[2] Hall *v.* Plaine, 14 Ohio St. 417; Sinker *v.* Floyd, 104 Ind. 291.

[3] Weise *v.* Gerner, 42 Mo. 527; Hutchings *v.* Weems, 35 Mo. 285; Brady *v.* Chandler, 31 Mo. 28; Van Doren *v.* Relfe, 20 Mo. 455; Wilkes *v.* Morehead, Stanton's Code (Ky.), p. 31 (n); Lytle *v.* Lytle, 2 Metc. (Ky.) 127, 128. Also, State *v.* Johnson, 52 Ind. 197; Shane *v.* Francis, 30 id. 92. [Hollister *v.* Hubbard (1899), 11 S. D. 461, 78 N. W. 949. An action for breach of a sheriff's bond, payable to the county, must be brought in the name of the party in interest, and not in the name of the county for the use of such party. To the same effect is Guernsey *v.* Tuthill (1900), 12 S. D. 584, 82 N. W. 190. See, however, City of Bethany *v.* Howard (1899), 149 Mo. 504, 51 S. W. 94, where the contrary is held in respect to a contractor's bond.]

[4] Reed *v.* Harris, 7 Robt. 151. A Special Term decision, and not entitled to much weight. See Western R. Co. *v.* Nolan, 48 N. Y. 513; Davis *v.* Erickson, 3 Wash. 654; Kelley *v.* Thuey, 102 Mo. 522; Henricus *v.* Englert (N. Y. App. 1893), 33 N. E. 550 (obligees on a bond, who signed as "agents" of others, are the only proper plaintiffs to a suit on the bond, though a different rule would apply had the instrument not been under seal).

while that in relation to the trustee of an express trust is permissive.

§ 77. * 139. **Actions by Third Persons for whose Benefit Contracts have been made.** The cases thus far considered in this section are all connected with the assignment of a thing in action by the original creditor, and they involve the question, When may the assignee, under such circumstances, be the party plaintiff in an action to enforce the assigned demand? The rule of the statute, that every action must be brought in the name of the real party in interest, applies also to numerous cases which have no connection whatever with assignments and assignees; and I propose, in the remainder of this section, to review and examine these other illustrations of the principle. It is now the settled doctrine in so many of the States, that it may be called the American doctrine,[1] — although the contrary rule has been established in England and in some States, and notably in Massachusetts,[2] where it has been very recently reaffirmed with emphasis, — that, where an express promise was made by A. to B., upon a consideration moving from B., whereby the promisor engages to do something for the benefit of C., as, for example, to pay him a sum of money, although C. is both a stranger to the consideration and not an immediate party to the contract, yet he may maintain an action upon the promise in his own name against the promisor, without in any manner joining as a party the one to whom the promise was directly made.[3] This rule was originally adopted prior to the reformed procedure, and was based partly upon considerations of convenience, and partly upon a liberal construction of the nature of the contract. [The provision

[1] Hendrick *v.* Lindsay, 93 U. S. 143. For an interesting discussion of the *rationale* of the doctrine, see an article by Henry O. Taylor, 15 Amer. Law Rev. 231.

[2] [The same doctrine prevails in Connecticut. See Baxter *v.* Camp (1898), 71 Conn. 245, 41 Atl. 803, and Morgan *v.* Randolph, etc. Co. (1900), 73 Conn. 396, 47 Atl. 658.]

[3] Kimball *v.* Noyes, 17 Wis. 695; Sanders *v.* Clason, 13 Minn. 379; Meyer *v.* Lowell, 44 Mo. 328; Cross *v.* Truesdale, 28 Ind. 44; Devol *v.* McIntosh, 23 Ind. 529; Day *v.* Patterson, 18 Ind. 114; Rice *v.* Savery, 22 Iowa, 470; Scott *v.* Gill, 19 Iowa, 187; Allen *v.* Thomas, 3 Metc. (Ky.) 198; Wiggins *v.* McDonald, 18 Cal. 126; Miller *v.* Florer, 15 Ohio St. 148, 151, per White J.; Rogers *v.* Gosnell, 58 Mo. 589, 590; 51 Mo. 466; Coster *v.* Mayor of Albany, 43 N. Y. 399, 411; Van Schaick *v.* Third Avenue R. Co., 38 N. Y. 346; Ricard *v.* Sanderson, 41 N. Y. 179; Barker *v.* Bradley, 42 N. Y. 316, 319; Secor *v.* Lord, 3 Keyes, 525; Claflin *v.* Ostrom, 54 N. Y. 581, 584; Cooley *v.* Howe Machine Co., 53 N. Y. 620; Glen *v.* Hope Mut. Life Ins. Co., 56 N. Y. 379, 381; Barlow *v.* Meyers, 6 N. Y. Sup. Ct. 183; Johnson *v.* Knapp, 36 Iowa, 616; Jordan *v.* White, 20 Minn. 91.

of the codes under review does not place the matter beyond all doubt; although the person for whose benefit the promise is thus made is certainly the real party in interest.][1] The following are

[1] [So late as 1903, the Supreme Court of Wisconsin, in the case of Tweeddale *v.* Tweeddale, *infra*, declared that "there is as much confusion, probably, in the judicial holdings in respect to the matter, as on any question of law that can be mentioned."

The conflict centres about the two requisites laid down in the leading case of Vrooman *v.* Turner, 69 N. Y. 280. These are as follows: there must be, in order to allow suit by a third person on such a contract, (1) an intention on the part of the promisee to secure some benefit to the third party, (2) some privity between the promisee and the party to be benefited, and some duty or obligation owing from the promisee to the third person which would give the latter a legal or equitable claim to the benefit of the promise. Most of the cases turn on one or the other of these points, and they may be grouped accordingly.

In Morgan *v.* Randolph, etc. Co. (1900), 73 Conn. 396, 47 Atl. 658, the defendant purchased the property of a partnership, and in part consideration agreed to pay the partnership debts. Held that the intention was primarily to secure a benefit to the partnership and not to the creditors, hence the latter could not recover on the agreement. This is an extreme case, and the court itself admits that it is out of accord with the current of American authority.

There are numerous cases of actions by materialmen and laborers upon contractors' bonds, which have usually turned upon the question of intention. Such a case was Parker *v.* Jeffery (1894), 26 Ore. 186, 37 Pac. 712, where the court held that to entitle a third person to recover upon a contract made between other persons, there must not only be an intent to secure some benefit to such third person, but the contract must have been made and entered into directly and primarily for his benefit. The same rule was adopted in Montgomery *v.* Rief (1897), 15 Utah 495, 50 Pac. 623; Brower Lumber Co. *v.* Miller (1896), 28 Ore. 565, 43 Pac. 659; Howsmon *v.* Trenton Water Co. (1893), 119 Mo. 304, 24 S. W. 784, Jefferson *v.* Asch (1893), 53 Minn. 446, 55 N. W. 604.

The construction of these contractors' bonds, as indicative of intention, has given rise to some difficulty. In Pickle Marble & Granite Co. *v.* McClay (1898), 54 Neb. 661, 74 N. W. 1062, the bond provided that the contractor should provide all the labor and materials necessary for the construction of the building, and that there should not be any lawful claims against him for labor and materials. This was held to be a bond for the benefit of the materialmen and laborers. The same bond was similarly construed in Korsmeyer etc. Co. *v.* McClay (1895), 43 Neb. 649, 62 N. W. 50, and in Pioneer, etc. Co. *v.* McClay (1898), 54 Neb. 663, 74 N. W. 1063. Similar bonds were construed in Doll *v.* Crume (1894), 41 Neb. 655, 59 N. W. 806; Kaufmann *v.* Cooper (1896), 46 Neb. 644, 65 N. W. 796; Rohman *v.* Gaiser (1898), 53 Neb. 474, 73 N. W. 923; and Spokane & Idaho Lumber Co. *v.* Boyd (1902), 28 Wash. 90, 68 Pac. 337, and in each case held to have been executed for the benefit of materialmen and laborers. In McDonald *v.* Davey (1900), 22 Wash. 366, 60 Pac. 1116, a bond conditioned that the lessee of a mine should pay all debts contracted for labor and materials used in and about the mine, was held to be a bond for the benefit of the laborers, overruling the case of Sears *v.* Williams (1894), 9 Wash. 428, 37 Pac. 665, in which the court had criticised the Nebraska cases. Even a covenant that the contractor would file with the board of public works receipts of claims from all parties furnishing materials and labor, was held to be a covenant for the benefit of materialmen, in Lyman *v.* City of Lincoln (1894), 38 Neb. 794, 57 N. W. 531.

On the other hand, in Greenfield Lumber Co. *v.* Parker (1902), 159 Ind. 571, 65 N. E. 747, where one contracted with a township to build a school house and gave a bond conditioned that he would provide the labor and material at his own cost, and that the township should not be

some examples and illustrations of this rule: Where a partnership assigns its assets, and, in consideration thereof, the

answerable therefor, it was held that this was not a covenant for the benefit of the materialmen. See also Reynolds *v.* Louisville, etc. R. R. Co. (1895), 143 Ind. 579, 40 N. E. 410. So in Parker *v.* Jeffery (*supra*) a covenant by the contractor to pay all sums of money due for material and labor, was held not to be a covenant for the benefit of the laborers and materialmen. Same holding in Brower Lumber Co. *v.* Miller (*supra*), and in Jefferson *v.* Asch (*supra*). See also Fidelity & Deposit Co. *v.* Parkinson (1903), — Neb. —, 94 N. W. 120.

In State *v.* St. Louis, etc. Ry. Co. (1894), 125 Mo. 596, 28 S. W. 1074, it was held that where a railroad company covenants to pay the debts of another company, the creditors of the latter may sue on the covenant, but where the agreement is merely to "save harmless" another against the claims of third persons, the latter cannot sue on the agreement, as it is not made for their benefit.

The Iowa cases on this point are based upon a statute, and hence are not of general authority. See Green Bay Lumber Co. *v.* School Dist. (1902), — Ia. —, 90 N W. 504, citing the earlier Iowa decisions.

Upon the question whether privity between the promisee and a third person, or some duty or obligation owing from the former to the latter, is necessary to support an action by such third person, there is wide divergence of judicial opinion. The New York cases have continued to adhere to Vrooman *v.* Turner. See Townsend *v.* Rackham (1894), 143 N. Y. 516, 38 N. E. 731. In the more recent case of Buchanan *v.* Tilden (1899), 158 N. Y. 109, 52 N. E. 724, the duty owing from the promisee to the third person was largely a moral one, but was held sufficient. The promise was made to a husband by another for the benefit of his wife, and this relation, taken in connection with the peculiar equities of the case, was held to be a sufficient consideration to support a promise in favor of his wife. The court is careful to state that the case is decided upon its peculiar facts.

The New York doctrine is followed in Jefferson *v.* Asch (1893), 53 Minn. 446, 55 N. W. 604; Union Storage Co. *v.* McDermott (1893), 53 Minn. 407, 55 N. W. 606; School District ex rel. *v.* Livers (1899), 147 Mo. 580, 49 S. W. 507; McDonald *v.* American Nat. Bank (1901), 25 Mont. 456, 65 Pac. 896. In Howsmon *v.* Trenton Water Co. (1893), 119 Mo. 304, 24 S. W. 784, and Kansas City Sewer Pipe Co. *v.* Thompson (1893), 120 Mo. 218, 25 S. W. 522, the court held that inasmuch as there was no liability of the promisee to the third person, no recovery could be had against the promisor.

In the following cases the promisee was under contractual obligation to the third party, and the promisor, for a consideration, assumed the debt. In each case a recovery was allowed. Barnett *v.* Pratt (1893), 37 Neb. 349, 55 N. W. 1050; Lovejoy *v.* Howe (1893), 55 Minn. 353, 57 N. W. 57; Meyer *v.* Shamp (1897), 51 Neb. 424, 71 N. W. 57; Porter *v.* Woods (1896), 138 Mo. 539, 39 S. W. 794; Maxcy *v.* New Hampshire Fire Ins. Co. (1893), 54 Minn. 272, 55 N. W. 1130; Barnes *v.* Hekla Fire Ins. Co. (1893), 56 Minn 38, 57 N. W. 314; Dickinson Co. *v.* Fitterling (1898), 72 Minn. 483, 75 N. W. 731; Feldman *v.* McGuire (1899), 34 Ore. 309, 55 Pac. 872; Hawley *v.* Bank (1896), 97 Ia. 187, 66 N. W. 152.

In a number of States, however, the limitations of the New York doctrine have been abandoned, and neither privity nor duty, as between the promisee and the third person is required to support a suit by the latter. Thus in Ferris *v.* Am. Brewing Co. (1900), 155 Ind. 539, 58 N. E. 701, a lease was executed by a lessee whereby he covenanted to sell no beer upon the leased premises except that manufactured by the plaintiff, and the plaintiff was allowed to enforce this covenant by injunction against the lessee.

As stated in the text, one of the most striking instances of the application of this liberal view appears in the case of the assumption, on the part of a grantee of land, of a mortgage debt. It is held in a number of States that an action will lie

purchaser agrees with the members to pay all the firm debts, any creditor of the partnership may sue him upon this under-

under such circumstances by the mortgagee against the grantee, even though the immediate grantor is not personally liable therefor. Hare *v.* Murphy (1895), 45 Neb. 809, 64 N. W. 211; McKay *v.* Ward (1899), 20 Utah, 149, 57 Pac. 1024; Enos *v.* Sanger (1897), 96 Wis. 150, 70 N. W. 1069. In Hicks *v.* Hamilton (1898), 144 Mo. 495, 46 S. W. 432, the Supreme Court of Missouri held that such an action could not be maintained by the mortgagee, in the absence of a liability on the part of the immediate grantor. But two years later, in Crone *v.* Stinde (1900), 156 Mo. 262, 55 S. W. 863, the Hicks case was expressly overruled, and it was held that the liability of the grantor for the debt was not a condition precedent to the right of the mortgagee to sue the grantee. In Starbird *v.* Cranston (1897), 24 Colo. 20, 48 Pac. 650, the mortgagee was allowed to sue the grantee, but it does not appear whether or not the grantor was liable for the debt. On the contrary, the Supreme Court of Minnesota, in Brown *v.* Stillman, 43 Minn. 126, 45 N. W. 2, has refused to allow such an action except where the grantor was liable.

An action by the mortgagee against the grantee, at least under the rule of Brown *v.* Stillman (*supra*), is expressly provided for by statute in Connecticut. Gen. St. 1902, § 587.

The Supreme Court of Wisconsin seems to have gone to the extreme limit of liberality in permitting third parties to sue, as appears in two very recent cases. In Etscheid *v.* Baker (1901), 112 Wis. 129, 88 N. W. 52, the parents of defendant's wife conveyed a farm to him for a recited consideration of $5,000, and he gave back a mortgage securing a bond running to them in that amount, conditioned on his paying to them $4,000, in designated instalments, and the remaining $1,000 to their daughter (defendant's sister-in-law) within one year after the decease of both of the obligees. The daughter's administrator brought an action on the bond more than a year after the decease of both the parents, and was allowed to recover, although the last surviving obligee had executed a receipt in full satisfaction of the mortgage and bond, and had discharged the mortgage of record, the court calling attention to the fact that the daughter had known of the provision of the bond and had assented thereto. In Tweeddale *v.* Tweeddale (1903), — Wis. —, 93 N. W. 440, the court went still farther. The facts in this case, so far as they concern this question, were almost identical with those in Etscheid *v.* Baker, except that the beneficiary, who was the brother of the defendant, knew nothing about the provision for his benefit until after the discharge of the mortgage by his mother, who was the mortgagee and obligee of the bond. But the court held that this made no difference, and said: "Without further discussion of the matter we adhere to the doctrine that where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former, and such promisor made the promise directly to the third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person without his consent."

It is true that three months prior to the decision in the Tweeddale case, the same court, in Rowe *v.* Moon (1902), 115 Wis. 566, 92 N. W. 263, in refusing to accept the rule laid down in the New York case of Vrooman *v.* Turner, stated that, to

taking, and recover the amount of the indebtedness due to the plaintiff thus suing,[1] and may even sue him and the sureties who united with him in his undertaking to the assigning parties;[2] and where many subscribers contributed different sums of money to the defendant for a specified purpose, and he entered into a written contract with three persons, whereby, among other things, he promised to repay the sums so loaned, it was held that any subscriber might sue on the agreement to recover the amount which he advanced,[3] and where B. placed a sum of money in the hands of A., which the latter promised to pay over to C., C. may prosecute an action against A. on his promise.[4] Where the defendant was indebted to B., who was in turn indebted to C. in a less amount, and the two former parties agreed that defendant should pay to C. the amount of the latter's demand, which should be *pro tanto* a payment on his own debt to B., C. was permitted to recover on this promise.[5] If in a policy of insurance it is stipulated that the loss, if any, shall be paid to

enable a third person to enforce a contract, there must be both "an intent on the part of the promisor [should read promisee] to benefit him, and some duty or obligation to carry out such promise." If this means an obligation other than that arising from the promise itself, it is inconsistent with the later case of Tweeddale *v.* Tweeddale, and must be deemed overruled by the latter.

Utah, also, seems committed to this liberal doctrine. In Brown *v.* Markland (1898), 16 Utah, 360, 52 Pac. 597, the court said: "Where a promise or contract has been made between two parties for the benefit of a third, an action will lie thereon at the instance and in the name of the party to be benefited, although the promise or contract was made without his knowledge, and without any consideration moving from him."

Kentucky, also, has approved a liberal interpretation of the statute. In Blakeley *v.* Adams (1902), — Ky. —, 68 S. W. 393, it was held that a deed conveying land, which provides that a certain surety of the grantee shall have a lien on the land to indemnify him, creates a lien in favor of the surety, which may be enforced by him, though he is a stranger to the deed. This is a curious case, and it does not clearly appear how the doctrine of an action by a third party applies. But the court considered it and decided it on that basis, and in the course of the opinion said: "The generally recognized doctrine in American courts is that a third party, for whose benefit a contract was made between others, may maintain an action on the contract against the promisor. And in no State has this doctrine been carried farther than in Kentucky."

The rule stated in the Tweeddale case (*supra*), is provided against by statute in some States. See McArthur *v.* Dryden (1897), 6 N. D. 438, 71 N. W. 125, which construes the statute of that State, Rev. Codes, § 3840, declaring that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."]

[1] Sanders *v.* Clason, 13 Minn. 379; Meyer *v.* Lowell, 44 Mo. 328, and cases cited; Barlow *v.* Myers, 6 N. Y. Sup. Ct. 183; 64 N. Y. 41.

[2] Kimball *v.* Noyes, 17 Wis. 695; Devol *v.* McIntosh, 23 Ind. 525; Claflin *v.* Ostrom, 54 N. Y. 581, 584.

[3] Rice *v.* Savery, 22 Iowa, 470, 477. Dillon J. speaks of the rule as well settled.

[4] Allen *v.* Thomas, 3 Metc. (Ky.) 198.

[5] Wiggins *v.* McDonald, 18 Cal. 126.

a person named, not the assured, such person may sue in his own name on the policy.[1] B. sold and delivered goods to A., and in consideration thereof A. promised to pay a certain sum to C., which was, in fact, the amount of a debt due from B. to C.; it was held that C. could recover upon the promise so made by A. in his behalf.[2] Perhaps the most striking illustration of this doctrine, and of the extent to which it has been carried, is found in a class of cases where, upon a conveyance of land, the grantee assumes and promises to pay a debt which is secured by mortgage on the land so conveyed. If the grantee of land encumbered by a mortgage assumes the mortgage debt by a clause in his deed, and promises to pay the same, the creditor-mortgagee may maintain an action against this grantee upon the bond or other evidence of the indebtedness, and recover the amount thereof, and is not restricted to the remedy by foreclosure of the mortgage;[3] and the creditor may thus sue the grantee upon the bond, even though that instrument had expressly provided that the mortgagee should first have recourse on the land, and the obligor should only be liable for the deficiency which might arise after the foreclosure; this stipulation, it was held, protected the obligor personally, and could not be taken advantage of by the grantee who had promised to pay the debt.[4] The result of these and other decisions is, that the third person, for whose benefit an undertaking is entered into between other parties, may sue upon it, although such undertaking is an instrument in writing and under seal.[5] This doctrine is plainly a departure from the tech-

[1] Cone *v.* Niagara Fire Ins. Co., 3 N. Y. Sup. Ct. 33, 39, 60 N. Y. 619 (loss made payable to an encumbrancer of the property insured; encumbrancer can sue alone, even though his debt has been fully paid, so that he will hold the amount recovered as a trustee for the owner; to the same effect, Bartlett *v.* Iowa State Ins. Co., 77 Iowa, 86; Newman *v.* Springfield Ins. Co., 17 Minn. 123, 126; [Phœnix Ins. Co. *v.* Omaha Loan & Trust Co. (1894), 41 Neb. 834, 60 N. W. 133. On the contrary, in Williamson *v.* Michigan Fire & Marine Ins. Co. (1893), 86 Wis. 393, 57 N. W. 46, it was held that the action must be brought in the name of the assured, though the mortgagee, to whom the loss was payable, might be joined.]

[2] Hall *v.* Roberts, 61 Barb. 33; and see Sacramento Lumber Co. *v.* Wagner, 67 Cal. 293.

[3] Lawrence *v.* Fox, 20 N. Y. 268; Burr *v.* Beers, 24 N. Y. 178; Brewer *v.* Maurer, 38 Ohio St. 550; Pope *v.* Porter, 33 Fed. Rep. 7; Stevens *v.* Flannagan (Ind. 1892), 30 N. E. 898; and see the subject fully discussed in 3 Pom. Eq. Jur., §§ 1206–1208, and notes. [See also note 1, p. 106, *supra*.]

[4] Thorp *v.* Keokuk Coal Co., 48 N. Y. 253.

[5] Coster *v.* Mayor of Albany, 43 N. Y. 399, 411; Van Schaick *v.* Third Avenue R. R., 38 N. Y. 346; Ricard *v.* Sanderson, 41 N. Y. 179; Lawrence *v.* Fox, 20 N. Y. 268; Burr *v.* Beers, 24 N. Y. 178; Thorp *v.* Keokuk Coal Co., 48 N. Y. 253; Kimball *v.* Noyes, 17 Wis. 695; Devol *v.*

nical notions of the common law, which did not permit a person to sue upon a contract unless he was a party to it, or unless the consideration moved from him, and which especially forbade an action upon a sealed undertaking by a stranger. The courts of some States adhere strictly to this old notion, and utterly repudiate the innovation.[1] The new rule, however, is as convenient as it is just. The objections to it are every way technical and arbitrary, — a repetition of verbal formulas without any convincing reasons. It certainly avoids a circuity of actions, and it enables the only person beneficially interested in the promise — the real party in interest — to come into court in the first instance and establish his rights, without being driven to enforce them in a roundabout manner through the intervention of a third person, who, if successful, must account to him for the proceeds of the litigation. The true extent and application of the doctrine, and the proper limitations upon it, have been discussed and fixed by the New York Court of Appeals in very recent cases.[2]

McIntosh, 23 Ind. 529; Barker *v.* Bradley, 42 N. Y. 316, 319; Secor *v.* Lord, 3 Keyes, 525; Claflin *v.* Ostrom, 54 N. Y. 581, 584; Glen *v.* Hope Mut. L. Ins. Co., 56 N. Y. 379, 381; McDowell *v.* Law, 35 Wis. 171. The principle applies to contracts under seal: Emmitt *v.* Brophy, 42 Ohio St. 82; *contra*, Woodbury Sav. Bk. *v.* Charter Oak Ins. Co., 29 Conn. 374.

[1] Exchange Bank *v.* Rice, 107 Mass. 37, per Gray J.

[2] Garnsey *v.* Rogers, 47 N. Y. 233, 240, per Rapallo J.; Merrill *v.* Green, 55 N. Y. 270, 273; Turk *v.* Ridge, 41 N. Y. 201, 206. See also Hinman *v.* Bowen, 5 N. Y. Sup. Ct. 234, which holds that a defence, good as against the immediate promisee, is also available against the beneficiary. (s. c. 3 Hun, 192.) Phillips *v.* Van Schaick, 37 Iowa, 229. See also Green *v.* Richardson, 4 Colo. 584; McKinnon *v.* McKinnon, 81 N. C. 201; Cone *v.* Niagara Ins. Co., 60 N. Y. 619; Barlow *v.* Meyers, 64 id. 41; Arnold *v.* Nichols, 64 id. 117; Simson *v.* Brown, 68 id. 355; Lake Ontario Shore R. Co. *v.* Curtiss, 80 id. 219; Dunning *v.* Leavitt, 85 id. 301; Root *v.* Wright, 84 id. 72, 74, 75; Pardee *v.* Treat, 82 id. 385; Vrooman *v.* Turner, 69 id. 280; Rowe *v.* Parsons, 6 Hun, 338; Bean *v.* Edge, 84 N. Y. 514; Todd *v.* Weber, 95 N. Y. 181, 194; Wheat *v.* Rice, 97 N. Y. 296; Seward *v.* Huntington, 94 N. Y. 116; Litchfield *v.* Flint, 104 N. Y. 543; Vilas *v.* Page, 106 N. Y. 439; Berry *v.* Brown, 107 N. Y. 659; St. Mark's Church *v.* Teed, 120 N. Y. 583; Lorillard *v.* Clyde, 122 N. Y. 498. The principal limitations upon the doctrine, as determined by the New York cases, may be stated as follows. In order that the third person may sue upon the promise, it must be designed to be primarily for his benefit, and not primarily for the exoneration of the promisee. Arnold *v.* Nichols, 64 N. Y. 117. There must have been some obligation or duty owing from the promisee to the third person which would give the third person a legal or equitable claim to the benefit of the promise, or an equivalent from him personally; a mere stranger to the contract cannot sue. Simpson *v.* Brown, 68 N. Y. 355; Vrooman *v.* Turner, 69 N. Y. 280; Litchfield *v.* Flint, 104 N. Y. 543; Lorillard *v.* Clyde, 122 N. Y. 498; Pulver *v.* Skinner, 42 Hun, 322; Durnherr *v.* Rau (N. Y.), 32 N. E. 491. While it is immaterial whether or not the third person is designated by name (Simson *v.* Brown, 68 N. Y. 355), it is necessary that he be so indicated that he may be ascertained. Wheat *v.* Rice, 97 N. Y. 296 (creditors

§ 78. *140. **Commercial Paper. Action by Legal Promisee.** Upon the same principle, the equitable owner of a promissory note is the real party in interest within the statute, and is the proper person to sue upon it, although there may be no indorsement, and possession of the instrument is *prima facie* evidence of

of a firm have no legal interest in a contract with the firm by which the promisor agrees to pay a specified portion of the firm's debts, as it rests entirely with the promisor to designate what creditors shall have the benefit of the promise); see also Edick *v.* Green, 38 Hun, 202; Weller *v.* Goble, 66 Iowa, 113. Some acceptance of the promise by the creditor, by word or act, must be shown. Wheat *v.* Rice, 97 N. Y. 296. On the other hand, the rule as stated in more general terms seems to be recognized in Todd *v.* Weber, 95 N. Y. 181 (the promise of the father of a bastard child, made to certain persons, on consideration that these persons provide for the child's education and support, to "make it up to them" in his will, may be sued upon by the child, as being the party beneficially interested). See also St. Mark's Church *v.* Teed, 120 N. Y. 583. The question of the acceptance of the promise by C., the third person, has been much discussed in Indiana. Until accepted by C., the contract may, of course, be rescinded by A. and B. Davis *v.* Calloway, 30 Ind. 112. But where the obligation or sum is specific, and is due at a known or certain time, a demand by C. is not necessary before suit. Rodenbarger *v.* Bramblett, 78 Ind. 213; distinguishing Durham *v.* Bischof, 47 Ind. 211 (where A. had made no absolute and specific promise, being assignee of a stock of goods under an agreement "to compromise or otherwise to settle all debts owing by the assignors," it is manifestly just and proper that a demand by C., a creditor, should be required before suit). Bringing the action by C. is usually sufficient evidence of his acceptance of the contract; no averment of acceptance is necessary. Carnahan *v.* Tousey, 93 Ind. 561, Elliott J. dissenting; Risk *v.* Hoffman, 69 Ind. 137. Many cases, in addition to those cited from New York, hold that the promise must have been intended to be primarily for C.'s benefit, in order that he may sue upon it. See Dundee Mortgage, etc. Co. *v.* Hughes, 20 Fed. Rep. 39; Burton *v.* Larkin, 36 Kans. 246; Johnson *v.* Bamberger (Ark. 1892), 19 S. W. 920 (agreement among creditors not to sue debtor without concurrence of a majority of the creditors is not intended for his benefit); Civil Code of California, § 1559; Chung Kee *v.* Davidson, 73 Cal. 522: "It must appear from the direct terms of the contract that it was made for the benefit of third parties. It cannot be implied from the fact that the contract would, if carried out between the parties to it, operate incidentally to their benefit." For further illustrations, see Waltz *v.* Waltz, 84 Ind. 403 (contract for benefit of promisee's heirs); Western Development Co. *v.* Emery, 61 Cal. 611 (contract of subscription); Baker *v.* Bryan, 64 Iowa, 561; Jordan *v.* Kavanaugh, 63 Iowa, 152. Promisor assumes promisee's debts, and creditors of the latter sue. Stariha *v.* Greenwood, 28 Minn. 521; Ellis *v.* Harrison, 104 Mo. 270; Knott *v.* Dubuque & S. C. R. Co. (Iowa, 1892), 51 N. W. 57; compare Anderson *v.* Fitzgerald, 21 Fed. Rep. 294. Persons whose property in a city was destroyed by fire were allowed to sue a water company for breach of its contract to supply the city with water, in Paducah Lumber Co. *v.* Paducah Water Supply Co., 89 Ky. 340; *contra*, Davis *v.* Clinton Water Works, 54 Iowa, 59; Ferris *v.* Carson Water Co., 16 Nev. 44; s. c. 40 Am. Rep. 485. The principle under discussion was stated without any limitation in Hecht *v.* Caughron, 46 Ark. 132; Chamblee *v.* McKenzie, 31 Ark. 155; Talbot *v.* Wilkins, 31 Ark. 411; Green *v.* Morrison, 5 Colo. 18; Lehow *v.* Simonton, 3 Colo. 346; Dodge's Adm. *v.* Moss, 82 Ky. 441; Kaufman *v.* U. S. Nat. Bk., 31 Neb. 661; Shamp *v.* Meyer, 20 Neb. 223; Miliani *v.* Tognini, 19 Nev. 133; Schneider *v.* White, 12 Or. 503; Bassett *v.* Hughes, 43 Wis. 319. [See note 1, p. 106, *supra*.]

such ownership.[1] In fact, wherever the spirit of the reformed system is carried out, — and this is now very generally, if not universally, the case, — the equity rule as to parties is freely applied to all legal actions, and this one principle will easily solve all particular cases of difficulty or doubt.[2] But, as has been shown in preceding paragraphs, the law as to commercial paper has not been changed in several of the States by this provision of the statute in reference to the parties plaintiff; and in those States, therefore, the indorsee, and, *a fortiori*, the payee of a negotiable note or bill may maintain an action upon it, even though there may be relations between himself and third persons which give them a right of action over against him for the proceeds. As, for example, if A., having in his hands money belonging to B., should loan it, and take a note from the borrower payable to himself, he could sue upon it; however much B. might have been interested in the original money, and however valid a demand he may have against A., he is not a party to the note nor the holder of it.[3] In the class of cases already mentioned, where an express contract is made with one for the benefit of another, and the person thus beneficially interested is permitted to sue in his own name, the one to whom the promise was expressly given may, in general, also maintain an action.[4] The promise being actually made to him, and the consideration moving from him, he is *legally* the contracting party, and is clothed with the *legal* right; indeed, he falls under the definition of trustee of an express trust given in another section of the codes.[5]

[1] Garner *v.* Cook, 30 Ind. 331; Compton *v.* Davidson, 31 Ind. 62. In the latter case, the answer denied that the plaintiff was "the legal owner of the note in suit." This was held no defence, as it was sufficient if he was the *equitable* owner.

[2] Conyngham *v.* Smith, 16 Iowa, 471; Tate *v.* Ohio & Miss. R. Co., 10 Ind. 174; Swift *v.* Ellsworth, 10 Ind. 205.

[3] Robbins *v.* Cheek, 32 Ind. 328; Robbins *v.* Dishon, 19 Ind. 205.

[4] [Held in Dorr Cattle Co. *v.* Jewett (1902), 116 Ia. 93, 89 N. W. 109, that one who sells property to another under an agreement that its value shall be credited on the note of a third person, may, on failure of the purchaser to make the credit as agreed, maintain an action against the purchaser for the value of the property.]

[5] See Rice *v.* Savery, 22 Iowa, 470, 477; Cottle *v.* Cole, 20 Iowa, 481, 485. In the former of these cases Dillon J. said: "If the promise is made for the benefit of another, who is the real party in interest, the latter may sue, though the contract was made to an agent or trustee; or the agent or trustee, or person in whose name a contract is made for the benefit of another, may sue without joining the party for whose benefit the suit is prosecuted." This subject is treated at large in a subsequent section. See also Tinkler *v.* Swaynie, 71 Ind. 562; Ward *v.* Cowdrey, 5 N. Y. S. 282, affirmed 119 N. Y. 614; and Albere *v.* Kingsland, 13 N. Y. S. 794; Ley *v.* Miller, 28 Neb. 822.

§ 79. *141. **Instances of Real Party in Interest. Actions on Bonds, Actions by Principals and Agents, etc.** The following are additional examples of actions maintained by the real party in interest, and in which the equity doctrine on this subject has been freely applied, although the rights to be protected and the remedies to be obtained were legal. After a judgment had been obtained in an action of ejectment prosecuted according to the old form by John Doe as the fictitious plaintiff, the succeeding action to recover the mesne profits of the land should be brought in the name of the actual owner of the fee, — the lessors of the plaintiff in the ejectment, — they being the real parties in interest.[1] An undertaking given to the sheriff by the defendant in an action for the recovery of chattels, in order to procure a return of the goods, should be prosecuted by the plaintiff in that action, since he is the real party in interest;[2] and it is said to be a general rule in Iowa that when a bond or undertaking is given to an officer, in the course of some judicial proceeding, for the security of any particular person, such person may sue upon it in his own name without the formality of an assignment.[3] If a levy by virtue of an execution is made upon chattels by a deputy sheriff, and the goods are wrongfully taken from his possession, an action against the wrong-doer should be brought by the sheriff; he is the real party in interest, since the deputy sheriff acted simply as his agent.[4] An injunction bond having been given to two obligees, defendants in the action, one of them only was injuriously affected by the injunction and suffered any damage therefrom; he alone, it was held, could maintain an action on the undertaking, as he was the only party in interest, and a suit in the names of both united as plaintiffs was declared to be improperly brought under the code.[5] A plaintiff in a pending suit having moved for the

[1] Masterton *v.* Hagan, 17 B. Mon. 325. It must be understood that the new system had gone into effect *after* the commencement of the ejectment, and before that of the second action for mesne profits.

[2] McBeth *v.* Van Sickle, 6 Nev. 134. See also, as to actions on *attachment bonds*, National Park Bank *v.* Goddard, 131 N. Y. 494 (the person at whose instance an officer levies an attachment is the proper plaintiff); Munzesheimer *v.* Byrne (Ark., 1892), 19 S. W. 320 (action on attachment bond for witness fees).

[3] Moorman *v.* Collier, 32 Iowa, 138.

[4] Terwilliger *v.* Wheeler, 35 Barb. 620.

[5] Summers *v.* Farish, 10 Cal. 347.

[A contrary conclusion was reached by the Supreme Court of Montana in Montana Mining Co. *v.* St. Louis Co. (1897), 19 Mont. 313, 48 Pac. 305, where it was held that in an action on an injunction bond, all of the obligees are necessary parties to the action, and the fact that some of the obligees have no interest in the subject of the suit, does not change the rule. The court said, "But, say counsel, the code

appointment of a receiver, the application was denied on condition that the defendant give a bond or undertaking to account himself as though he were a receiver for all assets which might come into his hands, and in pursuance of this order he gave a bond in form running to the State; the plaintiff having recovered judgment, and the defendant failing to account, the action on the undertaking was properly brought at once by the plaintiff in his own name, without any assignment to him by the State.[1] A person, in whose name a business was secretly carried on by the defendant and others in order to conceal their property and interest from their creditors, was permitted to recover the value of assets received in the course of the business, which had been taken by the defendant and converted to his own use.[2] Where several persons were owners of a chattel, but for purposes of convenience the title stood in the name of one of them alone, and he executed a bill of sale of it in his own name to a purchaser who supposed that his immediate vendor was solely interested, it was held that all the owners might join as plaintiffs to recover the price; they were the real parties in interest under the provision of the code.[3] This case is a particular instance of a general rule. It is now

provision that the suit shall be brought in the name of the real party in interest has changed the common-law rule, and any party shown to have no interest in a recovery sought would be improperly joined. This is true; but, considering what we have said, is the argument correctly invoked in this instance? The action should be brought in the name of the real party in interest, but as the bond, on its face, declared them to be the real parties in interest, in order to ascertain the truth of the matter alleged, that one obligee alone was damaged, it was necessary to join all the obligees as plaintiffs, or make them defendants." In support of the text: Pilger *v.* Marder (1898), 55 Neb. 113, 75 N. W. 559, where the action was on a replevin bond.

In Gyger *v.* Courtney (1900), 59 Neb. 555, 81 N. W. 437, it was held that "a trustee of an express trust, who was restrained with respect to matters concerning the trust estate, may maintain an action on the bond given in the injunction suit in which he is named as obligee."]

[1] Baker *v.* Bartol, 7 Cal. 551. [In Curry *v.* Gila County (1898), Ariz., 53 Pac. 4, it was held that a county for whose use and benefit a bond is executed, may sue upon it, although the bond is executed to the Territory of Arizona. But in Myers *v.* Baughman (1901), 61 Neb. 818, 86 N. W. 507, it was held that the prosecutrix in a bastardy proceeding could not sue on the bastardy bond in her own name, but the action could be brought only in the name of the State, which was named as obligee, for the use of the prosecutrix as her interest might appear, the State being in fact a beneficiary under the bond as well as the prosecutrix.]

[2] Paddon *v.* Williams, 2 Abb. Pr. N. S. 88.

[3] Silliman *v.* Tuttle, 45 Barb. 171. [In Chamberlain *v.* Woolsey (1903), — Neb. —, 95 N. W. 38, it was held that "one having legal title and the right of possession to personal property may maintain an action for its wrongful conversion by a stranger, without joining a party who may have a beneficial interest therein."]

settled that when a simple contract, whether verbal or written, is entered into by an agent in his own name, but really acting on behalf of an undisclosed principal, and the fact of the agency is unknown at the time, but the parties suppose that they are dealing with him on his own individual account, the principal may bring an action and recover upon it as though he had been the party expressly contracting.[1] In these cases, however, the agent may also bring the action; he being one of the contracting parties, the agreement being in express terms made with him, he is a proper party to enforce its observance;[2] the agent may also sue, even where the principal was disclosed, and it was shown that he was acting in behalf of such principal, if the contract is of such a form that the promise is in express terms made to the agent himself.[3] Where the promise in favor of a principal is implied, the agent cannot in general sue upon it in his own name, but the action must be brought by the principal himself. Thus, where a person making a bet in his own name deposited $3,000, the amount thereof, with the stakeholder, but of this sum only $600 was his own money, and the rest had been furnished by other parties — not as a loan — who united with him in the wager, and he brought an action under the statute against the stakeholder to recover back the whole amount of the money so deposited by him, it was held by the New York Court of Appeals that he could only recover the $600 which he had actually furnished of his own funds; that he was simply an agent for the owners of the remaining portion of the moneys advanced, and the implied promise to refund arose in their favor alone; and they must therefore sue in their own names to recover their respective shares.[4]

[1] St. John *v.* Griffith, 2 Abb. Pr. 198; Hall *v.* Plaine, 14 Ohio St. 417; Higgins *v.* Senior, 8 Mees. & W. 834; Sims *v.* Bond, 5 B. & Ad. 389, 393, per Ld. Denman; Bastable *v.* Poole, 1 Cromp. M. & R. 410, per Parke B.; Hicks *v.* Whitmore, 12 Wend. 548; Taintor *v.* Prendergast, 3 Hill, 72. See *post*, § * 177.

[2] See cases cited in last note. Tyler *v.* Freeman, 3 Cush. 261; [Herman *v.* City of Oconto (1898), 100 Wis. 391, 76 N. W. 364; Barham *v.* Bell (1893), 112 N. C. 131, 16 S. E. 903; Brown *v.* Sharkey (1894), 93 Ia. 157, 61 N. W. 364; Brannon *v.* White Lake Tp. (1903), — Ia. —, 95 N. W. 284.]

[3] Cases cited in last notes. Fear *v.* Jones, 6 Iowa, 169; Usparicha *v.* Noble, 13 East, 332; Buffum *v.* Chadwick, 8 Mass. 103; Fairfield *v.* Adams, 16 Pick. 381.

[In Ward *v.* Ryba (1897), 58 Kan. 741, 51 Pac. 223, an agent took a bill of sale of personal property in his own name, in payment of a debt due to his principal, and upon taking possession of the property was dispossessed of it by a third person. It was held that the agent could not maintain replevin for it under a general allegation of ownership in himself, without stating facts in respect to his special interest and right of possession.]

[4] Ruckman *v.* Pitcher, 20 N. Y. 9. For further examples of the real party in

§ 80. *142. **Particular Injury to Plaintiff Essential in Certain Cases. People cannot maintain Action to redress Private Wrong.** It is the established doctrine in several States, and by many cases, that an action cannot be maintained by a private person, citizen, freeholder, or tax-payer, either suing alone or on behalf of all others similarly situated, to restrain or remove or redress any public wrong, or nuisance, or unlawful act done under color of legal authority by the officers of a county, town, city, or other municipality, unless the plaintiff has suffered some special wrong, unless some particular injury is done to him which is not sustained by all others in the community alike. As a result of this rule, no citizen or tax-payer or freeholder can prosecute an action

interest, see Winona & St. Peter R. Co. *v.* St. Paul & S. C. R. Co., 23 Minn. 359; Lafayette Cy. *v.* Hixon, 69 Mo. 581; Quillen *v.* Arnold, 12 Nev. 234; Kahnweiler *v.* Anderson, 78 N. C. 133; Mann *v.* Ætna Fire Ins. Co., 38 Wis. 114; Kellogg *v.* Adams, 51 id. 138; Sigel Sch. Dir. *v.* Coe, 40 id. 103, action on the official bond of a school district treasurer by the official successors of the obligee; Territory *v.* Cox, 3 Mont. 197; Dunning *v.* Ocean Nat. Bk., 61 N. Y. 497; Olmstead *v.* Keys, 85 id. 593; Greene *v.* Republic F. Ins. Co., 84 id. 572; Conn. F. Ins. Co. *v.* Erie R. Co., 73 id. 399, 405; Rowe *v.* Parsons, 6 Hun, 338, action on administrator's bond running to the people, by persons interested in the estate; Dodson *v.* Lomax (Mo., 1893), 21 S. W. 25.

[For other instances of actions maintained by the real party in interest, see Rogers *v.* Galloway (1898), 64 Ark. 627, 44 S. W. 454 (college suing on subscriptions made to secure its establishment); State ex rel. *v.* Sandford (1894), 127 Mo. 368, 30 S. W. 112 (State on relation of county tax-collector); Hodges *v.* Nalty (1899), 104 Wis. 464, 80 N. W. 726 (persons who paid for building a church suing on unpaid subscriptions); Railway Co. *v.* Taylor (1893), 57 Ark. 136, 20 S. W. 1083 (one who has a special property in an animal killed by a railway train); Ettlinger *v.* P. R. & C. Co. (1894), 142 N. Y. 189, 36 N. E. 1055 (holder of bonds secured by trust mortgage, suing for foreclosure); Kinsella *v.* Sharp (1896), 47 Neb. 664, 66 N. W. 634 (suit for conversion, by donee or nominal vendee); German Savings Bank *v.* Citizens Nat. Bank (1897), 101 Iowa, 530, 70 N. W. 769 (intervention by bank which paid a check on a forged indorsement, in suit between drawer of check and the drawee bank, not allowed); City of Des Moines *v.* Polk County (1899), 107 Iowa, 525, 78 N. W. 249 (suit by city for fees earned by city officers); Cabe *v.* Vanhook (1900), 127 N. C. 424, 37 S. E. 464 (suit by trustees of a cemetery to compel an executor to erect a fence according to the terms of a will); Alexander *v.* Overton (1893), 36 Neb. 503, 54 N. W. 825 (suit for wrongful sale of land brought by nominal vendee); Union Nat. Bank *v.* Hill (1899), 148 Mo. 380, 49 S. W. 1012 (suit by stockholders of an insolvent bank against directors for negligent management, where assignee refuses to sue).

It was held in United States ex rel. *v.* Railroad Co. (1895), 3 Okla. 404, 41 Pac. 729, that where private parties, as relators, are authorized to use the name and authority of the United States for the protection of their interests, the exemption from payment of or security for costs, enjoyed by the United States, does not in any way attach to them. They are the real parties in interest and are subject to the same liabilities for costs as other litigants. Illinois Cent. R.R. Co. *v.* Matthews (1903), — Ky. —, 72 S. W. 302: One not the owner of baggage which he checks, but who is liable to the owner, may sue the carrier for damage to it.]

to restrain official acts which would create a municipal indebtedness; or to set aside and annul such public acts when done, although the indebtedness must sometime be paid by means of increased taxation, and the plaintiff's property would be liable for his proportionate share of the tax when levied.[1] On the other hand, actions of the nature and for the purposes described, brought by a citizen, tax-payer, or freeholder, are permitted in many and perhaps in a majority of the States, and are common forms of judicial proceeding to restrain the abuse of local legislative and administrative power by municipal officials. Among these remedial processes are actions by a citizen, tax-payer, or freeholder to restrain or set aside tax proceedings, the levying of assessments for local improvements, the issue of bonds by municipal corporations in aid of railways, and similar acts of a public or *quasi* public nature.[2] On the other hand, the people cannot

[1] Doolittle *v.* Broome Cy. Supervisors, 18 N. Y. 155; Roosevelt *v.* Draper, 23 N. Y. 318; People *v.* Mayor, 32 Barb. 102; Sargent *v.* Ohio & Miss. R. Co., 1 Handy, 52; Carpenter *v.* Mann, 17 Wis. 155; Kittle *v.* Fremont, 1 Neb. 329; Craft *v.* Jackson Cy. Com'rs, 5 Kan. 518; Kirkpatrick *v.* State, 5 Kan. 673; Tift *v.* Buffalo, 1 N. Y. Sup. Ct. 150; Comins *v.* Jefferson Cy. Sup., 3 id. 296; Ayres *v.* Lawrence, 63 Barb. 454; Demarest *v.* Wickham, 63 N. Y. 320; Kilbourn *v.* St. John, 59 id. 21; Lutes *v.* Briggs, 64 id. 404; Wood *v.* Bangs, 1 Dak. 179.

[2] [Kircher *v.* Pederson (1903), 117 Wis. 68, 93 N. W. 813; Zuelly *v.* Casper (1903), — Ind. —, 67 N. E. 103.] Rice *v.* Smith, 9 Iowa, 570; State *v.* Bailey, 7 id. 390; State *v.* Marshall Cy. Judge, 7 id. 186; Litchfield *v.* Polk Cy., 18 id. 70; Olmstead *v.* Henry Cy. Sup., 24 id. 33; Williams *v.* Peinny, 25 id. 436; Stokes *v.* Scott Cy., 10 id. 166; McMillan *v.* Boyles, 14 id. 107; Rock *v.* Wallace, 14 id. 593; Ten Eyck *v.* The Mayor, 15 id. 486; Chamberlain *v.* Burlington, 19 id. 395; Hanson *v.* Vernon, 27 id. 28; Hubbard *v.* Johnson Cy. Sup., 23 id. 130; Harney *v.* Charles, 45 Mo. 157; Scribner *v.* Allen, 12 Minn. 148; Howes *v.* Racine, 21 Wis. 514; Mitchell *v.* Milwaukee, 18 id. 92, 97; Bond *v.* Kenosha, 17 id. 284, 287; Veeder *v.* Lima, 19 id. 280, 295–299; Rochester *v.* Alfred Bank, 13 id. 432, 439; Sauerhering *v.* Iron Ridge & M. R. Co., 25 id. 447; Warden *v.* Fond du Lac Cy. Sup., 14 id. 618; Kellogg *v.* Oshkosh, 14 id. 623; Nill *v.* Jenkinson, 15 Ind. 425; Lewis *v.* Henley, 2 id. 332; La Fayette *v.* Fowler, 34 id. 140; Harney *v.* Indianapolis, C. & D. R. Co., 32 id. 244; Coffman *v.* Keightley, 24 id. 509; Oliver *v.* Keightley, 24 id. 514; Nave *v.* King, 27 id. 356; Harrison Cy. Com'rs *v.* McCarty, 27 id. 475; Madison Cy. Com'rs *v.* Brown, 28 id. 161; Andrews *v.* Pratt, 44 Cal. 309; Bucknall *v.* Story, 36 Cal. 67; Douglass *v.* Placerville, 18 Cal. 643; Vanover *v.* Justices, etc., 27 Ga. 354; Brodnax *v.* Groom, 64 N. C. 244; Galloway *v.* Jenkins, 63 N. C. 147; Worth *v.* Fayetteville, 1 Wins. (No. 2 Eq. N. C.) 70; Mobile *v.* Waring, 41 Ala. 139; Gilmer *v.* Hill, 22 La. An. 465; White Sulphur Springs Co. *v.* Holly, 4 W. Va. 597; Bull *v.* Read, 13 Gratt. 78; Baltimore *v.* Gill, 31 Md. 375, 395; Stoddert *v.* Ward, 31 Md. 562; Lane *v.* Schomp, 20 N. J. Eq. 82; Merrill *v.* Plainfield, 45 N. H. 126; Barr *v.* Deniston, 19 N. H. 170, 180; New London *v.* Brainard, 22 Conn. 552; Scofield *v.* Eighth School Dist., 27 id. 499, 504; Webster *v.* Harwinton, 32 id. 131; Terrett *v.* Sharon, 34 id. 105; Mercer Cy. Sup. *v.* Hubbard, 45 Ill. 139; Vieley *v.* Thompson, 44 Ill. 9; Cleghorn *v.* Postlewaite, 43 id. 428; Taylor *v.* Thompson, 42 id. 9; Clarke *v.* Hancock Cy. Sup., 27 id. 305, 311; Butler *v* Dun

maintain a civil action for the redress of mere private wrongs. An action can be brought in their name only to uphold and enforce a distinct right on their part in respect to the subject-matter of the controversy.[1]

§ 81. * 143. **Special Provision in New York respecting Action by Grantee of Land held by Disseisor at Time of Conveyance. Partnerships.** The last clause of § 111 (1501, 449, 1909, 1910) in the New York Code was added as an amendment merely for purposes of certainty, and to remove all possible doubts as to the true meaning of the section. As it was originally enacted without this clause, a doubt had sometimes been suggested whether any action at all could be brought under the circumstances mentioned in the amendment, that is, when land had been conveyed by an owner which at the time was held by a disseisor adversely to such true owner. If brought by the grantee, he could show no title, because the conveyance to him would, by virtue of other rules of the law, be deemed a nullity. If brought in the name of the grantor, it might be said that he was not the real party in interest, and, under the requirements of this section, was forbidden to sue. The code was therefore amended so as to exclude the latter construction, by adding the final provision as it now stands. The purpose of this amendment is really to limit and restrict the operation and effect of the section as originally enacted, and not to create any new authority or right as between the grantor and the grantee for the use of the former's name by the latter, nor to create any new title to the land in the grantee himself.[2] An express provision exists in the codes of certain

ham, 27 id. 474; Perkins *v.* Lewis, 24 id. 208; Robertson *v.* Rockford, 21 id. 451; Prettyman *v.* Tazewell Cy. Sup., 19 id. 406; Drake *v.* Phillips, 40 id. 388; Colton *v.* Hanchett, 13 id. 615; Dows *v.* Chicago, 11 Wall. 108. See Dillon on Munic. Corp. §§ 906, 914–924 (4th ed.); Allison *v.* Louisville, etc. R. Co., 9 Bush, 247. See also later cases, Longley *v.* City of Hudson, 4 N. Y. Sup. Ct. 353; Marsh *v.* City of Brooklyn, id. 413; Clay Cy. Com'rs *v.* Markle, 46 Ind. 96, 103–105; Zorger *v.* Rapids Tp., 36 Iowa, 175; Minnesota Oil Co. *v.* Palmer, 20 Minn. 468; Hodgman *v.* Chicago & St. P. R. Co., 28 Minn. 48; Moses *v.* Kearney, 31 Ark. 261; Normand *v.* Otoe Cy. Com'rs, 8 Neb. 18; Noesen *v.* Port Washington, 37 Wis. 168; Benton Cy. Com'rs *v.* Templeton, 51 Ind. 266; Delaware Cy. Com'rs *v.* McClintock, 51 Ind. 325; Turpin *v.* Eagle Creek, etc. Co., 48 Ind. 45; Ayers *v.* Lawrence, 59 N. Y. 192; Metzger *v.* Attica & A. Arc R. Co., 79 id. 171; Newton *v.* Keech, 9 Hun, 355. See also, on this subject, 1 Pomeroy's Equity, §§ 258, 259, 260, 265, 266.

[1] People *v.* Albany & Susq. R. R., 57 N. Y. 161; People *v.* Ingersoll, 58 N. Y. 1; People *v.* Fields, 58 N. Y. 491. See People *v.* Sherwin, 2 N. Y. Sup. Ct. 528; and Wood *v.* The Mayor, etc., 73 N. Y. 556.

[2] Hamilton *v.* Wright, 37 N. Y. 502, 507, per Woodruff J.; Steeple *v.* Down-

States, authorizing partnerships to sue and to be sued by and in their firm names, without making the individual members by name parties to the action.[1] This provision is merely permissive, and not at all compulsory; it is not a substitute for, but an addition to, the former existing methods of conducting suits.[2]

SECTION THIRD.

THE EFFECT OF AN ASSIGNMENT OF A THING IN ACTION UPON THE DEFENCES THERETO.

§ 82. *154. **Statutory Provisions respecting the Effect of Assignment upon Defences.** The statutory provision found in the various State codes which relates to the subject-matter of this section is the following: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defence existing at the time of or before notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before maturity."[3] In Ohio, Kansas, and Nebraska, the phraseology is slightly different. It reads: "The action of the assignee shall be without prejudice to any set-off or other defence now allowed."[4] The consideration of the topics embraced in this provision should, in a strictly scientific method, form a part of the general subject of Defences, and might properly be postponed until this portion of the work is reached; but I have chosen to pursue the order of the codes themselves, which is the same in all the States, rather than to

ing, 60 Ind. 478; Voorhis *v.* Kelly, 31 Hun, 293; Smith *v.* Long, 12 Abb. N. Cas. 113.

[1] See statutory provisions cited in note to § *121, *ante*.

[2] Whitman *v.* Keith, 18 Ohio St. 134.

[3] New York, § 112 (502, 1909, 1910); [Minnesota, St., 1894, § 5157;] California, § 368; Kentucky, § 31; South Carolina, § 135; Oregon, §§ 28, 382; Nevada, § 5; Iowa, § 2546 (slightly altered); North Carolina, § 55; [Utah, Rev. St., 1898, § 2903; North Dakota, Rev. Codes, 1899, § 5222; South Dakota, Ann. St., 1901, § 6071; Arizona, Rev. St., 1901, § 1301; Oklahoma, St., 1893, § 3899; Montana, § 571; Idaho, Code Civ. Pro., 1901, § 3156; Wyoming, Rev. St., 1899, § 3467; Colorado, § 4; Connecticut, Gen. St., 1902, § 650, in a somewhat different form from that given in the text; Indiana, Burns' St., 1901, § 277; Wisconsin, St., 1898, § 2606.]

[4] [Ohio, Bates' Ann. St., § 4993;] Kansas, § 27; [Nebraska, § 31; Washington, Bal. Code, § 4835, in a quite different form.]

adopt one more theoretically correct, yet perhaps not more practically advantageous.

§ 83. * 155. **Defences and Counter-Claims Distinguished.** It is important that the defences which this clause admits should be carefully distinguished from the counter-claim subsequently provided for by the statute. This section speaks of *defences* which, as they ask no affirmative relief, and simply prevent the plaintiff from succeeding, may be made available against an assignee as well as against the original creditor. The counter-claim is more than a defence: it assumes a right of action against and demands a recovery of affirmative relief from the plaintiff in the suit, and is, therefore, impossible as against an assignee suing, if it existed against the assignor. The proposition here stated is very simple and plain, and yet the defences permitted against the assignee by this section have been sometimes confounded with counter-claims, and that even by judges and courts.[1]

§ 84. * 156. **Interpretation of the Statute.** The section quoted above, and which is substantially the same in all the States, does not change the then existing law as to defences under the circumstances mentioned in it. It was not intended to alter the substantial rights of the parties, but only to introduce such modifications into the modes of protecting them as were rendered necessary by the provisions of the preceding section requiring the real party in interest in most cases to be the plaintiff. Taking the two sections together, the plain interpretation of them is: The assignee of a thing in action must sue upon it in his own name, but this change in the practice shall not work any alteration of the actual rights of the parties; the defendants are still entitled to the same defences against the assignee who sues which they would have had if the former rule had continued to prevail, and the action had been brought in the name of the assignor, but to no other or different defences. In other words, the section must be interpreted as though it read as follows: "In the case of the assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defence existing at the time of or before notice of the assignment, which would

[1] [In Iowa, Washington, and Wyoming the statute expressly names both counter-claim and set-off as being unprejudiced by the action of the assignee. Washington, Bal. Code, § 4835; Wyoming, Rev. St., 1899, § 3467; Iowa, Code, 1897, § 3461.]

have been available to the defendant had the action been brought in the name of the assignor." This construction is now firmly and universally established.[1]

§ 85. *157. **The Rule, as Existing Prior to the Codes, Stated. Assignee takes Subject to Equities and Legal Defences.** As the pre-existing rule is thus reaffirmed, a full discussion of the statutory provision requires an examination and statement of that rule itself. In the first place, the general doctrine is elementary that the purchaser of any thing in action, not negotiable, takes the interest purchased subject to all the defences legal and equitable *of the debtor who issued the obligation or security*. That is, when the original debtor, the obligor on the bond, or the promisor, in whatever form his promise is made, if it is not negotiable, is sued by the assignee, the defences legal and equitable which he had at the time of the assignment, or at the time when notice of it was given, against the original creditor, avail to him against the substituted creditor.[2] This doctrine has been applied to all kinds of defences as well as to set-off, and to all forms of contract not negotiable: as, for example, in an action on a bond and mortgage by the assignee, the defence that the bond and the mortgage collateral thereto were given on consideration that the obligee should perform certain covenants contained in an agreement between the parties, which was set out, and that he had wholly failed to perform the same, was held good;[3] in an action brought on a warehouseman's receipt, the same being held not negotiable;[4] in an action by an assignee for the benefit of creditors;[5] and in an action to compel a specific performance, brought by the assignee of the vendee, under a contract for the sale of lands, although the vendee was in possession.[6]

[1] Beckwith *v.* Union Bank, 9 N. Y. 211, 212, per Johnson J.; Myers *v.* Davis, 22 N. Y. 489, 490, per Denio J.

[2] Ingraham *v.* Disbrough, 47 N. Y. 421; Andrews *v.* Gillespie, 47 N. Y. 487; Bush *v.* Lathrop, 22 N. Y. 535, 538, per Denio J.; Blydenburgh *v.* Thayer, 3 Keyes, 293; Callanan *v.* Edwards, 32 N. Y. 483, 486, per Wright J., who thus states the rule: "An assignee of a *chose in action* not negotiable takes the thing assigned subject to all the rights which the debtor had acquired in respect thereto prior to the assignment, or to the time notice was given of it, when there is an interval between the execution of the transfer and the notice." Commercial Bank *v.* Colt, 15 Barb. 506; Ainslie *v.* Boynton, 2 Barb. 258; Wood *v.* Perry, 1 Barb. 114; Western Bank *v.* Sherwood, 29 Barb. 383; Reeves *v.* Kimball, 40 N. Y. 299.

[3] Western Bank *v.* Sherwood, 29 Barb. 383.

[4] Commercial Bank *v.* Colt, 15 Barb. 506.

[5] Maas *v.* Goodman, 2 Hilt. 275; Marine & F. Ins. Bk. of Ga. *v.* Jauncey, 1 Barb. 486.

[6] Reeves *v.* Kimball, 40 N. Y. 299.

§ 86. *158. **Doctrine applies also to Second and Subsequent Assignees.** The doctrine is not confined, however, in its operation to the case of the debtor — the promisor in the thing in action — setting up a defence to an action brought by an assignee upon the demand itself to enforce the collection or performance thereof; it applies also to the second and subsequent assignees of a non-negotiable thing in action, although transferred to the purchaser and holder for full value, and without notice, if there were equities subsisting between the original assignor and his immediate assignee in favor of the former. If the owner and holder of a thing in action not negotiable transfers it to an assignee upon condition, or subject to any reservations or claims in favor of the transferrer, although the instrument of assignment be absolute on its face, this immediate assignee, holding in it a qualified and limited property and interest, cannot convey a greater property and interest than he himself holds; and if he assumes to convey it to a second assignee by a transfer absolute in form, and for a full consideration, and without any notice on the part of such purchaser of a defect in the title, this second assignee nevertheless takes it subject to all the equities, claims, and rights of the original owner and first assignor. The doctrine of so-called "*latent* equities," which has received some judicial support, — that is, the doctrine that the equities of the original assignor, under the circumstances thus stated, are latent and cannot prevail against the title of the second assignee, — is unsound; it is an attempt to extend the peculiar qualities of negotiable paper to things in action not negotiable, and destroys the fundamental distinction between the two classes of negotiable and non-negotiable demands.[1]

§ 87. *159. **Illustrations.** A few illustrations of this rule will serve to show its true meaning, and the extent of its

[1] Bush *v.* Lathrop, 22 N. Y. 535; Anderson *v.* Nicholas, 28 N. Y. 600, approved by Woodruff J. in Reeves *v.* Kimball, 40 N. Y. 311; Mason *v.* Lord, 40 N. Y. 476, 487, per Daniels J.; Williams *v.* Thorn, 11 Paige, 459; McNeil *v.* Tenth Nat. Bank, 55 Barb. 59, 68; s. c. 46 N. Y. 325; Schafer *v.* Reilly, 50 N. Y. 67; Mangles *v.* Dixon, 3 H. of L. Cas. 702. See also, on the subject discussed in this and the succeeding paragraphs, Union Coll. *v.* Wheeler, 61 N. Y. 88, 104, 112; Barry *v.* Equitable Life Ins. Soc., 59 id. 587; Greene *v.* Warwick, 64 id. 220; Loomis *v.* Ruck, 56 id. 620; Davis *v.* Bechstein, 69 id. 440, 442; Matthews *v.* Sheehan, 69 id. 585; Cutts *v.* Guild, 57 id. 229, 232, 233; Reid *v.* Sprague, 72 id. 457, 462; Crane *v.* Turner, 67 id. 437, 440; Combes *v.* Chandler, 33 Ohio St., 178, 181–185; Farmers' Nat. Bk. *v.* Fletcher, 44 Iowa, 252; and see in Pomeroy's Equity, §§ 707–715, where this subject is fully discussed.

application. The holder of a bond and mortgage for $1,400 assigned and delivered them to secure an indebtedness of $270, the assignee giving back a written undertaking to return the same upon being paid that amount. This assignee afterwards transferred the securities to a second, and he to a third assignee, the latter paying full value, and having no notice of any outstanding claims or defects in the title. The original owner tendered to this assignee the $270 and interest thereon, and demanded a return of the bond and mortgage. Upon refusal he brought an action to compel such return; and it was held by the New York Court of Appeals, after a most exhaustive discussion, that he should recover.[1] Certificates of stock being wrongfully taken from the owner and sold to the defendant, it was held that the latter acquired no better or higher title than that held by his immediate transferrer, — the one who wrongfully converted the stock, — and that the original owner could recover the value of the securities with interest; but the decision was partly placed upon the special circumstances of the transfer, which deprived the defendant of the character and position of a *bona fide* purchaser.[2] The lessee of premises assigned the lease by an instrument valid on the face, but the transfer was in fact given as security for a usurious loan made to him by the assignee. This lease was afterwards transferred by the assignee, passed through divers hands, and was finally purchased by the defendant, who knew that the first transfer was intended as a security for a loan, but who had no knowledge nor notice of the usurious taint which affected the loan, and who paid full value as the consideration of the transfer to himself. Subsequent to the original assignment by the lessee, but before the transfer to the defendant, the plaintiffs recovered a judgment against such lessee, which was regularly entered and docketed, and the lessee's interest in the premises leased and in the lease itself was sold on execution,

[1] Bush *v.* Lathrop, 22 N. Y. 535. The opinion of Denio J. is a most able review of all the authorities which seem to sustain the doctrine that certain so-called "*latent equities*" are not protected against an assignment. He shows that all the expressions of judicial opinion to that effect are *obiter dicta*, while a large number of direct decisions necessarily involving the question are opposed to the doctrine. See Ballard *v.* Burgett, 40 N. Y. 314, and the cases cited.

[2] Anderson *v.* Nicholas, 28 N. Y. 600. On account of the peculiar facts referred to in the text, which prevented the defendant from relying upon the defence of *bona fides*, this case cannot be regarded as a direct authority for the doctrine of the text.

bought in by the plaintiffs, and a sheriff's deed of such interest was delivered to them, which deed, however, was executed after the assignment to the defendant. The plaintiffs thereupon commenced an action to recover possession of the leased premises, and to avoid the transfer of the lease to the defendant on account of the usury which affected and nullified the first assignment made by the lessee to his immediate assignee. The New York Court of Appeals, following the doctrine of the decisions quoted above, held that the action could be maintained; that the lessee might have set aside the transfer from himself on account of the usury which tainted it; that the subsequent assignees, including the defendant, succeeded to all the rights, and were subjected to all the disabilities, possessed by and imposed upon the person who transferred the security to them, — the first assignee; and, finally, that the judgment creditors of the lessee were clothed with his rights and powers in the matter.[1]

§ 88. *160. **Doctrine of Estoppel Applied against the Assignor in Case of Quasi-Negotiable Demands.** The principle thus settled, and the cases which support it, are entirely consistent with another doctrine that has lately been approved and established by the same distinguished court, namely, the doctrine of estoppel as applied to the transfer of certain species of things in action which, in the customary practice of business men, have acquired a *quasi*-negotiable character. The doctrine as thus invoked by the court may be stated as follows: The owner of certain kinds of things in action not technically negotiable, but which, in the course of business customs, have acquired a semi-negotiable character as a matter of fact, may assign or part with them for a special purpose, and at the same time may clothe the assignee or person to whom they have been delivered with such *apparent indicia* of title, and instruments of complete ownership over them, and power to dispose of them, as to *estop* himself from setting up against a second assignee, to whom the securities have been transferred in good faith and for value, the fact that the

[1] Mason *v.* Lord, 40 N. Y. 476, 487. The doctrine is directly sustained in the following more recent cases: Schafer *v.* Reilly, 50 N. Y. 61, 67; Reeves *v.* Kimball, 40 N. Y. 299; Ingraham *v.* Disborough, 47 N. Y. 421; Cutts *v.* Guild, 57 N. Y. 229, 232, 233. In the last case Bush *v.* Lathrop is reaffirmed, and its principle pronounced to be "well settled." The result of these authorities is to limit the decision in Moore *v.* Metrop. Nat. Bank, *infra*, and to confine it to the doctrine as laid down in McNeil *v.* Tenth Nat. Bank, *infra*.

title of the first assignee or holder was not absolute and perfect. After some conflict of opinion in the lower courts, the New York Court of Appeals has recently applied the foregoing doctrine to the customary mode of dealing with certificates of stock. It holds that if the owner of such stock certificates assigns them as collateral security, or pledges them, or puts them into the hands of another for any purpose, and accompanies the delivery by a blank assignment and power of attorney to transfer the same in the usual form, signed by himself, and this assignee or pledgee wrongfully sells them to an innocent purchaser for value in the regular course of business, such original owner is *estopped* from asserting, as against this purchaser in good faith, his own higher title and the want of actual title and authority in his own immediate assignee or pledgee. This principle, thus applied to the peculiar state of facts described, and to the particular kind of securities, is in no respect necessarily antagonistic to the general doctrine in relation to things in action before stated in the text. The court rested its decision exclusively upon the form of the blank assignment and power of attorney executed by the assignor and delivered to the assignee, which clothed him with all the *apparent* rights of ownership which are recognized by business men in their usual course of dealing with like securities, as sufficient to confer a complete title and power of disposition upon the assignee. The decision was nothing more than the application of the doctrine of estoppel in circumstances to which it had not before been applied.[1]

[1] McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325, reversing s. c. 55 Barb. 59. The Supreme Court held (1) that certificates of stock were in no respect negotiable, and (2) the rule as laid down by Denio J. in Bush *v.* Lathrop. The law of estoppel was not invoked nor alluded to. In the Court of Appeals the doctrine of latent equities was discussed; the decision of the court in Bush *v.* Lathrop, and the reasoning of Mr. Justice Denio, were expressly recognized as correct, and as applicable to all cases in which the facts do not warrant the application of the principle of estoppel. Mr. Justice Rapallo, in his able judgment, does not discuss the rule in relation to things in action of all kinds; he confines himself exclusively to the particular species of security then before the court, — certificates of stock in stock corporations; and, while he does not claim for them absolute negotiability, he does in fact render them indirectly negotiable by means of the estoppel which arises upon dealing with them in the manner described, which is the mode universally prevalent among business men. Ballard *v.* Burgett, 40 N. Y. 314. In Holbrook *v.* N. J. Zinc Co., 57 N. Y. 616, 622, 623, the doctrine of estoppel was applied to the corporation itself, whose stock had been transferred in good faith, and in the usual manner, to the plaintiff. McNeil *v.* Tenth Nat. Bank, *supra*, and Leitch *v.* Wells, 48 N. Y. 585, were held to be controlling; and Ledwich *v.* McKim, 53

§ 89. *161. **Extension of Doctrine of Estoppel to all Things in Action, making them all practically Negotiable.** This decision, and the rule which it establishes in reference to certificates of stock, are doubtless in the interests of modern business methods. For several years these certificates of stock, with an assignment in blank and a blank power of attorney to effect their surrender and transfer, have been practically regarded by business men as negotiable instruments; they have been used, transferred from hand to hand, and assigned by delivery, in exactly the same manner as bills and notes payable to bearer, and millions of property are constantly ventured upon their use. It was a matter of absolute necessity that the courts should pronounce these securities *practically* negotiable; a contrary ruling would have interrupted and jeoparded the whole financial system of the country. It would have been well if the court had boldly met the question face to face, and had expressly held these securities to be negotiable to all intents and purposes. This course of decision would have produced no unexpected interference with other general doctrines, and it has a precedent in the acts of the American courts holding that municipal and corporation coupon bonds of the ordinary form are negotiable. As the court did not pursue this course, it accomplished the same purpose by resorting to the doctrine of estoppel; and I repeat, that when confined to these peculiar forms of securities which had been made practically negotiable by the course of business, the judgment and its *ratio decidendi* do not affect the general principle in relation to the transfer of things in action which has been stated and illustrated in preceding paragraphs. But the same court has, in a still later case, gone far beyond both the conclusions and the reasoning of its judgment in McNeil *v.* Tenth National Bank, and has virtually obliterated the distinction between negotiable and non-negotiable things in action, at least so far as the relations between assignors and assignees of them are concerned. The doctrine of estoppel, which had been used to protect the customary modes of transacting business with certificates of stock, is now extended to all species of things in

N. Y. 307, was said not to conflict in any manner. It is decided in Nevada that certificates of stock in the ordinary form are not negotiable instruments, so that when such certificates had been stolen and transferred in the customary manner to a *bona fide* purchaser for value, the latter acquired no title as against the owner. Bercich *v.* Marye, 9 Nev. 312.

action, and the effect of an estoppel is declared to be produced from *a mere assignment of the security, absolute on its face, executed by the original owner, and delivered to his assignee.* In short, whenever the owner of a non-negotiable thing in action delivers the same to another person, and accompanies the delivery by an assignment thereof, absolute on its face, and this person transfers the same to a purchaser for value who relies upon the apparent ownership created by the written assignment, and has no notice of anything limiting that apparent title, the original owner is estopped from asserting as against such purchaser any equities existing between himself and his immediate assignee, and any interest or property in the security which he may have, notwithstanding the written transfer. The Court of Appeals, in reaching this conclusion, expressly overrules the decision made upon the facts involved in Bush *v.* Lathrop, but at the same time declares that it does not intend to shake the general doctrine controlling the transfer of non-negotiable things in action upon which that decision is based. It is plain, however, that the ancient and, as it was supposed, well-settled doctrine is substantially abrogated by this last application of the principle of estoppel. The estoppel is made to arise from a mere naked transfer in writing, absolute in form; the *rationale* of the decision is the apparent ownership thus bestowed upon the assignee; and these elements of the judgment will clearly apply to so many cases that things in action are practically rendered negotiable in their nature as between the series of successive holders, — the assignors and assignees. This point being attained, it will be a short and easy step to apply the doctrine of estoppel to the debtor himself, — the obligor or promisor who utters the security. If negotiability is produced by means of estoppel between the assignor and assignee, arising from the fact and form of a transfer from one to another, by parity of reasoning the debtor may be regarded as estopped by the fact and form of his issuing the undertaking and delivering it to the first holder, and thus creating an apparent liability against himself. In short, there is exactly the same reason for holding the debtor estopped from denying his liability upon a written instrument which apparently creates an absolute liability, when that instrument has passed into the hands of a purchaser who has no notice of the actual relations between the original parties, as for holding an assignor

estopped from denying the completeness of a transfer made by him absolute on the face. This result, if reached, would render all things in action practically negotiable.[1]

§ 90. * 162. **Recapitulation of Rules Established independently of the Codes.** As the result of adjudications of which the foregoing are examples, the rules of the law as established independently of the codes may be summed up in the following manner: (1) All defences, either legal or equitable, which existed in favor of the debtor himself against the original creditor at the time of the assignment, or of notice to him of the assignment, of a non-negotiable thing in action, avail to him against the assignee who seeks to enforce the demand against such debtor; (2) When the owner and holder of a non-negotiable thing in action transfers it to an assignee for a special purpose — such as security for a loan, and the like — by an assignment absolute on its face, but as between himself and his assignee retains an interest in or claim upon the demand, and this assignee assumes to transfer the same absolutely to a second assignee who purchases in good faith without notice and for value, the first assignee in fact transfers no higher title than he possesses, and the second assignee takes the thing in action subject to the equities and claims of the original assignor; but (3) in the State of New York a modification of this second rule has been introduced in very recent decisions, and in pursuance thereof, if the original owner accompanies the delivery of the thing in action with a written assignment thereof absolute in form, and therefore apparently vesting the complete ownership in his immediate assignee, an innocent purchaser for value from the latter is protected against any claims, demands, or equities existing in favor of the first assignor; the latter is estopped from asserting his true right and property in the security. This modification, which was at first confined to certificates of stock transferred by means of the customary blank assignment and power of attorney, has been extended to all things in action.

§ 91. * 163. **Effect of Code Provision upon Defence of Set-off. No Substantial Change.** What construction has been put by the courts upon the provision of the codes embodying and reaffirming these general rules? I shall consider in the first place the effect of this provision upon the defence of set-off. No substantial change has been made in the rights of the several parties. The

[1] Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41.

assignee takes the demand assigned subject to all the rights which the debtor had acquired prior to the assignment, or prior to the time when notice was given, if there was an interval between the execution of the transfer and the notice; but he cannot be prejudiced by *any* new dealings between the original parties after notice of the assignment has been given to the debtor. When two opposing debts exist in a perfect condition at the same time, either party may insist upon a set-off. If, therefore, the holder of such a claim already due and payable assign the same, and the debtor at the time of this transfer holds a similar claim against the assignor, which is also then due and payable, he may set off his debt against the demand in the hands of the assignee. If, however, the assignment is made before the opposing demand becomes mature, and the latter does not thus become actually due and payable until after the transfer, the debtor's right of set-off is destroyed by the mere fact of the assignment, and no notice thereof to him is necessary to produce that effect.[1] The following special rule also exists under the peculiar circumstances mentioned. If an insolvent holder of a claim not yet matured assigns the same before maturity, and the debtor at the time of this transfer holds a similar claim against the assignor, which is then due and payable, his right of set-off against the assignee, when the latter's cause of action arises, is preserved and protected.[2] This latter doctrine is based upon

[1] [This is not the rule in California. In St. Louis Nat. Bank *v.* Gay (1894), 101 Cal. 286, 35 Pac. 876, the facts were as follows: On Feb. 4, 1891, defendant made and delivered to D. two non-negotiable notes payable one year from date, which D. assigned on Feb. 24, 1891, to plaintiff. On Feb. 12, 1891, D. made and delivered his negotiable note, payable one year from date, to C., which was regularly assigned to defendant on Oct. 21, 1891. When defendant purchased D.'s note he had no notice that his note to D. had been assigned, and was not notified thereof until Feb. 1, 1892. Thus, neither at the time of the assignment by D. of defendant's notes nor at the time when notice of such assignment was given to defendant, were any of the demands due and payable. But it was held that in a suit by plaintiff on defendant's notes, commenced Aug. 1, 1892, defendant might plead his demand against D. as a valid set-off. The statute provided that "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defence existing at the time of or before notice of the assignment," Code of Civ. Pro., § 368; and it was contended by plaintiff that at the time of the notice of assignment defendant's demand against D. was not an existing set-off, because it was not then due. But the court held that the thing itself — the note, the chose in action — was then existing, which satisfied the statute.]

[See § * 797, *infra*, and notes.]

[2] [In the case of Storts *v.* George (1899), 150 Mo. 1, 51 S. W. 489, the court said: "It has been often ruled in the State of New York, and is now the law in this State, that, if the claim against the assignee was due at the date of the assignment, then there is an equity because

considerations of equity, and is intended to prevent one party from losing his own demand on account of the insolvency of his immediate debtor, and from being at the same time compelled to pay the debt originally due from himself to that insolvent. These three rules existed prior to the codes, and have not been changed by the provisions of the statute under consideration.[1]

of the insolvency of the assignor, and the debt so due may be set off against the claim in favor of the assignee, though the claim held by the assignee was not due at the date of the assignment. . . . But the claim against the assignee must be due at the date of the assignment, and if it is not then due, there is no equitable set-off." See also Homer *v.* Bank of Commerce (1897), 140 Mo. 225, 41 S. W. 790.

But in St. Paul, etc. Trust Co. *v.* Leck (1894), 57 Minn. 87, 58 N. W. 826, the court held that this equitable right of set-off was available against an assignee when the opposing claim held by the defendant was not only unmatured at the time of the assignment, but was not due at the time the set-off was pleaded. Same rule affirmed in Stolze *v.* Bank of Minnesota (1897), 67 Minn. 172, 69 N. W. 172. In Laybourn *v.* Seymour (1893), 53 Minn. 105, 54 N. W. 941, defendants were indebted to a corporation on account. They also held the express contract obligation of the corporation to deliver a certain amount, in value, of manufactured goods. In an action on the account brought by the general assignee of the corporation, the defendants properly set off their claim against the corporation, though no demand had been made for the goods, the insolvency and assignment making the demand unnecessary.

The equitable right of set-off cannot be used to obtain an unjust preference by a creditor of an insolvent debtor. Thus, in Northern Trust Co. *v.* Healy (1895), 61 Minn. 230, 63 N. W. 625, where the debtor of an insolvent purchased a claim held by a third person against the insolvent, for the purpose of using the same as a set-off, having reasonable cause to believe, when he purchased it, that his creditor was insolvent, it was held that he could not use the claim as a set-off.]

[1] [Stadler *v.* First Nat. Bank (1899), 22 Mont. 190, 56 Pac. 111, quoting § *163 of the text with approval.] Beckwith *v.* Union Bank, 9 N. Y. 211; Myers *v.* Davis, 22 N. Y. 489; Martin *v.* Kunzmuller, 37 N. Y. 396; Blydenburgh *v.* Thayer, 3 Keyes, 293; 34 How. Pr. 88; Watt *v.* Mayor, etc., 1 Sandf. 23; Wells *v.* Stewart, 3 Barb. 40; Ogden *v.* Prentice, 33 Barb. 160; Adams *v.* Rodarmel, 19 Ind. 339; Morrow's Assignees *v.* Bright, 20 Mo. 298; Walker *v.* McKay, 2 Metc. (Ky.) 294; Roberts *v.* Carter, 38 N. Y. 107; Williams *v.* Brown, 2 Keyes, 486; Robinson *v.* Howes, 20 N. Y. 84; Maas *v.* Goodman, 2 Hilt, 275; Merrill *v.* Green, 55 N. Y. 270, 274; Lathrop *v.* Godfrey, 6 N. Y. Sup. Ct. 96; Frick *v.* White, 57 N. Y. 103; Gildersleeve *v.* Burrows, 24 Ohio St. 204. When negotiable paper is transferred after maturity, the maker has the same right to avail himself of a claim against the assignor as a set-off that he would have if the demand assigned was not negotiable. Norton *v.* Foster, 12 Kan. 44, 47, 48; Leavenson *v.* Lafontane, 3 Kan. 523, 526. As further illustrations of the text, see Martin *v.* Pilsbury, 23 Minn. 175; Davis *v.* Sutton, 23 id. 307; Davis *v.* Neligh, 7 Neb. 84; Downing *v.* Gibson, 53 Iowa, 517; Chapman *v.* Plumer, 36 Wis. 262; Harte *v.* Houchin, 50 Ind. 327; Heavenridge *v.* Mondy, 49 Ind. 434; Turner *v.* Campbell, 59 Ind. 279; Barlow *v.* Myers, 64 N. Y. 41, reversing 3 Hun, 720; 6 T. & C. 183; Shipman *v.* Lansing, 25 Hun, 290; Seymour *v.* Dunham, 24 id. 93; Taylor *v.* The Mayor, etc., 20 id. 292; Huse *v.* Ames, 104 Mo. 91; Rayburn *v.* Hurd, 20 Or. 229; Fuller *v.* Seiglitz, 27 Ohio St. 355. The defendant, it has been held, in pleading his set-off or counterclaim must allege that it matured before the assignment of the claim on which he is sued. Francis *v.* Leak (Ind. App., 1893), 33 N. E. 807. In support of the third

§ 92. *164. **Illustrations.** The true extent and limitations of the doctrine will best be seen in its application to the facts of decided cases. On the 24th of August, 1850, the firm of W. C. & A. A. Hunter, having on deposit in the Union Bank the sum of $3,000, made a general assignment to one Beckwith. At the time the bank was holder of a bill of exchange, which was indorsed by the firm and had been discounted by the bank for them. This bill fell due on the 27th of August, and, not being paid, the amount of it was charged against the firm in their account by the bank. On the next day, the 28th, the assignee for the first time notified the bank of the assignment, and demanded payment of the sum on deposit to the firm's credit, which was refused. The assignee brought a suit to recover the debt, and the bank set up the amount due on the bill of exchange as an offset. It was held by the Superior Court of New York City, and by the Court of Appeals, that the demand in favor of the bank could not be set off, as it was not an existing demand payable when the assignment was made; and that no notice was necessary by the assignee to protect himself against such a defence. Notice is only necessary against subsequent acts and dealings of the debtor with an assignor, which might prejudice the rights of the assignee, such as payment.[1] In March, 1855,

(special) rule stated in the text, see Smith *v.* Spingler, 83 Mo. 408; Green *v.* Conrad (Mo. Sup., 1893), 21 S. W. 839; Armstrong *v.* Warner (Ohio, 1892), 31 N. E. 877; Fera *v.* Wickham, 61 Hun, 343; Laybourn *v.* Seymour (Minn., 1893), 54 N. W. 941, and cases cited; Yardley *v.* Clothier, 51 Fed. Rep. 508, and cases cited; Louis Snyder's Sons Co. *v.* Armstrong, 37 Fed. Rep. 18; Balbach *v.* Frelinghuysen, 15 Fed. Rep. 685; Jones *v.* Piening (Wis., 1893), 55 N. W. 413.

[In Wyman *v.* Robbins (1894), 51 O. St. 98, 37 N. E. 264, it was held that where an indorsee of a promissory note brings an action on it against the maker, the latter may set off an indebtedness due him from a previous indorsee, when such indebtedness existed while such indorsee held the note and both note and indebtedness were then past due.

Way *v.* Colyer (1893), 54 Minn. 14, 55 N. W. 744: In an action by an assignee of a judgment, the defendant may plead as a set-off against the judgment an indebtedness to him of the assignor, who was the original judgment creditor, existing at the time of the assignment of the judgment.

Wolf *v.* Shelton (1902), 159 Ind. 531, 65 N. E. 582: A purchaser of real estate under a warranty deed has the right to set off against his warrantor's assignee of a non-negotiable note, given for the unpaid purchase money, a sum that the purchaser has been compelled to pay to relieve his purchase from a pre-existing debt.]

[1] Beckwith *v.* Union Bank, 9 N. Y. 211, 212. [See, as to necessity of notice, Stadler *v.* First Nat. Bank (1899), 22 Mont. 190, 56 Pac. 111.] See, however, Smith *v.* Fox, 48 N. Y. 674, which was an action by an assignee for the benefit of the creditors of one R., a private banker, brought on a note given by defendant to R., and transferred to the plaintiff. At the time of the assignment defendant had an amount of money on deposit with R., — more than sufficient to pay the note; and this demand was held to be a good set-off against the note, on

the firm of Watrous & Lawrence made a general assignment to one Meyers, having before that time sold goods to the defendants on credit, the price of which did not become due and payable until September, 1855. In February of the same year, W. & L. had ordered from the defendants a quantity of articles — patent churns — to be manufactured and delivered at a certain agreed price. There had been such mutual dealings between the parties before. In May, 1855, the defendants completed the churns, and tendered them to the assignee, who declined to receive them. The assignee brought an action for the price of the goods when it became due in September, and the defendants insisted upon the value of the churns as an offset. The defence of offset was rejected. The court held that the situation of the parties at the date of the assignment must determine the question, and unless a right of offset existed *then*, it could not arise afterwards. It did not exist then, because neither of the demands had matured; but it was enough that the defendant's claim was not yet payable, even if the one assigned was presently due.[1] If the defendant's demand had become mature at the time of the assignment, it could undoubtedly have been set off under the equitable rule before stated, on account of the insolvency of W. & L. A firm made a general assignment, having at the time a claim due and payable against the defendants. The assignee brings an action upon the demand, and the defendants set up a note of the assignors which they held at the time of the assignment, but which did not fall due until after that date. The attempted set-off was rejected. "An allowance to a party by way of set-off is always founded on an *existing* demand *in præsenti*, and not on one that may be claimed *in futuro*."[2] In an action by an as-

the authority of Smith *v.* Felton, 43 N. Y. 419. The claim made against the defendant, and the demand set up by him, must both affect him in the same capacity; thus, when the defendant is sued for a personal debt, he cannot interpose as a set-off a demand due him as an executor. Barlow *v.* Myers, 6 N. Y. Sup. Ct. 183.

[1] Myers *v.* Davis, 22 N. Y. 489, 490, citing Chance *v.* Isaacs, 5 Paige, 592; Bradley *v.* Angell, 3 N. Y. 475, 493. [This case, Myers *v.* Davis, was quoted and approved in Stadler *v.* First Nat. Bank (1899), 22 Mont. 190, 56 Pac. 111.] See also Fera *v.* Wickham, 135 N. Y. 223, reversing s. c. 61 Hun, 343, and overruling Rothschild *v.* Mack, 42 Hun, 73. In Kentucky, however, the assignor's insolvency is a sufficient ground for allowing the set-off of a claim not due at the time of the assignment. Kentucky Flour Co.'s Assignee *v.* Merchants' Bank (Ky., 1890), 13 S. W. 910. [Same rule in Minnesota: St. Paul, etc. Trust Co. *v.* Leck (1894), 57 Minn. 87, 58 N. W. 826.]

[2] Martin *v.* Kunzmuller, 37 N. Y. 396; Watt *v.* The Mayor, etc., 1 Sandf. 23; Wells *v.* Stewart, 3 Barb. 40.

signee for the benefit of creditors, the defendant relied upon a judgment for costs recovered by himself against the assignor after the making of the transfer. This set-off was not admitted, and it was decided that no notice of the assignment was necessary to cut off such a defence.[1] And when the defendants, in an action brought upon an assigned demand, alleged payments which they had made, subsequent to the assignment, as sureties for the assignor upon a liability existing prior to and at the time thereof, this set-off was overruled on the same principle; for, although there was a liability which *might* result in a debt, there was no existing debt until the payment had actually been made.[2] In another action by an assignee the defendant insisted that a similar set-off arising from his payment as surety for the assignor, made under the same circumstances as the last, should be allowed as within the equitable rule on account of the assignor's insolvency. The set-off was rejected, however, because there was no existing indebtedness in favor of the defendant against the assignor at the date of the assignment. Such a present indebtedness is indispensable, whether the case is to be governed by the ordinary rule, or whether the equitable doctrine based upon the assignor's insolvency[3] is relied upon.[4] When a negotiable prom-

[1] Ogden *v.* Prentice, 33 Barb. 160. See also Lucas *v.* East Stroudsburg Glass Co., 38 Hun, 581.

[2] Adams *v.* Rodarmel, 19 Ind. 339.

[3] [The meaning of the word "insolvency," as used in this connection, was considered by the supreme court of Montana in Stadler *v.* First Nat. Bank (1899), 22 Mont. 190, 56 Pac. 111. The court, after quoting the above portion of the text, said: "Insolvency has two meanings. In its popular sense, it signifies the condition of a person whose entire assets are insufficient to pay his debts in full. The term is, however, used in a restricted sense to express the present ability of a trader to pay his current obligations as they mature, in the usual course of business. . . . The National Bank Act seems strongly to imply that, so long as an association is carrying on its business and meeting its obligations as they mature, whatever its actual condition as to future ability may be, it is, in the absence of fraud, not to be deemed insolvent, as between itself and its customers; and that it does not become so until, at the least, it commits an act of insolvency, and probably not until it suspends payment or is closed by the government."]

[4] Walker *v.* McKay, 2 Metc. (Ky.) 294. [And in Merchants' Nat. Bank *v.* Robinson (1895), 97 Ky. 552, 31 S. W. 136, the court said: "An unmatured debt cannot be set off against a *bona fide* assignee for value of a demand due from the defendant to the assignor." See also Stadler *v.* First Nat. Bank (1899), 22 Mont. 190, 56 Pac. 111, quoting the text. See, to the contrary, Stolze *v.* Bank of Minnesota (1897), 67 Minn. 172, 69 N. W. 172; St. Paul, etc., Trust Co. *v.* Leck (1894), 57 Minn. 87, 58 N. W. 826; St. Louis Nat. Bank *v.* Gay (1894), 101 Cal. 286, 35 Pac. 876.] See, however, Morrow's Assignees *v.* Bright, 20 Mo. 298, in which the set-off was allowed, the court plainly mistaking or misconceiving the extent and limitations of the equitable doctrine flowing from the insolvency of the assignor. See also the decision in Chenault *v.* Bush, 84 Ky. 528, which is similar to that in

issory note is assigned before it becomes due, the maker thereof cannot offset against the assignee a claim existing against the original payee and assignor of the note, although the assignee have notice of such claim at and before the time of the transfer to him; there is no case for the set-off between the original parties at the date of the assignment, because the demands are not then matured, and the notice given to the assignee is not of any existing legal defence.[1] There being no possibility of setting off a claim of damages arising from a tort or fraud against a demand growing out of contract, if two such opposing claims exist and are in suit, and the creditor in the contract assigns his cause of action, which is afterwards merged in a judgment in favor of the assignee, and subsequently to that assignment the opposing party — the debtor in the contract — obtains a judgment for the damages in his action on the tort, the latter is not entitled to set off this judgment against the one recovered against himself by the assignee. No rights of set-off existed at the date of the transfer, and none could spring up after that time.[2]

§ 93. *165. **Right of Set-off may be Available although once Suspended. Illustration.** It is possible that a right of set-off may be available at the time an action is brought, although at some prior period it was suspended, as is well illustrated by the following case: On the 29th of August the Hollister Bank discounted for one Monteath a sight draft on New York drawn by him, and passed the proceeds to his credit as a deposit. He did not draw them out. This draft was dishonored on presentment.

Morrow's Assignees *v.* Bright. The latter case has recently been overruled by Huse *v.* Ames, 104 Mo. 91, and the rule in Walker *v.* McKay, stated in the text, now prevails in Missouri. See also, in support of the text, Kinsey *v.* Ring (Wis., 1892), 53 N. W. 842.

[1] Williams *v.* Brown, 2 Keyes, 486. See also Barlow *v.* Myers, 6 N. Y. Sup. Ct. 183; s. c. reversed on appeal, 64 N. Y. 41. But, where negotiable paper is assigned after maturity, the maker's rights of set-off are the same as though the demand assigned was not negotiable. Norton *v.* Foster, 12 Kan. 44, 47, 48; Leavenson *v.* Lafontane, 3 Kan. 523; Harris *v.* Burwell, 65 N. C. 584; *contra*, Richards *v.* Darly, 34 Iowa, 427, 429. The maker has the same rights of set-off also when the note is assigned before maturity, but not in good faith and for a valuable consideration. Bone *v.* Tharp, 63 Iowa, 223. In Richards *v.* Union Village, 48 Hun, 263, and in Richards *v.* La Tourette, 53 Hun, 623, claims in the hands of the defendants were not allowed to be offset against demands sued upon by assignees not due at the time of the assignment; in the first case, against an order for the payment of money; in the second case, against a bond and mortgage. It is fair to say, however, that in neither of these cases was Barlow *v.* Myers mentioned.

[2] Roberts *v.* Carter, 38 N. Y. 107. See Martin *v.* Richardson, 68 N. C. 255.

On the 31st the bank failed, and in the course of time Robinson was appointed its receiver. On the 21st of September Monteath assigned to the Howes his claim against the bank for the sum on deposit, the same being partly or wholly the proceeds of the said draft. At the time of the assignment the draft in question was held by parties in New York, to whom the bank had transferred it as collateral security; and, of course, during the interval in which the draft was thus held, the bank could have had no possible set-off by means of it against the demand of Monteath for his deposit, either made by him or by his assignee. But before any action was brought, the bank again became owner of the draft. An action was afterwards commenced by the receiver to recover an indebtedness due to the bank from the Howes; they set up the claim of Monteath for his deposit assigned to them, as above stated; and the receiver in fact opposed the demand of the bank against Monteath upon the dishonored draft as a set-off to the defendants' set-off.[1] Although the New York Court of Appeals held that the debt against the bank assigned to the defendants by Monteath should be disallowed, yet their entire reasoning shows that it was disallowed, not because it would not in itself have been a valid set-off, but because its effect was entirely destroyed by the counter set-off of the draft in the hands of the bank. If the bank had retained the continuous ownership of the draft, as soon as it was dishonored it would have been a good claim against Monteath, and would have extinguished, in whole or in part, his claim for the money due on deposit; this set-off existing at the date of the assignment to the defendants would have been equally available against them; and as the bank became owner of the draft before the action was brought, its original right revived with the same force and to the same extent as though the draft had never been out of its control.[2]

§ 94. *166. **California Rule. Set-off of Demand Accruing after Assignment but before Notice.** It is held, in California, that a demand against an assignor, which was obtained by the debtor or accrued in his favor before notice of the assignment, although in fact subsequent to the assignment itself, may be set off against

[1] [In Hammer *v.* Downing (1901), 39 Ore. 504, 64 Pac. 651, it was held that a set-off to a plea of set-off is bad, and constitutes a departure in pleading. See, however, cases cited in note to § *748.]

[2] Robinson *v.* Howes, 20 N. Y. 84.

the cause of action in the hands of the assignee.[1] This ruling, however, is clearly opposed to the doctrine of the New York cases already quoted, and to the theory of set-off generally adopted. Notice may be required in order to cut off other defences; but a set-off, according to the accepted rule, must exist in the form of a debt then due and payable to the debtor at the date of the transfer. A note, payable on demand, with or without interest, transferred at a considerable interval of time after its date, is taken and held by the assignee, subject to all defences existing in favor of the maker against the payee at the time of the transfer; in other words, such a note is transferred after maturity.[2]

§ 95. *167. **Nature of Notice Necessary to protect Assignee. Defendant's Rights as against Assignee purely Defensive.** When notice to the debtor is necessary to a complete protection of the assignee against subsequent transactions between the assignor and the debtor, such as payment, release, and the like, an actual notice is not indispensable. Such information or knowledge as would be sufficient to put any reasonable man upon the inquiry, when an inquiry reasonably followed up would have led to an ascertaining of the truth, is equally effective to protect the assignee; in short, the equitable rule in reference to purchasers of land applies to the assignees of things in action.[3] In Ohio, a set-off against the person beneficially interested, for whose benefit the suit is prosecuted, may be interposed when the action is brought by one who is, within the meaning of the code, a trustee of an express trust, and there has been no assignment at all. Thus, where a promise is made to A. for the benefit of B., and

[1] McCabe *v.* Grey, 20 Cal. 509. [The case of McCabe *v.* Grey was affirmed in St. Louis Nat. Bank *v.* Gay (1894), 101 Cal. 286, 35 Pac. 876, the court saying: "Appellant refers to the fact that in Pomeroy on Remedies and Remedial Rights, § *166, McCabe *v.* Grey, 20 Cal. 510, was hostilely criticised; but in this instance, at least, the opinion of the text-writer has not overruled the decision of the court."

The same rule seems to obtain in Kentucky. In Huber *v.* Egner (1901), Ky., 61 S. W. 353, it was held that the maker of a note is entitled, in an action by the assignee, to plead as a set-off the amount of a time deposit he made with the payee after the assignment, when the certificate of deposit became due before he had notice of the assignment.] See also Martin *v.* Wells, Fargo, & Co.'s Exp. (Ariz., 1892), 28 Pac. 958.

[2] Herrick *v.* Woolverton, 41 N. Y. 581, reversing s. c. 42 Barb. 50. This case decides nothing new in the law of set-off; it simply ends a long controversy in the New York courts upon the question whether notes on demand *with interest* are continuing securities, or whether, like such notes without interest, they become due at once.

[3] Wilkins *v.* Batterman, 4 Barb. 47; Williamson *v.* Brown, 15 N. Y. 354.

the former, in pursuance of the express permission of the code, brings the action in his own name, a set-off existing against B., who is the real party in interest, the beneficiary for whose behalf the contract was made and the suit is maintained, may be pleaded, and, if proved, will be allowed in total or partial bar of the recovery.[1] While in actions prosecuted by assignees the defendant can always avail himself of any existing valid set-off, and sometimes counter-claim, *as a defence*, he cannot recover a judgment against the assignee for the excess of any of his claim over the amount of debt established by the plaintiff; as against the assignee, a set-off and a counter-claim of the same nature — that is, a right of action which would be a counter-claim if prosecuted against the original assignor — can only be used defensively, and can do no more than defeat the action entirely.[2]

§ 96. *168. **Actions to wind up Insolvent Corporations. Doctrine of Set-off Complicated by other Considerations.** Many difficulties have arisen, and many cases have been decided, growing out of proceedings to wind up insolvent corporations, and especially insolvent insurance companies; but, as the questions generally turned upon particular provisions of charters, or of statutes regulating such proceedings, little or no aid can be obtained from these decisions in construing the section of the code under consideration. A portion of these companies were mutual, in which every person assured became at once a corporator, so that in any business transaction between himself and the company he would necessarily occupy both the position of creditor and of debtor. This double relation is destructive to any power on his part of invoking the doctrine of set-off. Other companies were stock corporations, and, in addition to the rules as to set-off common to all creditors and debtors, there are special statutory provisions in many States regulating the winding up of these bodies, which greatly enlarge the scope of set-off. The adjudications made in the settlement of such corporations, and the particular rules applicable to them adopted by the courts, have, therefore, little or no connection with the subject-matter of the present discussion. In the case of a mutual company there is no room for any set-off, as has been expressly determined.

[1] Miller & Co. *v.* Florer, 15 Ohio St. 148, 151.

[2] Leavenson *v.* Lafontane, 3 Kans. 523, 525; Loomis *v.* Eagle Bank, 10 Ohio St. 327; Casad *v.* Hughes, 27 Ind. 141.

A marine insurance company having become insolvent, and a receiver of its affairs appointed, he brought an action on certain notes given by the maker thereof for the premium of several policies of insurance. A loss had occurred on one of these policies which became due and payable before any of the notes fell due, and before the appointment of the receiver and the assignment to him. There was an interval of time, then, both before the appointment of the receiver and afterwards, during which the company first and the receiver subsequently were holders of a claim against the defendant not yet matured, while the defendant was holder of a claim against the company which *was* due and payable. Upon the general doctrine as heretofore stated in the text, the maker of these premium notes could not have had an available set-off against the assignee, because at the date of the transfer both demands had not matured; but, as his own claim was then due and payable, the equitable rule founded upon the insolvency of the assignor would have relieved him. The set-off was entirely rejected, however, on the ground that the company was mutual, the defendant being a corporator, and both a debtor and a creditor.[1] In other cases brought by the receiver of an insolvent insurance company, not mutual, upon premium notes, claims by the makers of the notes on account of losses which occurred previous to the appointment of the receiver, but not adjusted so as to become actually payable until after the transfer to him, have been allowed as offsets, not, however, by virtue of the general law as to offsets, — it being held that they did not fall within the settled rules, — but by virtue of certain provisions contained in the statute relating to insolvent corporations which describe such claims as "mutual credits," and direct them to be set off.[2]

§ 97. *169. **Right of Set-off in Actions by Personal Representatives. Rule in New York.** When an executor or administrator sues individually on a note given, or a promise made to him as such personal representative for a debt owing to the deceased at the time of his death, it is the rule in New York that the defendant cannot set off claims due to himself from such decedent, although

[1] Lawrence *v.* Nelson, 21 N. Y. 158. It was conceded, by way of a *dictum*, that if the corporation had not been mutual, the set-off would have been allowed as stated in the text.

[2] Osgood *v.* De Groot, 36 N. Y. 348. See, however, Osgood *v.* Ogden, 4 Keyes, 70.

accruing prior to the death, "on the ground that the plaintiff's demand arose after the death of the testator; and in such a case, no set-off can be received, notwithstanding it existed at the time of the death of the deceased." [1]

§ 98. *170. **Rules as to Set-off apply to other Defences, except that it is Notice, not Assignment, which cuts off Availability.** The foregoing cases and statements relate to the special defence of set-off as against the assignee. Exactly the same rules apply to every other species of defence, with the single modification that, in respect of many such defences, the point of time which limits the effect or cuts off the availability of the defence is not the date of the assignment, but the date of the notice thereof, actual or implied, which is given to the debtor. If the debtor is not notified actually or impliedly of the assignment, it is possible that many transactions between himself and the assignor, done in good faith on his part, may have the same effect in discharging his indebtedness as if the demand had not been assigned, — such as payment to or release by the original creditor, the assignor.[2] But no transaction can have this effect if entered into subsequently to a notice of the assignment given to the debtor, or to such information received by him as in law amounts to the same thing as actual notice. Thus, if after a notice to the debtor that the demand against him is assigned, he make a payment to the assignor, he cannot rely upon it as a defence partial or total to an action brought by the assignee to enforce the claim.[3]

The scope of this work does not require nor even permit that I should discuss the defence of set-off, or any other particular defence, in an exhaustive manner. The sole purpose of this section is to construe and interpret the provision, found in almost the same language in all the State codes of procedure, and to ascertain what change, if any, that provision had wrought in the pre-existing rules of the law in relation primarily to parties, and incidentally to the availability of defences where the party plaintiff is an assignee of a thing in action.

[1] Merritt *v.* Seaman, 6 N. Y. 168, citing Root *v.* Taylor, 20 Johns. 137; Fry *v.* Evans, 8 Wend. 530; Mercein *v.* Smith, 2 Hill, 210; 2 R. S. 279.

[2] Hogan *v.* Black, 66 Cal. 41; Randall *v.* Reynolds, 20 J. & S. 145.

[3] Field *v.* The Mayor, etc. of N. Y., 6 N. Y. 179; McCloskey *v.* San Francisco, 66 Cal. 104.

SECTION FOURTH.

WHEN A PERSON OTHER THAN THE REAL PARTY IN INTEREST MAY SUE.

§ 99. *171. **Statutory Provisions.** There are two forms of the statutory provision, which differ, however, very slightly. The first is: "An executor, an administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted.[1] A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."[2] The second form is a little more special: "An executor, administrator, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."[3] The only difficulties of interpretation presented by this section are the determining with exactness what persons are embraced within the three classes, described as "trustees of an express

[1] [The use of the word "may" instead of "must" allows the action to be brought either by the trustee or the beneficiary. In Hutchison *v.* Myers (1893), 52 Kan. 290, 34 Pac. 742, the court said: "But granting that Holmes, who is named as trustee in the instrument, is the trustee of an express trust, we see no reason why the beneficiary may not properly bring the action. . . . As will be observed, the provision authorizing the trustee to bring an action is permissive rather than mandatory in its terms, and hence will not preclude the maintenance of an action in the name of the real party in interest." And in Snell *v.* Harrison (1895), 131 Mo. 495, 32 S. W. 37, it was held that where a trustee of an express trust holding the legal title to land institutes a partition proceeding and joins the *cestuis que trustent*, who are minors, such joinder is not sufficient ground for the abatement of the action.]

[2] N. Y. § 113 (449); Cal. § 369; South Carolina, § 136; Oregon, § 29; Nevada, § 6; North Carolina, § 57; [Utah, Rev. St., 1898, § 2902; North Dakota, Rev. Codes, 1899, § 5223; South Dakota, Ann. St., 1901, § 6072; Arizona, Rev. St., 1901, §§ 1299, 1300; Washington, Bal. Code, § 4825; Montana, § 570; Idaho, Code Civ. Pro. 1901, § 3157; Colorado, § 5; Arkansas, Sand. & Hill's Dig. § 5626; Connecticut, Gen. St., 1902, § 620; Wisconsin, St., 1898, § 2607; Indiana, Burns' St., 1901, § 252; Minnesota, St., 1894, § 5158; Missouri, Rev. St., 1899, § 541.]

[3] Ohio, § 27; Kansas, § 28; Iowa, § 2544; [Oklahoma, St., 1893, § 3900; Wyoming, Rev. St., 1899, § 3469, Kentucky, § 21, in a somewhat different form; Nebraska, § 32.]

trust," "persons with whom or in whose name a contract is made for the benefit of another," and "persons expressly authorized by statute to sue." It is plain that there are substantially three classes. The second and better form of the provision actually separates them, and does not represent one as a subdivision of the other. The first form in terms speaks of "the person with whom or in whose name a contract is made for the benefit of another," as an instance or individual of the wider and more inclusive group, "trustees of an express trust." It should be carefully noticed, however, that these two expressions are not stated to be synonymous; the former is not given as a definition of the latter. The section does not read, "a trustee of an express trust shall be construed to mean a person with whom or in whose name a contract is made for the benefit of another;" but simply that the latter shall be regarded as one species of the genus. There is here no limitation, but rather an extension, of the meaning, and the clause of course recognizes other kinds of trustees besides the party to the special form of contract, who is not very happily termed a "trustee." The section of the New York code, when originally passed, contained but the first sentence as it now stands. Some doubt arose as to its meaning, and a judicial decision having held that the phrase embraced, among others, a person with whom or in whose name a contract is made for the benefit of another, the legislature, to remove all possibility of doubt, added this judicial language as an explanatory clause. The two forms of the provision, although their phraseology differs somewhat, mean exactly the same thing, and establish exactly the same rule. As these two phrases, whether they be regarded as separated, or one as partially explanatory of the other, are the most comprehensive ones in the section, and present the main difficulties of construction, I shall discuss them first in order, and shall endeavor to ascertain what particular classes of persons were intended to be described by them. This discussion will consist in discovering, if possible, some general principle of interpretation by which to test each particular case, and in stating the instances which have been definitely passed upon by the courts.

§ 100. *172. **Meaning of Term, "Trustee of an Express Trust." Theoretical View.** What is a "trustee of an express trust"? The section uses the term in its most general sense without limi-

tation, so that when its full legal signification is ascertained, *that* must be its meaning in this connection. If the legislature has said, as in New York and other States, that, in addition to its generally accepted technical import, it shall also include certain persons who are not usually, nor perhaps with strict accuracy, denominated "trustees," this exercise of the legislative power within the domain of definition does not change, certainly does not lessen, its signification, as it stands without the explanatory comment. In Ohio, and in several of the States, the phrase is used alone, but accompanied by the clause which is descriptive of another class, and is not a mere partial explanation. We must find the true legal definition of "trustees of an express trust," and add to this the "persons with whom or in whose name contracts are made for the benefit of others;" the combined result will be the entire class intended by the legislature.[1] It is obvious that the trust must be "express," in contradistinction to implied. In the large number of instances where a trust is raised by implication of law from the acts, circumstances, or relations of the parties, the trustee is certainly not embraced within the language of the provision. An *express* trust assumes an intention of the parties to create that relation or position, and a direct act of the parties by which it is created in accordance with such intention, outside of the mere operation of the law. In the case of an implied trust, the law, for the purpose of doing justice, and usually for the purpose of working out some equitable remedy, lays hold of the prior situation, acts, or circumstances of the parties, declares that a trust arises therefrom, and imposes the quality of trustee upon one, and of beneficiary upon another, in a manner and with a result that are often the furthest possible from their actual design. In an express trust the parties intend such a relation between themselves, carry out their intention by suitable words, and the law confirms and accomplishes the object which they had in view. An express trust primarily assumes three parties: the one who by proper language, creates, grants, confers, or declares the trust; the second who is the recipient of the authority thus conferred; and the third for

[1] [The statute authorizing the trustee of an express trust to sue in his own name without joining the beneficiary, has no application to a case where the object of the suit is to give the trustee powers not conferred upon him by the instrument creating the trust: Sampson *v.* Mitchell (1894), 125 Mo. 217, 28 S. W. 768.]

whose benefit the authority is received and held. It is true that in many instances the first-named parties are actually but one person; that is, the same individual declares, confers, receives, and holds the authority for the benefit of another; but the theory of the transaction is preserved unaltered, for the single person who creates and holds the authority acts in a double capacity, and thus takes the place of two persons. It is impossible, however, to conceive of an express trust as a legal transaction or condition, without assuming the prior intention, and the express language by which this intention is effected, and the trust created resting upon one as the trustee for the benefit of a second as the beneficiary; and, except as every grant, transfer, or delegation of authority and power is in a certain broad sense a contract, the notion of a contract is not essential to our conception of an express trust. The authority may be conferred by the public acting through governmental machinery, as in the case of officers, or by the intervention of courts, as in the cases of administrators, executors, receivers, and the like; or by private persons, as in innumerable instances of trusts relating to real or personal property; but there must be the intent to accomplish that very result, and this intent must be expressed by language or by some process of delegation which the law regards as an equivalent. Furthermore, in its accurate legal signification, a trust implies something which is the subject thereof. Although the word may have a more extensive meaning in its popular use, so that a trust may be spoken of where the trustee is simply clothed with a power to do some personal act unconnected with any property in which he has an interest or over which he has a control, yet this is not its legal import. An illustration of this legal notion of a trustee may be seen in the case of a guardian over the person alone of his ward, without any interest in or power over his estate, or the committee of the person of a lunatic. Such a guardian or committee, although possessing a power to be exercised for the benefit of another, is not a trustee; and the term, when applied to him, could be used only in a popular and not a legal sense. Such a guardian or committee would not therefore, by virtue merely of the permission granted in the provision of the statute under examination, be entitled to sue in his own name as a trustee of an express trust. In the light of this analysis of the expression as a term of legal import, it is plain that "a person

with whom or in whose name a contract is made for the benefit of another," is not necessarily a trustee. He may be; and whether he is or is not must depend entirely upon the nature and subject-matter of the contract itself. The contract may be of such a kind, stipulating concerning property in such a manner, that the contracting party will be made a trustee. On the other hand, it may be of such a kind, having no reference perhaps to property, or stipulating for personal acts alone, that the contracting party will not be a trustee in any proper sense of the word, but will be at most an agent of the person beneficially interested. There are numerous instances, therefore, in which an agent, who enters into an agreement for either a known or for an unknown principal, is permitted, in accordance with the particular clause under consideration, to sue in his own name.

§ 101. *173. **Judicial View.** I shall proceed to show, in the first place, how far the foregoing description is sustained by judicial authority. Few cases have attempted to define the phrase, "trustee of an express trust," in any comprehensive manner, for the courts have in most cases been content with determining whether the particular instance before them fell within the term. The following definitions or descriptions, however, have been given: "An express trust is simply a trust created by the direct and positive acts of the parties, by some writing, or deed, or will. And it is to be observed, in reference to § 4 of the code [of Indiana], that it does not assume to define the meaning of the term 'trustee of an express trust' in its general sense; it simply declares that these words, within the meaning of the section, 'shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.' Evidently this provision was not intended to limit the meaning of the general term, 'express trust,' or to confine the operation of the statute to the particular class of cases referred to, but rather to enlarge its sense by including also that class within it."[1] In another case it was said: "In order to constitute a trustee of an express trust, as I understand the statute, there must be some express agreement to that effect, or something which in law is equivalent to such an agreement. The case of factors and mercantile agents may or may not constitute an exception under the custom and usage of merchants.

[1] Weaver *v.* Wabash, etc. Canal Co. Trs., 28 Ind. 112, 119.

But in every other case the trust must, I think, be expressed by some agreement of the parties, not necessarily, perhaps, in writing, but either written or verbal, according to the nature of the transaction. In this case no agreement is shown that the plaintiff was to take or hold as trustee, and that he is a trustee results merely from other circumstances. It is implied from the fact of partnership, and from the fact that the plaintiff received the assignment on account of a debt due the firm. If it is not a case purely of implied trust, as distinguished from an express trust, then I am at loss to conceive of one; and to hold the plaintiff to be a trustee of an express trust would, in my judgment, be a palpable disregard of the statute, and a violation of the intent of the legislature."[1] In a case where a contract in the nature of a lease was effected by a person describing himself in the instrument as agent of the owners, but who had no interest whatever in the premises leased, and did not execute the instrument, and to whom no promise was made as the lessor, it was held that he could not maintain an action for the rent or for possession of the land forfeited by non-payment of the rent. He could not sue as the "person with whom, or in whose name, a contract is made for the benefit of another," because no promise at all was made to him, and he was not a "trustee of an express trust." The court said: "One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under the code, sue upon such contract in his own name." Of course this last expression must be taken in connection with the facts of the case; namely, that no promise was made to the plaintiff individually.[2]

[1] Robbins *v.* Deverill, 20 Wis. 142, per Dixon C. J. This was an action by the plaintiff as assignee of P. & W. The assignment was in writing, but was taken on account of a debt due from P. & W. to the firm of R. & L., which consisted of the plaintiff and the two others, with an understanding that P. & W. were not to be credited on their debt to R. & L. until the money was collected. Dixon C. J. said: "The demand was transferred to the plaintiff alone by words of absolute assignment, no trust being *expressed*. . . . Upon these facts the plaintiff cannot recover. He is not the real party in interest, nor the trustee of an express trust, within the meaning of the statute. He is not a trustee of an express trust, because no such trust appears from the assignment, and none is shown to exist between himself and his copartners by virtue of any other instrument." He then adds the remark quoted in the text.

[2] Rawlings *v.* Fuller, 31 Ind. 255. [In Mitchell *v.* St. Mary (1897), 148 Ind. 111, 47 N. E. 224, the court said: "There must be something in the nature of the contract, appearing upon its face or from allegations in the pleadings, disclosing that a trust relation exists and is sought

§ 102. *174. **Same Subject. New York Cases.** The nature of an express trust, and the classes of persons embraced within the statutory phrases in question, were determined, upon great consideration, by the New York Court of Appeals, in the leading case of Considerant *v.* Brisbane.[1] "The term 'trustee of an express trust' had acquired a technical and statutory meaning. Express trusts, at least after the time of the adoption of the [New York] Revised Statutes, were defined to be trusts created by the direct and positive acts of the parties, by some writing or deed, or will; and the Revised Statutes had abolished all express trusts except those therein enumerated which related to land. If this section (§ 113 [449]) of the code was to be restricted and limited to those enumerated express trusts, the practical inconvenience arising from making the beneficial interest the sole test of the right to sue, and which that section (§ 113) was intended to obviate, would continue to exist in a large class of formal and informal trusts. Accordingly, in 1851, the section was amended by adding the provision that 'a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.' It is to be observed that there is no attempt to define the meaning of the term 'trustee of an express trust' in its general sense; but the statutory declaration is that these words 'shall be construed to include a person,' etc. The counsel for the respondent insists that the sole intention of the legislature in amending the section was to remove a doubt that had been expressed, whether a factor or other agent, who had at common law a right of action on a contract made for the benefit

to be enforced for the benefit of the *cestui que trust*. It is not enough that an agent who exceeds his authority in suing in his own name upon a demand due his principal is an agent and may intend to account for the recovery. He cannot bind his principal without authority expressed or implied, and it is only when the principal may be deemed to be in court and bound by the proceeding that sec. 251 [allowing suit by a trustee of an express trust] is intended to apply."]

[1] Considerant *v.* Brisbane, 22 N. Y. 389, 395, per Wright J. As to action by trustees of an express trust, see also Presb. Soc. of Knoxboro *v.* Beach, 8 Hun, 644; Heavenridge *v.* Mondy, 49 Ind. 434; 34 id. 28: when a judgment has been obtained by a trustee of an express trust, defendant may set off a judgment in his favor against the beneficiary, and plaintiff is estopped from setting up that he is the real party in interest; North W. Conf. of Univ. *v.* Myers, 36 id. 375; Brooks *v.* Harris, 42 id. 177; Wiley *v.* Starbuck, 44 id. 298; Washington Tp. *v.* Bonney, 45 id. 77. For further examples, see Wetmore *v.* Hegeman, 88 N. Y. 69; White *v.* Allatt, 87 Cal. 245; Cassidy *v.* Woodward, 77 Iowa, 354; and *infra*, § *178.

of his principal by reason of his legal interest in the contract, was by the code deprived of that right. But no such limited intention can be inferred from the words of the statute. Indeed, it is only by a liberal construction of the section that the case of a contract by a factor (an individual contract) can be brought within it at all. It is intended manifestly to embrace, not only formal trusts declared by deed *inter partes*, but all cases in which a person acting in behalf of a third party enters into a written express contract with another, either in his individual name, without description, or in his own name expressly, in trust for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes not only a person with whom, but one in whose name, a contract is made for the benefit of another." These definitions and descriptions of the term fully sustain the conclusions reached in the preceding paragraph as to the legal meaning of the phrase "trustee of an express trust." It is abundantly settled that an agent cannot sue in his own name to enforce an implied liability to his principal; if by any possibility he should be a trustee under such circumstances, he would not be the trustee of an *express* trust.[1]

§ 103. *175. **Statute includes an Agent with whom an Express Contract is made. Illustrations.** Having thus attempted to arrive at a general definition of the term, I shall proceed to consider the cases which are embraced within it, and shall take at first those in which a "person with whom, or in whose name, a contract is made for the benefit of another" has sued in his own name. It is fully established by numerous decisions that when a contract is entered into expressly with an agent in his own name, the promise being made directly to him, although it is known that he is acting for a principal, and even although the principal and his beneficial interest in the agreement are fully disclosed and stipulated for in the very instrument itself, the agent in such

[1] Palmer *v.* Fort Plain, etc. Plk. R. Co., 11 N. Y. 376, 390, per Selden J.: "There is no covenant or agreement running to these officers in terms. They, as agents of the town, convey the right to use the highway upon a certain condition. It is virtually the act of the town through them. If an implied covenant arises upon the instrument, it is a covenant with the town, and must be enforced by, and in the name of, the town." Ruckman *v.* Pitcher, 20 N. Y. 9: "The agent may, in many cases, sue upon express contracts, made with himself by name. . . . But this implied duty or *assumpsit* arises only in favor of those to whom the money in fact belonged, and therefore cannot be enforced in the name of another person to whom the obligation is not due."

case is described by the language of the statute, and may maintain an action upon the contract in his own name without joining the person thus beneficially interested.[1] The following are

[1] [Leach *v.* Hill (1898), 106 Iowa, 171, 76 N. W. 667 : A bank cashier, who cashes a check upon the undertaking of a third person that the check will be honored by the drawee, may sue, as trustee of an express trust, upon the check and the third person's agreement, without joining the bank for which he was acting. In Mitchell *v.* St. Mary (1897), 148 Ind. 111, 47 N. E. 224, on the other hand, where a note was endorsed in blank and given to the treasurer of a corporation as a mere custodian of the corporation, with no intention to make him a trustee, such treasurer, it was held, could not sue upon it in his own name as the trustee of an express trust. See also Hudson *v.* Archer (1893), 4 S. D. 128, 55 N. W. 1099, quoting the text. See also Herman *v.* City of Oconto (1898), 100 Wis. 391, 76 N. W. 364 ; Ward *v.* Ryba (1897), 58 Kan. 741, 51 Pac. 223 ; Brown *v.* Sharkey (1894), 93 Iowa, 157, 61 N. W. 364.] Considerant *v.* Brisbane, 22 N. Y. 389, reversing s. c. 2 Bosw. 471. The plaintiff was agent for a foreign corporation which did business under the name of "Bureau, Guillon, Goden, & Co." The defendant applied to the plaintiff for stock in said corporation, and authorized the plaintiff to subscribe in his name for such stock to the amount of $10,000, and, in payment of the subscription, gave plaintiff two notes, each in the following form : "New York, March 1, 1855. On the first day of July, 1855, I promise to pay V. Considerant, executive agent of the company Bureau, Guillon, Goden, & Co., the sum of $5,000, for which I am to receive stock of said company known as premium stock, to the amount of $5,000, value received. A. Brisbane." The plaintiff alleged that he had entered defendant's name as a subscriber; averred a tender of the stock and a refusal to accept the same ; and sued in his own name on the notes. The Court of Appeals held that he could maintain the action. The judgment of Wright J. is an exhaustive discussion of the whole subject. Denio J. dissented, but not from the general reasoning as to the true interpretation of the code. His dissent was based entirely upon a construction of the notes sued upon. He insisted that the promise in these notes was, in fact, made to the company, and not to the agent; and so the case did not fall within the terms of the statutory provision. Rowland *v.* Phalen, 1 Bosw. 43; Cheltenham Firebrick Co. *v.* Cook, 44 Mo. 29 ; Wright *v.* Tinsley, 30 Mo. 389 ; Weaver *v.* Wabash, etc. Canal Co. Trs., 28 Ind. 112 ; Rice *v.* Savery, 22 Iowa, 470, in which it was held that either the agent or the beneficiary might sue. See *supra*, § *140. Winters *v.* Rush, 34 Cal. 136 ; Ord *v.* McKee, 5 Cal. 515 ; Scantlin *v.* Allison, 12 Kan. 85, 88 ; Noe *v.* Christie, 51 N. Y. 270, 274. In Hubbell *v.* Medbury, 53 N. Y. 98, the provision of the code was held to be permissive only, and not to prohibit an action by the beneficiary, even without the trustee. (Compare *ante*, § *138.) And see Presb. Soc. of Knoxboro *v.* Beach, 8 Hun, 644 ; People *v.* Slocum, 1 Idaho, 62. It is held in New York that an action against a common carrier for a breach of his contract, or of his duty to carry, must be brought in the name of the owner of the goods, although the contract may have been made or the goods shipped by another. Green *v.* Clarke, 12 N. Y. 343 ; Krulder *v.* Ellison, 47 N. Y. 36 ; Thompson *v.* Fargo, 63 N. Y. 479 ; 49 N. Y. 188. But when the consignor, although not the general owner, has a lien upon or a special interest in the goods, and makes the contract and pays the consideration for their carriage, he may bring an action for the breach of the contract in his own name, in order that he may protect his rights. Swift *v.* Pacific Mail S. S. Co., 106 N. Y. 206. The usual rule, however, seems to be that the person with whom the common carrier contracts, although for another's benefit, may sue, whether or not he has a special interest in the goods. Snider *v.* Adams Exp. Co., 77 Mo. 533; Wolfe *v.* Mo. Pac. Ry. Co., 97 Mo. 473 ; Hooper *v.* Chicago & N. W. Ry. Co., 27 Wis. 91 ; Waterman *v.* C. M. & St. P. Ry. Co., 61 Wis. 464. For further instances of

particular instances, or examples of particular classes of cases, in which an agent has been permitted to sue, or may always sue, in his own name, because the contract is made with him directly, although on behalf of a known principal: on a sealed lease between the plaintiff, as agent for the owner, of the first part, and the defendant as the lessee;[1] on a sealed contract between plaintiff and defendant, the plaintiff describing himself as agent for his sisters, and stipulating that they should act in defendant's theatre at specified wages, which the latter covenanted to pay, the action being brought for such wages;[2] where the plaintiff, being the holder of the legal title to certain land, which he held, however, merely for the benefit of a married woman, was induced, by false representations, to execute a mortgage thereon, supposing it to be for her benefit and at her request, but in fact without any consideration paid to himself or to her, brought an action in his own name to restrain a foreclosure of the mortgage;[3] in an action on a policy of marine insurance "for the account of whom it may concern," and in case of loss the amount insured to be paid to the plaintiff or order;[4] where a promise was made to the administrator of an estate, and he afterwards resigned, and another was appointed in his place, it being held that he was the proper party to sue;[5] where a grantee in a deed of land was simply acting as agent for another, and the purchase price was paid with that other's money, the grantee is the proper party to sue for the breach of a covenant which was broken immediately

suits by agents on contracts made with them expressly in their own names, see McLaughlin *v.* Deadwood First Nat. Bk., 6 Dak. 406; Consol. Barb-Wire Co. *v.* Purcell, 48 Kan. 267; Cremer *v.* Wimmer, 40 Minn. 511 (contract by agent for sale of land); Close *v.* Hodges, 44 Minn. 204 (mortgage to agent); Lake *v.* Albert, 37 Minn. 453; Stoll *v.* Sheldon, 13 Neb. 207; Seymour *v.* Smith, 114 N. Y. 481; Coffin *v.* Grand Rapids Hydr. Co. (1892), 18 N. Y. Suppl. 782; Hollingsworth *v.* Moulton, 53 Hun, 91; Albany & R. Iron, etc. Co. *v.* Lundberg, 121 U. S. 451; Merchants' Bank *v.* McClelland, 9 Colo. 608 (cashier of bank); Holmes *v.* Boyd, 90 Ind. 332 (same). Further illustrations of the text: Coffin *v.* Grand Rapids Hydraulic Co. (N. Y. App. 1893), 32 N. E. 1076; Lewis *v.* Whitten (Mo. Sup. 1892), 20 S. W. 617; Rockwell *v.* Holcomb (Colo. 1892), 31 Pac. 944; Beck *v.* Haas, 31 Mo. App. 180.

[1] Morgan *v.* Reid, 7 Abb. Pr. 215.

[2] Nelson *v.* Nixon, 13 Abb. Pr. 104.

[3] Brown *v.* Cherry, 38 How. Pr. 352.

[4] Walsh *v.* Wash. Mar. Ins. Co., 3 Robt. 202; Greenfield *v.* Mass. Mut. L. Ins. Co., 47 N. Y. 430. See also Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77; Waring *v.* Indem. F. Ins. Co., 45 id. 606; Strohn *v.* Hartford F. Ins. Co., 37 Wis. 625; Protection Ins. Co. *v.* Wilson, 6 Ohio St. 553. [Insurance taken out by an employer for the benefit of his employees may be sued for by the employer without joining the beneficiaries, because he is a trustee of an express trust: Fidelity & Casualty Co. *v.* Ballard (1899), 105 Ky. 253, 48 S. W. 1074.]

[5] Harney *v.* Dutcher, 15 Mo. 89.

upon the execution of the deed, *e. g.*, a covenant against incumbrances;[1] a guest at an inn who had property of another in his possession, which was lost, was held to be the proper party to sue for its value;[2] an auctioneer may sue for the price of goods sold by him, whether he have any interest in the price or not,[3] and a sheriff, for the price of property sold by him on execution;[4] the master of a ship or other vessel may maintain an action for freight, or on any contract concerning the ship, entered into on behalf of the owners,[5] or for the taking and carrying away, conversion of, or injury to, the cargo.[6]

§ 104. *176. **Actions on Bonds given to protect other Persons. Obligee may sue.** Various kinds of bonds and undertakings generally required by statute, and given to some designated obligee, although showing on the face that they are designed to protect, secure, or indemnify other persons, are also contracts made "with, or in the name of, one person for the benefit of another;" and although the party immediately interested may in general sue in his own name,[7] yet the obligee or person to whom the promise is made may always, unless forbidden by statute, maintain the action, and in some States is the only one who is permitted to do so.[8] Among these are bonds in great variety given to the "people" or to the "State," conditioned upon the faithful discharge of their duties by public, local, or municipal officers, actions on which, except when otherwise directed by statute, may be brought by the people or the State;[9] bonds running to the people or to the State, conditioned upon the faithful discharge of duties by various private or semi-private trustees, or by persons appointed in judicial proceedings and the

[1] Hall *v.* Plaine, 14 Ohio St. 417, 423.

[2] Kellogg *v.* Sweeney, 1 Lans. 397.

[3] Minturn *v.* Main, 7 N. Y. 220, 224; Bogart *v.* O'Regan, 1 E. D. Smith, 590.

[4] Armstrong *v.* Vroman, 11 Minn. 220; McKee *v.* Lineberger, 69 N. C. 217, 239.

[5] Kennedy *v.* Eilau, 17 Abb. Pr. 73; Braithwaite *v.* Power, 1 N. Dak. 455.

[6] Houghton *v.* Lynch, 13 Minn. 85.

[7] See *supra*, §§ *139, *141.

[8] [United States *v.* McCann (1901), 40 Ore. 13, 66 Pac. 274, quoting the text, where it was held that a person to whom a contractor's bond is executed conditioned to pay all persons supplying the contractor with labor and materials, is a trustee of an express trust. The same question was raised in United States *v.* Rundle (1901), 27 Wash. 7, 67 Pac. 395; and the United States, as obligee of the bond, was held a proper plaintiff, as trustee of an express trust.]

[9] Hunter *v.* Mercer Cy. Com'rs of, etc., 10 Ohio St. 515 (county treasurer's bond running to the State); State *v.* Moore, 19 Mo. 369 (sheriff's bond); Meier *v.* Lester, 21 Mo. 112 (constable's bond); Shelby Cy. *v.* Simmonds, 33 Iowa, 345 (county treasurer's bond running to the county).

like, such as those given by administrators, executors, or receivers;[1] those given by the trustees of an estate, although entirely for the benefit of the persons having an interest in the estate;[2] bastardy bonds[3] and the like; bonds given directly to a sheriff or other superior officer to indemnify a deputy sheriff or other subordinate officer against the consequences of acts done in the discharge of the latter's official duties;[4] a bond given by a town superintendent of common schools to the supervisor of the town, an action on which must be brought by the supervisor or his successor in office.[5]

§ 105. *177. **Actions on Contracts Made for Undisclosed Principals. Agent may sue.** In all the instances heretofore mentioned, the contract has been made with an agent in his own name, and the promise given to him, although the principal or beneficiary was known, and even expressly designated and provided for by the terms of the agreement. The rule is the same, and even more emphatically so, if the principal or beneficiary is, at the time of the contract, unknown or undisclosed, or not mentioned in the instrument. When a contract, even in writing, is made with and by an agent, and no mention is made of any principal or beneficiary, but the other contracting party supposes he is dealing with the former on his own private account, but in fact such person *is* an agent for an undisclosed principal and enters into the agreement in the course of his agency, actually effecting the contract on behalf of that superior behind him, the rule is well settled that the one who was thus a direct party to the agreement — the actual agent — may bring an action upon it in his own name, or the principal may sue in *his* name.[6]

[1] People *v.* Laws, 3 Abb. Pr. 450; Annett *v.* Kerr, 28 How. Pr. 324; People *v.* Townsend, 37 Barb. 520. The reporter's head-note reads *should* be sued by the people; this is more than was decided. Baggott *v.* Boulger, 2 Duer, 160. The bond may also be prosecuted by the person interested and benefited. See, however, Carmichael *v.* Moore, 88 N. C. 29.

[2] People *v.* Norton, 9 N. Y. 176, 179.

[3] People *v.* Clark, 21 Barb. 214. [See Myers *v.* Baughman (1901), 61 Neb. 818, 86 N. W. 507, where it was held that an action on a bastardy bond could be brought *only* in the name of the State, which was named as obligee, for the use of the prosecutrix as her interest might appear, the State being in fact a beneficiary under the bond as well as the prosecutrix.]

[4] Stilwell *v.* Hurlbert, 18 N. Y. 374, 375.

[5] Fuller *v.* Fullerton, 14 Barb. 59.

[6] [Stewart *v.* Gregory, Carter & Co. (1900), 9 N. D. 618, 84 N. W. 553; Carter *v.* Southern Ry. Co. (1900), 111 Ga. 38, 36 S. E. 308; Tustin Fruit Assn. *v.* Earl Fruit Co. (1898), Cal., 53 Pac. 693.] Erickson *v.* Compton, 6 How. Pr. 471; Grinnell *v.* Schmidt, 2 Sandf. 706; Union India Rubber Co. *v.* Tomlinson, 1 E. D. Smith, 364; Van Lien *v.* Byrnes, 1 Hilt. 133; Higgins *v.* Senior, 8 Mees. & W.

§ 106. *178. **Other Classes of Trustees.** I have thus far considered only the particular class of trustees of an express trust specially described in some of the codes as "persons with whom or in whose name a contract is made for the benefit of others." There are numerous other and more properly designated classes of such trustees; and whatever be their nature, or the object of the trust, they may, by virtue of this section of the statute, maintain an action in their own names. They are generally created or appointed by some instrument in the nature of a grant or conveyance, or they may be appointed in judicial proceedings by a court. Although the rule is simple and peremptory that these trustees may sue without joining the beneficiaries, the following instances in which the rule has been applied may be enumerated: assignees, general or special, in trust, to pay creditors;[1] the assignees of a contract in trust to reimburse out of the proceeds thereof third persons for advances made;[2] trustees appointed to take and collect subscriptions for colleges and other similar purposes;[3] a receiver appointed in another State;[4] the grantee of lands in trust for the use and benefit of another is the proper party to sue for possession or for damages by trespass or other injury;[5] a person who agreed to hold notes

834; Sims *v.* Bond, 5 B. & Ad. 389, 393, per Lord Denman. Ludwig *v.* Gillespie, 105 N. Y. 653; McLaughlin *v.* Great Western Ins. Co., 20 N. Y. Suppl. (Com. Pl. 1892), 536; Manette *v.* Simpson, 15 N. Y. Suppl. (Supreme Ct. 1891), 448; Snider *v.* Adams Exp. Co., 77 Mo. 523; Keown *v.* Vogel, 25 Mo. App. 35. As against right of undisclosed principal to sue, see Kelley *v.* Thuey, 102 Mo. 522. In ordinary contracts made by agents for their principals, the latter are the real parties in interest, and must sue. Swift *v.* Swift, 46 Cal. 266, 269; Chin Kem You *v.* Ah Joan, 75 Cal. 124; Ferguson *v.* McMahon, 52 Ark. 433. See, also, *ante*, § *141.

[1] Lewis *v.* Graham, 4 Abb. Pr. 106; St. Anthony's Mill Co. *v.* Vandall, 1 Minn. 246. See Foster *v.* Brown, 65 Ind. 234. Assignee to pay creditors distinguished from a mere agent to collect claims and pay debts: Sandmeyer *v.* Dak. F. & M. Ins. Co. (S. Dak. 1891), 50 N. W. 353; citing Brockmeyer *v.* Wash. Nat. Bk., 40 Kan. 376; Cornley *v.* Dazian, 114 N. Y. 161; Simonton *v.* First Nat. Bk. of Minneapolis, 24 Minn. 216; Witter *v.* Little, 66 Iowa, 431. Compare Wynne *v.* Heck, 92 N. C. 414.

[2] Cummins *v.* Barkalow, 4 Keyes, 514. [And in Bates *v.* Richards Lumber Co. (1893), 56 Minn. 14, 57 N. W. 218, it was held that a beneficial interest in a contract for work and labor may be assigned by a party who engages therein to perform the same, so as to entitle the assignee to recover the contract price upon the fulfilment of the contract by the assignor, and that the assignee in such a case is a trustee of an express trust, as he is obliged to account for the proceeds.]

[3] Slocum *v.* Barry, 34 How. Pr. 320; Dix *v.* Akers, 30 Ind. 431; Musselman *v.* Cravens, 47 Ind. 4. See Lathrop *v.* Knapp, 37 Wis. 307.

[4] Runk *v.* St. John, 29 Barb. 585; *per contra*, Hope Life Ins. Co. *v.* Taylor, 2 Robt. 278. See Lathrop *v.* Knapp, 37 Wis. 307; Garver *v.* Kent, 70 Ind. 428.

[5] Goodrich *v.* Milwaukee, 24 Wis. 422; Boardman *v.* Beckwith, 18 Iowa, 292,

and a mortgage for the benefit of another, and to apply the proceeds thereof when collected in payment of a debt owned by himself to that other, may sue to enforce the securities;[1] the assignee of a stock subscription, who holds it for the benefit of a bank, is the proper party to bring an action upon it;[2] a person to whom chattels had been transferred for the benefit of a married woman in trust, to permit her to have exclusive use and possession, and to dispose of them by her direction, is the proper party to bring an action to restrain interference with or disturbance of her possession.[3] It has been held in Kentucky that where a railroad company issued bonds which were held by many different persons, and executed a mortgage to a trustee for the purpose of securing such bonds, this trustee, who was the sole mortgagee named in the instrument, could not maintain an action in his own name alone to foreclose the mortgage on account of the non-payment of the money due on the bonds, but he must join the bond-holders as parties plaintiff with himself.[4] The correctness of this decision may well be doubted in the light of the other cases above cited, which uniformly proceed upon a different doctrine.

§ 107. *179. **Actions Brought by Public Officers.** Many public officers are authorized by law to bring actions in their own names, and by virtue of their official character, in respect of matters falling within the scope of their official functions. As this subject is entirely regulated by special statutes, which greatly vary in different States, and as it is not in fact a portion of the general civil procedure, but rather a matter exceptional and collateral thereto, I shall not attempt any discussion of the cases in which such officers may sue, but shall simply mention a few

295. See Holden *v.* N. Y. & Erie Bank, 72 N. Y. 286, 297; Tyler *v.* Granger, 48 Cal. 259; McKinnon *v.* McKinnon, 81 N. C. 201; [Lewis *v.* St. Paul, etc. Ry. Co. (1894), 5 S. D. 148, 58 N. W. 580.]

[1] Gardinier *v.* Kellogg, 14 Wis. 605. See Davidson *v.* Elms, 67 N. C. 228; Thompson *v.* Toland, 48 Cal. 99, 114; Moorehead *v.* Hyde, 38 Iowa, 382. [In Struckmeyer *v.* Lamb (1896), 64 Minn. 57, 65 N. W. 930, the assignee of certain notes and chattel mortgages, who was to bring suit against the maker and account to his assignor for the proceeds if he collected anything, was held to be a trustee of an express trust, and could therefore maintain the action in his own name.]

[2] Kimball *v.* Spicer, 12 Wis. 668.

[3] Reed *v.* Harris, 7 Robt. 151. A trustee under separation articles, by the terms of which he was to receive annual payments from the husband and for the support of the wife, may sue for the recovery of such sums without joining the wife. Clark *v.* Fosdick, 118 N. Y. 7.

[4] Bardstown & L. R. Co. *v.* Metcalfe, 4 Metc. (Ky.) 199.

decisions which may have some general interest.[1] Actions by public officers suing as such should be brought in their individual names, but with their official titles added;[2] but the mere use of the official title will not be enough, without the proper averments of the official character in the pleadings; in the absence of such averments, the title will be regarded as only a description of the person.[3] In New York, counties cannot sue nor be sued. All actions and judicial proceedings in favor of or against counties, except those which some county officer is expressly authorized to maintain in his own name for the benefit of the county, must be brought by or against the "Board of Supervisors" of the county named, as an organized unit, and by that designation, and not against the supervisors individually;[4] but when the action is by or against the supervisors, not as the immediate representatives and in the place of the county, it must be brought by or against them individually, with their title of office added.[5] The rule in respect to towns in New York is different. They are municipal corporations, and *must* sue and be sued by their corporate name, except in the few cases where town officers are expressly authorized by statute to sue in their name of office for the benefit of the town.[6] In accordance with this rule, where the supervisor and commissioner of highways had entered into a contract on behalf of the town, which contained no promise to or undertaking with themselves, as such officers, it was held that they could not maintain an action upon it in their joint names, but the action should have been by the town, as the real party in interest.[7]

[1] [A county judge, suing on a trustee's bond under R. S. § 4015, is the trustee of an express trust: Richter *v.* Leiby (1898), 99 Wis. 512, 75 N. W. 82.]

[2] Paige *v.* Fazackerly, 36 Barb. 392. As to actions by towns, counties, supervisors, and similar officers, see Hathaway *v.* Cincinnatus, 62 N. Y. 434; Lewis *v.* Marshall, 56 N. Y. 663; Guilford *v.* Cooley, 58 id. 116; Chautauqua *v.* Gifford, 8 Hun, 152; Sutherland *v.* Carr, 85 N. Y. 104; Hagadorn *v.* Raux, 72 id. 583; Cairns *v.* O'Bleness, 40 Wis. 469; Beaver Dam *v.* Frings, 17 id. 398; Franklin T. Sup. *v.* Kirby, 25 id. 498; Dutcher *v.* Dutcher, 39 id. 651; Pine Valley *v.* Unity, 40 id. 682; La Crosse *v.* Melrose, 22 id. 459; School Dir. of Sigel *v.* Coe, 40 id. 103; Oconto Cy. Sup. *v.* Hall, 42 id. 59; Lafayette Cy. *v.* Hixon, 69 Mo. 581; Vanarsdall *v.* The State, 65 Ind. 176; Garver *v.* Kent, 70 id. 428; Jefferson Cy. Com'rs *v.* Lineberger, 3 Mont. 31; San Benito Cy. *v.* Whitesides, 51 Cal. 416.

[3] Gould *v.* Glass, 19 Barb. 179. [It was held in Atkinson *v.* Cawley (1900), 112 Ga. 485, 37 S. E. 715, that where an action is instituted by "W. Y. Atkinson, Governor, etc.," the words "Governor, etc.," are merely *descriptio personæ*, and do not designate the capacity in which the suit is brought.]

[4] Hill *v.* Livingston Cy. Sup., 12 N. Y. 52; Magee *v.* Cutler, 43 Barb. 239.

[5] Wild *v.* Columbia Cy. Sup., 9 How. Pr. 315, per Harris J.

[6] Duanesburgh *v.* Jenkins, 46 Barb. 294.

[7] Palmer *v.* Fort Plain & C. Plk. R.

The Secretary of State for the War Department of Great Britain was permitted to sue in his individual name to recover public moneys which had been embezzled by a subordinate official, it being shown that by the British statute the property was vested in him as such secretary.[1] The "Metropolitan Fire Department," a commission created by statute for the city of New York, is declared to be a *quasi* corporation, capable of suing and being sued, and not a mere official agency of the municipality.[2]

§ 108. *180. **Meaning of Phrase, "Persons expressly Authorized by Statute" to sue. Classes of Persons Included.** Hardly any attempt has been made by the courts to determine in a general manner the classes of persons who fall within the designation of "expressly authorized by statute" to sue. The Supreme Court of Indiana in one case made an approach towards such an interpretation. In an action upon a promissory note by the assignee thereof, his right to sue was denied by the defendant. The evidence tended to show that he was not the real party in interest. To meet this objection, he invoked a prior general statute, which expressly provides that indorsees and assignees of bills and notes may sue in their own names, and urged that he was thus brought directly within the class of "persons expressly authorized by statute" mentioned in the section of the code under consideration. The court, however, refused to adopt this construction of the code. It said: "Is the assignee of a note who holds it as such, without any real interest, one of that class of persons here referred to as being 'expressly authorized by statute to sue'? or does the provision have reference to another class of persons, such as the guardians of an idiot, etc.? We are of the opinion that the clause of the section above quoted does not have reference to the rights of an assignee of a promissory note, but to such persons as may be authorized to sue in their own names because of holding some official position, as the president of a bank, the trustees of a civil township, and the like."[3] There have been held embraced within the same class, not only the presidents and other managing officers of joint-stock associations for business purposes, but also similar

Co., 11 N. Y. 376, 390, per Selden J. "A town is a political corporation, and suits in its behalf must be prosecuted in the name of the town." See *supra*, § *174.

[1] Peel *v.* Elliott, 7 Abb. Pr. 433.

[2] Clarissy *v.* Metropolitan Fire Dep., 7 Abb. Pr. N. S. 352.

[3] Swift *v.* Ellsworth, 10 Ind. 205, per Hanna J.

officers of some voluntary societies organized for purposes not connected with business, when the action is brought on behalf of, or in relation to matters belonging to, the society, and among other instances the following;[1] a suit brought by the president of a voluntary unincorporated religious and missionary association to recover a legacy bequeathed to it;[2] by the treasurer of a division of the Sons of Temperance, a voluntary social organization;[3] by the president of a bank of which he was the nominal proprietor, all the contracts and transactions being in his name as such proprietor;[4] by the trustee of the "Pittsburg Trust Company," an unincorporated business association, in an action brought to recover damages for negligence in not protesting a bill of exchange belonging to such association, by which the amount thereof was lost.[5] An officer of the Bank of England was permitted to sue in New York upon a bill of exchange belonging to the bank, by showing that the statutes of England authorized him to bring an action.[6] On the other hand, it has been held in the same State that an action brought by a person as foreman of a certain named fire company — unincorporated — could not be maintained; that the provisions of the code and of other statutes authorizing suits in the name of officers of unincorporated bodies do not apply to such societies as fire companies.[7] If the doctrine stated by the Indiana court cited above be taken as the correct interpretation of the clause, it follows that the whole section provides for three classes of persons who may sue in their own name, although not the real parties in interest; namely, *first*, those with whom, or in whose name, a contract is made for the benefit of another, to whom the promise is directly given, and who sue because they are the actual promisees; *secondly*, trustees proper of an express trust, who, by virtue of being *trustees*, have an interest in or title to some

[1] [The president of an unincorporated association was allowed, under § 1919 of the Code of Civil Procedure, to bring an action to recover the property belonging to all the members of the same: Ostrom *v.* Greene (1900), 161 N. Y. 353, 55 N. E. 919.]

[2] De Witt *v.* Chandler, 11 Abb. Pr. 459 (General Term). It was held that the action might be maintained under statutes of 1848, 1849; citing Tibbetts *v.* Blood, 21 Barb. 650.

[3] Tibbetts *v.* Blood, 21 Barb. 650; expressly holding that these statutes are not confined to business associations.

[4] Burbank *v.* Beach, 15 Barb. 326.

[5] Laughlin *v.* Greene, 14 Iowa, 92, 94. The plaintiff was said to be a trustee of an express trust.

[6] Myers *v.* Machado, 6 Abb. Pr. 198.

[7] Masterson *v.* Botts, 4 Abb. Pr. 130 (Sp. T.).

property which is the subject-matter of the trust; and, *thirdly*, certain persons clothed with authority to do various acts for, or in behalf of, others, but who are not vested with any interest in or title to property, so as to render them *trustees* in the strict meaning of that term, and who are authorized by various statutes to maintain actions in the exercise of their personal authority, such as officers of voluntary societies, guardians, or committees of the person, and the like.

§ 109. *181. **Actions by Executors and Administrators.** That executors and administrators can maintain actions relating to the estate in their own names alone, is a proposition too familiar and elementary to require discussion or the citation of authority.[1] Although in general a foreign executor or administrator cannot sue as such in the courts of another State or country than that in which he was appointed, yet, if the objection is not raised by

[1] [In Bem *v.* Shoemaker (1898), 10 S. D. 453, 74 N. W. 239, it was held that on the refusal of the administrator to bring an action for the recovery of lands alleged to belong to the estate, the heirs may bring such action, on the broad ground that when one whose duty it is to protect the estate refuses to do so, the parties beneficially interested may take steps to do so. See also Tecumseh Nat. Bank *v.* McGee (1901), 61 Neb. 709, 85 N. W. 949, where the court said that "while the general rule is that an administrator or personal representative of a decedent's estate must prosecute actions for recovery of debts due the estate, there are exceptions to the rule; and in the present case *held* that the order of the trial court, substituting an heir at law and permitting her to prosecute the action for her interest in the claim in controversy in her own name, the other heirs having settled and compromised theirs, was not erroneous."

Ives *v.* Mutual Life Ins. Co. (1901), 129 N. C. 28, 39 S. E. 631: Only the personal representative, and not the heirs, of a deceased beneficiary can bring an action on a life insurance policy. Burrell *v.* Kern (1899), 34 Ore. 501, 56 Pac. 809: "When the cause of suit or action, whether in contract or in tort, accrues after the death of the testator or intestate, the money, if recovered, will be assets of the estate, and the executor or administrator may sue, at his option, in either his representative or individual capacity."

Hook *v.* Garfield Coal Co. (1900), 112 Ia. 210, 83 N. W. 963: An administrator cannot maintain trespass for injuries to the real estate of his intestate. In this case the court held that where administrators sue for trespass to real estate of their intestate under an assignment from the heirs, and request that the heirs, who assigned simply to avoid a multiplicity of suits, be substituted as parties plaintiff, such request, while discretionary with the court, should ordinarily be granted.

Bunker *v.* Taylor (1900), 13 S. D. 433, 83 N. W. 555: Where an executrix of an estate dies pending a suit, and administrators are appointed to continue the administration of the estate, they are "successors in interest" to the executrix within the statute providing that on the death of a party, if the cause of action survive, the action may be continued by his successor in interest. Strauss *v.* Bendheim (1900), 162 N. Y. 469, 56 N. E. 1007: A contract of sale may be made by executors and enforced by them in an action for specific performance, without making the beneficiaries parties, where such executors have an unqualified and imperative power to sell real estate and convert it into cash in order to divide it among legatees.]

answer or demurrer, it is waived under the codes of procedure; that is, the objection goes simply to the parties' capacity to sue, and not to the cause of action set up in the complaint or petition.[1] In California, lands owned in fee by the deceased do not descend at once to his heirs or pass to his devisees, but go with the personalty into the estate in the hands of his administrator or executor as a part of the assets to be administered upon. Any action, therefore, relating to such land, — to recover its possession, or damages for injuries done to it, or rents, or the like, — brought at any time before a final settlement of the estate and distribution thereof, must be prosecuted by the administrator or executor alone.[2] In an action by the administrator of a mortgagee, brought to foreclose the mortgage, the heir of the mortgagee is not a proper party to be joined as a co-plaintiff. In California, as in New York, the mortgage is a mere security, incident and collateral to the debt, and belongs wholly to the personalty.[3]

§ 110. *182. **Actions by General Guardians.** How far general guardians of infants, testamentary or appointed by the probate courts, are authorized to maintain actions in their own names, relating to the personal property of their wards, depends rather upon the provisions of the statutes which define their powers and duties than upon those of the codes.[4] The codes in general can

[1] Robbins *v.* Wells, 18 Abb. Pr. 191. [Held in Gregory *v.* McCormick (1893), 120 Mo. 657, 25 S. W. 565, that the objection that plaintiff is a foreign executor or administrator, if it appears on the face of the petition, if not raised by special demurrer on the ground that plaintiff has not legal capacity to sue, is waived. To the same effect see Wilson *v.* Wilson (1894), 26 Ore. 251, 38 Pac. 185, citing the text.

But see Louisville & Nashville R. R. Co. *v.* Brantley's Adm'r (1894), 96 Ky. 297, 28 S. W. 477, where it was held that where a foreign administrator attempts to bring suit, defendant may demur generally on the ground that the petition does not state a cause of action. It is not a case of want of legal capacity to sue. And it was held in Locke *v.* Klunker (1898), 123 Cal. 231, 55 Pac. 993, that a demurrer for want of facts will not be sustained where it merely does not appear from the complaint that the plaintiff had capacity to sue as administratrix, but it must appear from the complaint that she did not have capacity. The former objection can be taken only by answer.]

As to foreign administrator, see Connor's Adm. *v.* Paul, 12 Bush, 144; as to executors and administrators generally, see Duncan *v.* Whedbee, 4 Colo. 143; Mullin's Appeal, 40 Wis. 154; Harte *v.* Houchin, 50 Ind. 327; Wright's Adm. *v.* Wright, 72 Ind. 149 (A. as administrator of B.'s estate can sue A. as administrator of C.'s estate); Ham *v.* Henderson, 50 Cal. 367; Cashman *v.* Wood, 6 Hun, 520.

[2] Curtis *v.* Herrick, 14 Cal. 117; Meeks *v.* Hahn, 20 Cal. 620; Grattan *v.* Wiggins, 23 Cal. 16; Emeric *v.* Penniman, 26 Cal. 119.

[3] Grattan *v.* Wiggins, 23 Cal. 16.

[4] [In an action brought in behalf of minors by a guardian, it is necessary for the guardian to allege issuable facts show-

hardly be deemed to have enlarged their powers in this respect. In a few States, the guardian is specifically mentioned and coupled with the executor and administrator in the section of the statute under consideration; and this language may be interpreted as authorizing him to sue in respect of all property which is under his control by virtue of his office.[1] In New York, it has been determined by the Supreme Court in a very carefully considered case, the decision, however, being rested upon a construction of the Revised Statutes, and not of the code, that the general guardian may bring all actions in his own name respecting the personal property of the ward and the rents and profits of his real estate.[2] This same power is expressly conferred upon him by the statutes of certain States.[3] On the other hand, it is held in Kentucky that, while the guardian, who has taken a note expressly made to himself as payee for moneys belonging to the ward, may prosecute an action thereon, because the promise is given directly to him, he cannot sue in respect of his ward's property in general, since he has no estate or interest therein; such actions must be brought in the name of the infant.[4] The

ing his representative capacity, and if he does not do so the complaint is demurrable upon the ground of want of capacity to sue, but unless so made the objection is waived: Dalrymple *v.* Security Loan Co. (1900), 9 N. D. 306, 83 N. W. 245. The objection that the parties to an action are minors who appear without guardians *ad litem* is waived by pleading to the merits: Blumauer *v.* Clock (1901), 24 Wash. 596, 64 Pac. 844. A father may sue as guardian *ad litem* for services of his minor child rendered to a third party: Grosovsky *v.* Goldenberg (1902), 86 Minn. 378, 90 N. W. 282.]

[1] This interpretation is given to the language of the code by the Supreme Court of Indiana in Shepherd *v.* Evans, 9 Ind. 260, which holds that, by virtue of the provision, the guardian is empowered to bring such actions in his own name. See Wilson *v.* Houston, 76 N. C. 375 (when wards are necessary plaintiffs); Crawford *v.* Neal, 56 Cal. 321 (necessary allegations in suit by infant by a guardian *ad litem*). A general guardian may sue, Hauenstein *v.* Kull, 59 How. Pr. 24; Fox *v.* Kerper, 51 Ind. 148; and see Carrillo *v.* McPhillips, 55 Cal. 130; *per contra* he cannot sue in his own name, Vincent *v.* Starks, 45 Wis. 458.

[2] Thomas *v.* Bennett, 56 Barb. 197; Seaton *v.* Davis, 1 N. Y. Sup. Ct. 91; and see White *v* Parker, 8 Barb. 48, 52; Mebane *v.* Mebane, 66 N. C. 334; Biggs *v.* Williams, 66 N. C. 427.

[3] See [Wisconsin, St., 1898, § 3982.]

[4] Anderson *v.* Watson, 3 Metc. (Ky.) 509. [So, also, in Missouri, in Webb *v.* Hayden (1901), 166 Mo. 39, 65 S. W. 760, it was held that a suit to recover property belonging to a ward should be brought in the name of the ward by the curator, and not in the name of the curator, since the title is in the ward. McLean *v.* Dean (1896), 66 Minn. 369, 69 N. W. 140: Where a note is purchased by a guardian, payable to himself, but with the funds of his ward and for the ward's benefit, the guardian may sue upon it in his own name.

Dixon *v.* Cardozo (1895), 106 Cal. 506, 39 Pac. 857: After the commencement of the action plaintiff became insane, and a guardian was appointed and substituted, upon motion, as plaintiff. Held

statutes which provide for the appointment of guardians or committees over the property of lunatics, confirmed drunkards, and other such persons not *sui juris*, generally confer upon them the same powers that are given to the general guardians of infants, and a similar rule should therefore prevail in reference to their prosecution of actions. Although there is some conflict in the decided cases, yet, as these guardians or committees do not acquire any estate or interest in the property subjected to their control, but only a power of possession and management, the correct doctrine upon principle would seem to be that they cannot maintain actions concerning it in their own names, unless expressly authorized to do so by statute; other actions may be brought by them.[1]

SECTION FIFTH.

WHO MAY BE JOINED AS PLAINTIFFS.

§ 111. *183. Statutory Provisions. The following are the provisions relating to the joinder of parties plaintiff in one action found in the various State codes, and it will be seen that there is an absolute identity of language in all the legislation upon this subject. "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined

error, as the suit should have been prosecuted in the name of the original plaintiff, by J. D., his guardian. Dennison *v.* Willcut (1894), Idaho, 35 Pac. 698: "The guardian of a minor is not permitted to bring suit in his own name for money or property belonging to the ward, and which he has a right to the possession of as such guardian, but must bring suit as guardian."

Plympton *v.* Hall (1893), 55 Minn. 22, 56 N. W. 351: The suit instituted in behalf of a lunatic should be in the name of the lunatic, but brought by his guardian or next friend. Row *v.* Row (1895), 53 O. St. 249, 41 N. E. 239: An action to recover property belonging to an imbecile must be brought by guardian and not by next friend. R. S. § 4998. Howard *v.* Singleton (1893), 94 Ky. 336, 22 S. W. 337: In an action by a guardian to sell his ward's real estate owned jointly with another, the ward is not a necessary party.]

[1] King *v.* Cutts, 24 Wis. 625; McKillip *v.* McKillip, 8 Barb. 552. But, *per contra*, see Person *v.* Warren, 14 Barb. 488, which expressly holds that the committee is a "trustee of an express trust" within the meaning of the code. The whole subject was discussed and determined in the very late case of Fields *v.* Fowler, 4 N. Y. Sup. Ct. 598. The action was brought by the committee of the person and estate of a lunatic to set aside the sale of a farm made by defendant to the lunatic, to cancel the satisfaction of a mortgage which had been executed by him, and also a check which he had given on such sale. The action was held to be properly brought by the committee. E. Darwin Smith J., in giving the opinion of the court, says: "The rule undoubtedly was, and still is, at law, where the action is

as plaintiffs, except as otherwise provided in this title."[1] This is the important section; but the following one somewhat enlarges its scope and effect in certain cases: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."[2] The particular statutory rules relating to married women as parties, and prescribing when wives may sue alone or when husbands must be joined, will be stated in a subsequent portion of this section. Many of these special enactments are not found in the codes of procedure, but in separate and independent legislation.

§ 112. *195. **Scope of Statutory Provisions. The Provisions respecting Plaintiffs Compared with those respecting Defendants. Apply to Legal as well as Equitable Actions.** It must be conceded at once that there is no repeal or modification of the

brought to assert the title of the lunatic to real and personal property, it must be brought in his name, as held in McKillip *v.* McKillip, 8 Barb. 552." He cites the laws of 1845, ch. 112, which authorize the committee to sue for any debt, claim, or demand transferred to them, or to the possession and control of which they are entitled; also Gorham *v.* Gorham, 3 Barb. Ch. 32; Ortley *v.* Messere, 7 Johns. Ch. 139, and § 111 of the code, and reaches the conclusion that the equity rule as to parties is controlling in actions of this kind. The decision in Person *v.* Warren, 14 Barb. 488, is expressly approved and followed. S. P. Bearss *v.* Montgomery, 46 Ind. 544.

[1] New York, § 117 (446); Ohio, § 34; Kansas, § 35; California, §§ 378, 381; Iowa, § 2545; South Carolina, § 140; Nevada, § 12; Oregon, § 380, but limited to equitable actions; North Carolina, § 60; [Wisconsin, St., 1898, § 2602; Utah, Rev. St., 1898, § 2913; North Dakota, Rev. Codes, 1899, § 5229; South Dakota, Ann. St., 1901, § 6077; Oklahoma, St., 1893, § 3907; Washington, Bal. Code, § 4833, in somewhat different form; Montana, § 580; Idaho, Code Civ. Pro., 1901, § 3166; Wyoming, Rev. St., 1899, § 3479; Colorado, § 10; Arkansas, Sand. & Hill's Dig., § 5629; Connecticut, Gen. St., 1902, § 617; Indiana, Burns' St., 1901, § 263; Kentucky, § 22; Missouri, Rev. St., 1899, § 542; Nebraska, § 40.]

[2] New York, § 119 (448); California, § 382; South Carolina, § 142; Oregon, § 381, but limited to equity actions; Nevada, § 14; Ohio, § 36; Kansas, § 37; Iowa, § 2548; North Carolina, § 62; [Utah, Rev. St., 1898, § 2917; North Dakota, Rev. Codes, 1899, § 5232; South Dakota, Ann. St., 1901, § 6079; Arizona, Rev. St., 1901, § 1313; Montana, § 584; Idaho, Code Civ. Pro., 1901, § 3170; Colorado, § 12; Indiana, Burns' St., 1901, 270; Wisconsin, St., 1898, § 2604; Oklahoma, St., 1893, § 3909; Washington, Bal. Code, § 4833; Wyoming, Rev. St., 1899, § 3481; Connecticut, Gen. St., 1902, § 617; Nebraska, § 42; Arkansas, Sand. & Hill's Dig., § 5631; Kentucky, § 24; Missouri, Rev. St., 1899, § 544.]

[The code provision requiring the reason to be given for making a person defendant who should properly be a plaintiff, requires the reason for not joining him, that is, his refusal, to be stated, and not his reason for such refusal: Union Pac. Ry. Co. *v.* Vincent (1899), 58 Neb. 171, 78 N. W. 457.]

common-law rules in detail; the requirements of the old law as to joint and several rights, and the union or severance of the parties holding such rights, are not in any express manner referred to. It should also be carefully observed — and the fact is one of great practical importance — that the provisions in the various codes relating to parties plaintiff are not so full, minute, and express as those relating to parties defendant. Even in those State codes where the common-law distinctions between joint, joint and several, and several *liabilities* are utterly abolished, and the practical requirements as to the union or severance of parties *defendant* based upon them are wholly swept away, there is no corresponding express legislation as to the distinctions between joint and several *rights* and the union or severance of *plaintiffs*. This difference in the mode of treatment may be made the ground — and has been by many judges — of inferring that the legislature intended to leave the ancient legal doctrines as to plaintiffs untouched, and to confine its work of reform to the case of defendants. The legislative intent, therefore, whatever it may be, must be found in the few general provisions quoted at the commencement of the present section, and in the subsequent provisions which regulate the rendition of judgments, so far as the same depends upon or is connected with the parties to an action. Referring to these provisions, it is plain that their language is general, inclusive, without exception, and applying alike to all kinds and classes of actions. Whatever doctrines in reference to parties plaintiff the legislature has adopted, whatever regulations it has established, its intention, as shown by the language of all the codes but one or two, is to apply them equally to legal and to equitable actions. No exception being made nor even suggested, the courts cannot, unless by an act of positive legislation, by an act of direct usurpation, create an exception, and say that these general terms were intended to apply to equitable suits alone, while legal actions were intended to be left outside of their scope and effect.

§ 113. *196. **The Statute in Effect an Enactment of the Equity Doctrine. Practical Question herein.** These statutory provisions themselves are confessedly an enactment, with hardly a verbal change, of the general principles long ago established by courts of equity for the regulation of the parties plaintiff in suits pending before them. The legislature has, therefore, in a very brief

but comprehensive form, adopted the equitable doctrine, and has applied it to the civil action required to be used in the enforcement of all rights and the pursuit of all remedies, whether legal or equitable. This proposition cannot be denied, without denying to the language of the statute its plain meaning and ordinary significance and force. The practical question, then, arises at once, How far is this equitable doctrine inconsistent with the positive rules as to parties plaintiff in legal actions, long established as a part of the common-law procedure? To what extent does it, as thus generally stated, necessarily abrogate or modify these special rules? That *some* change is wrought, if we adhere to the simple language, is very manifest. For example, the common law required that all partners, or other joint contractors, should unite as plaintiffs, and admitted no ordinary exception or excuse for the non-joinder. The new procedure, after requiring, as did the common law, that all those parties "united in interest must be joined as plaintiffs," adds, "but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reasons being stated in the complaint or petition." The practice permitted by this clause was familiar to courts of equity, but was utterly unknown in courts of law. Here, however, it is applied to all actions; no exception is suggested; and if we follow the plain language of the codes, this important alteration is made in the ancient legal rules regulating the parties plaintiff.

§ 114. *197. **Statutory Provisions confirm Common-Law Rules to a Certain Extent.** Assuming that the provisions in relation to plaintiffs are an enactment in a statutory form of the general equitable doctrine in regard to the same subject, and that, as they stand in the codes, they equally embrace within their scope actions of all kinds, legal and equitable, and giving full force to their language, they do not abrogate but rather confirm a large portion of the common-law rules, those, I mean, which require all persons jointly interested to be united as plaintiffs. The general requirements, "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs," and "those who are united in interest *must* be joined as plaintiffs," plainly include the case of persons "having an interest in the subject-matter," or "united in interest" by virtue of their being joint obligees, covenantees, or

promisees at law, as well as the case of persons having some common equitable interest. The two sections of the codes from which I have quoted do not contemplate nor permit a severance among parties plaintiff when the old law requires a joinder;[1] the changes introduced by them rather tend in the opposite direction, and, taking their language simply as it stands, they would seem to allow the uniting of parties plaintiff in many cases where such union was forbidden in legal actions; as, for example, the uniting of survivors of joint promisees and the personal representatives of those deceased. In fact, the practical rule of equity in regard to suits by persons jointly interested, or having a joint right, was the same as that which prevailed at law, with the single exception or addition which provided for the case of a refusal by one or more of the joint holders of the right to unite with their fellows as plaintiffs. In equity, as well as in law, the joint owners of property, and the joint obligees, or covenantees, were in general required to be all made co-plaintiffs, but if one or more refused to join, he or they could be made defendants.[2] This equitable doctrine is now, if we accept the express language of the codes, and not the glosses put upon it by some of the courts, extended to all actions alike.

§ 115. * 198. **Code allows a Freer Union of Parties Plaintiff than under the Common Law.** As already stated, these sections of the codes, if full force be given to their plain and simple terms, look to a more free union of parties as plaintiffs in the same action than was allowed by the courts of law under the former system. In order to be a proper plaintiff, according to the ancient theory, the person must be interested in the whole of the recovery, so that one judgment could be rendered for all the plaintiffs *in solido;* that a judgment should be given to one plaintiff for a certain sum of money, or for certain lands or

[1] [In Burkett *v.* Lehmen-Higginson Co. (1899), 8 Okla. 81, 56 Pac. 856, the court said: "The provisions of our Code do not contemplate or permit a severance among parties plaintiff when the old law required a joinder. . . . Our Code, by abolishing distinctions in forms of action, has preserved all the rights of litigants that are equitable or legal, without changing the common-law rules relating to the joinder of parties to actions, except in the particular that, if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, and the respective rights of the several parties, plaintiffs or defendants, whether equitable or legal, may be determined and adjudicated in the one action, although in the case of joint plaintiffs or joint defendants their rights and liabilities may not in all particulars be the same."]

[2] See 1 Daniel's Chan. Pl. (4th Am. ed.), pp. 192, 206, 207, 208, 211, 216.

chattels, and a judgment for a different sum, or other lands or chattels, be awarded to another plaintiff, was regarded as the sheerest impossibility. The legal notion of survivorship forbade the union of the personal representatives of a deceased joint contractor with the others who were living, and even the union of the representatives of all, if all were dead. The text of the codes is broad enough, and explicit enough, if it is taken literally, to abolish these legal restrictions upon the freedom of joining parties as plaintiffs. The clauses, "All persons having *an interest* in the subject of the action, and in obtaining the relief demanded," and "those who are united in interest," do not necessarily require that the interest of all those who are to be united as plaintiffs should be equal or the same, and they do require the union of all those having such an interest without any restriction as to its nature, whether it be legal or equitable. The interest of the survivors of joint obligees, covenantees, or promisees, was, under the ancient system, strictly legal. The interest of the executors or administrators of the deceased joint obligee or promisee was equitable, but was none the less a full interest, for it enabled the estate to obtain its entire portion of the benefit flowing from the contract. The unequivocal language of the codes declares that persons holding this common interest in the subject-matter of the action, or in obtaining the relief demanded, may be united as plaintiffs.

§ 116. *199. **Joinder of Holders of Interests which are Several.** In one other class of cases these provisions of the reform legislation would seem to have modified the former practice in legal actions, if their meaning is to be found in their exact terms. At the common law, the different holders of several rights must sue separately, although the rights were created by a single instrument, and although there might be some kind of a common interest; no election was given to bring a joint action by all, or a separate action by each. This rule is directly within the modifying effect of the sections under consideration. "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs." The extent of the interest is not the criterion, nor its source nor origin. If the persons have *any* interest, whether complete or partial, whether absolute or contingent, whether resulting from a common share in the proceeds of the suit, or arising from the

stipulations of the agreement, the language applies without any limitation or exception, and without any distinction suggested between actions which are equitable and those which are legal.[1] This was the established equity doctrine which in many cases permitted parties to be united as plaintiffs whose rights were, in a *legal* aspect, not joint, but several. It is possible, indeed it frequently happens, that several rights may be held by two or more persons, who nevertheless have "an interest in the subject of the action and in the relief demanded;" and it would seem that these persons, according to the interpretation given above, may now, if they so elect, join as plaintiffs in bringing a legal action as well as in maintaining an equitable suit.

§ 117. *200. **Recapitulation of Foregoing Theoretical Analysis.** I have thus far intentionally examined the sections of the various State codes which relate to the joinder of parties plaintiff in the civil action, without any reference to judicial authority and construction; I have endeavored to ascertain and to state the object and design of the legislature as the same could be gathered with reasonable certainty from the very words which it has employed. This legislative intent, when the field of investigation is thus limited, depends upon the prior rules controlling the choice of parties plaintiff both in legal and in equitable actions and upon the exact text of the statute itself. I recapitulate the results reached by this analysis: (1) The common-law doctrines defining joint and several rights, and the special rules relating to joint and several actions, are not *specifically* abrogated or modified; whatever changes have been made are the result of very general and comprehensive language used by the legislature. (2) There is a striking difference between the general character of the provisions having reference to plaintiffs and that of the provisions referring to defendants; the latter are more special in their nature, and in many of the States much more reformatory. (3) The new system has, in a very comprehensive form, established the doctrine of equity in regard to the choice and joinder of plaintiffs, and, by making no exceptions or limitations, has applied this doctrine to all actions, whether legal or equitable. (4) The effect of extending this doctrine of equity to legal actions is not to *prevent* the union of parties as co-plaintiffs in cases where, on account of the joint right, the common law required

[1] First Nat. Bk. of Central City *v.* Hummel, 14 Colo. 259.

such union; the common-law rule making the joinder of all such persons necessary is left unaffected, with the single exception that if one who should regularly be made a plaintiff, in pursuance of such rules, refuses to permit his name to be thus used, he may be made a defendant instead; and this exceptional provision being without limitation or restriction in the text, applies as well to legal as to equitable actions. (5) Persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs in all actions, whatever be their nature, although the rights of such persons are *legally* several, and although at the common law they would be required to institute separate actions; or, in other words, the plain import of the legislation — its language not being confined to any class of suits — is to enlarge the number of cases in which persons may be joined as co-plaintiffs, and to place legal actions in this respect upon exactly the same footing as those which are equitable in their nature. (6) The special rules of the common law as to husband and wife have been entirely abolished in some States by provisions contained in their codes of procedure, and in other States by separate statutes relating exclusively to the status of marriage.

§ 118. *201. **General Theory of Judicial Interpretation. Introductory.** The foregoing results were obtained from an examination of the language alone which the legislatures have used; I shall now proceed to compare them with the general conclusions which have been reached by the courts in their interpretation of the same provisions, and shall thus test their correctness and their value as practical guides in the administration of justice. In pursuing this investigation, the inquiry will at present be confined to those judicial decisions which have dealt with the subject of parties plaintiff, those which discuss the analogous topic of parties defendant being reserved to the succeeding section of this chapter. This course will necessarily produce some repetition of general principles; but as the questions relating to plaintiffs and those relating to defendants arise from provisions of the codes quite different in their scope and import, a separate consideration of them will prevent confusion and uncertainty. I shall *first* ascertain, if possible, and formulate the general theory of construction upon which the courts have proceeded in their decision of special cases; and, *secondly*, shall classify and arrange

these cases, and deduce therefrom the particular rules as to the joinder of plaintiffs in the civil action which have been judicially settled as a part of the reformed system of procedure. The number of instances in which the courts have laid down a broad and comprehensive principle of interpretation, which might be the guide in whole classes of adjudications, is very few, and such a principle must rather be gathered by a process of induction from an analysis and comparison of particular cases. The few attempts at the statement of a general theory which have been made, I shall quote somewhat at length.

§ 119. * 202. **Interpretation Given by the Courts of New York and Ohio. Liberal Construction.** In an early case, — an action brought by the three obligees in an injunction bond, — the objection was raised that the rights of the plaintiffs were not joint, and that they had been improperly united. Their interests, which had been interfered with by the injunction, were in fact distinct and separate, and it was assumed throughout the judgment that, under the former system, each should have brought a several action on the undertaking. The court, after stating the old rule applicable to the circumstances, proceeded as follows: "We are now to determine this question as it arises under the code of procedure. With the view of embracing all cases, whether of law or equity, and of making them conform to one general rule, the code provides, in § 117, that 'all persons having an interest in the subject of the action and in relief demanded may be joined as plaintiffs.' This is now the rule in all cases, whether such as were formerly the subjects of suits in equity or of actions at law, and we are to administer it according to its spirit and true intent, however the practice may differ from the rule that has heretofore prevailed in actions at law. . . . It will be perceived that this case falls within the precise words of the section before cited. All have an interest in the subject of the action and in the relief demanded — that is, in the damages arising out of the operations of the injunction. It is not said to be a joint or an equal or even a common interest, but simply an interest in the subject of the action with the view of doing full justice and settling the rights of all the parties in interest in one suit."[1] The Supreme Court of Ohio has adopted the same prin-

[1] Loomis *v.* Brown, 16 Barb. 325, 330, 332, per Gridley J. In the recent case of Pelly *v.* Bowyer, 7 Bush, 513, the Court of Appeals of Kentucky gave a very dif-

ciple of interpretation, and has given a construction to important terms of the statutory provision. An action was brought upon an undertaking called a forthcoming bond, executed by the defendant and sureties in attachment proceedings. Certain creditors had commenced suit, and had attached the property of their common debtor. The latter gave the bond in question to the sheriff running to all these plaintiffs, the condition of which was that the property attached, or its equivalent in money, should be forthcoming to answer the judgments which might be obtained. Subsequently other creditors issued attachments against the same debtor, which were delivered to the same sheriff, and he returned on each that he had levied upon the same goods before mentioned. All these creditors united in an action upon the bond, and the objection was taken that there was a misjoinder of parties plaintiff. The court, after examining the clauses of the code relative to attachments, and showing that the bond enured to the benefit of all the creditors, disposed of the objection as to parties in the following manner: "The first question presented for our consideration is the right of joinder of the plaintiffs in the action. The provisions of the code are as follows [citing the sections]. In order to correctly determine this question, it is only necessary to ascertain what was the subject of the action, and how the parties stood related to it. The subject of the action is the attachment undertaking." The court proceeds to hold that all the plaintiffs had a beneficial interest in this undertaking, although not named as parties in it, and concludes: "It follows, therefore, that the subsequent attaching creditors had an interest in the subject of the action and in obtaining the relief demanded by the action upon the undertaking, and might properly be joined as plaintiffs."[1] It should be observed that the court here gave a very broad interpretation to the phrase "the subject of the action" and to the

ferent construction to the statutory provision. The action was brought by several distributees to recover from the administrator the shares found to be due each on a settlement of the estate, and it resulted in a joint judgment for the aggregate amount of such shares. The action, it was held, was entirely irregular. Quoting § 36 of the code, in relation to the joinder of plaintiffs, the court said: "There can be no doubt that in equity actions for the settlement of estates several distributees may unite as plaintiffs. But, except in a particular class of cases, not embracing this, we know of no authority for uniting as co-plaintiffs several parties having separate and independent rights of action against the same defendant, or for a joint recovery thereon."

[1] Rutledge *v.* Corbin, 10 Ohio St. 478, 484, per Sutliff J.

term "interest." The "subject of the action" was said to be the contract upon which the suit was brought, and not the mere individual rights arising from that contract, nor the breach of those rights by the defendant. The "interest" required is equally general, and the language of the clause is satisfied by a beneficial interest created by operation of law, even though the person in whom it resides is not named in the contract, and could not possibly have had any interest at the time the instrument was executed. Again, the rights of the plaintiffs were clearly several; the undertaking of the defendants was for different amounts due to separate individuals, and payable upon the happening of different events having no legal connection and no common element. It was, in its legal effect, a collection of independent promises to pay distinct sums of money to separate persons contained in one written instrument.

§ 120. *203. **Same Liberal View Adopted in Indiana.** The Supreme Court of Indiana has stated the same general principles of interpretation in a clear manner, and with the evident desire to comply with the spirit of the new system which characterizes all the decisions of that able tribunal. An action was brought by three plaintiffs upon a peculiar contract, entered into between themselves and the two defendants, in which each of the five stipulated for indemnity against a certain contingent liability to be given by the four others, and in which the rights and liabilities were clearly several according to the common-law conception. The court say: "The code itself is not exactly definite as to who may be joined as plaintiffs. It provides, however, that judgment may be given for or against one or more of several plaintiffs, which was the practice in equity, though it was otherwise at law. It also provides that all persons having an interest in the subject of the action, and in the relief demanded may be joined as plaintiffs. Indeed, the code seems to have re-enacted the rules which had prevailed in courts of equity as to who *must* join as plaintiffs, and may be joined as defendants. But as to those cases in which in equity plaintiffs might or might not have joined at their option, the code does not expressly speak, for the reason, probably that the general rule in equity was not founded upon any uniform principle, and could not be expounded by any universal theorem as a test.[1] And it may have been thought safe, there-

[1] Story Eq. Pl. § 539.

fore, to leave each case to be decided by the courts upon authority and analogy. That it was intended the rules of pleading in courts of equity should govern the subject, is quite evident from those provisions of the code which prescribe the relief that may be granted, and to whom; in this respect conforming entirely to the established practice of those courts, — a mode of administration quite impracticable in a great many cases, unless the parties might be as in chancery. The present inquiry is, then, in view of the considerations above stated, reduced to this: Could these plaintiffs have formerly been joined in chancery?" The opinion proceeds to examine the provisions of the contract, and, holding that the rights as well as the liabilities of all the parties were entirely several, and would have been so regarded in equity, concludes as follows: "In the case before us there is in the plaintiffs no community of interest in any matter involved in the suit; no right common to all is claimed; everything is separate, save only that the right asserted by each is founded in a contract which, for convenience, happens to be on the same sheet of paper. We have failed to find any warrant in the adjudged cases for a joinder of plaintiffs under such circumstances."[1] The equitable interpretation of the sections relating to the union of parties plaintiff is here fully admitted, and it is declared that the established rule of the equity courts is to be taken as the criterion by which to determine all questions as to the proper joinder of plaintiffs now arising, even in legal actions. The attempt to maintain this particular suit by the three co-plaintiffs was condemned, not because their rights were several according to the legal notion, but because they were so unconnected that they could not have been enforced by a single action in equity. The same court reiterated this principle of interpretation in another well-considered case, and it may be regarded as the settled doctrine of that State. "The code requires all persons having an interest in the subject of the action, and in the relief demanded, except as otherwise provided, to be joined as plaintiffs. It also requires those who are united in interest to be joined as plaintiffs or defendants. And it then declares that, when the question is one of common or general interest to many persons, or when the parties are numerous and it is impracticable to bring them all

[1] Goodnight *v.* Goar, 30 Ind. 418, 419, Ind. 51, 59; Home Ins. Co. *v.* Gilman, per Frazer J. See Maple *v.* Beach, 43 112 Ind. 7.

before the court, one or more may sue or defend for the benefit of the whole.[1] These provisions substantially re-enact the old equity rules on the subject of parties. All who are united in interest must join in the suit, unless they are so numerous as to render it impracticable to bring them all before the court; while those who have only a common or general interest in the controversy may one or more of them institute an action. This, however, must not be understood as allowing, in all cases, two or more persons having separate causes of action against the same defendant, though arising out of the same transaction, to unite and pursue their remedies in one action. Several plaintiffs, by one complaint, cannot demand several matters of relief which are plainly distinct and unconnected. But where one general right is claimed, where there is one common interest among all the plaintiffs centering in the point in issue in the cause, the objection of improper parties cannot be maintained."[2]

§ 121. *204. **In Missouri and California. Statute Held to apply only to Equitable Actions.** Notwithstanding the common principle which lies at the bottom of the foregoing opinions, and which has undoubtedly been adopted by a great majority of the various State courts in their construction of these statutory provisions, there has not been an absolute unanimity of decision. By some individual judges, and even by some courts, the operation of the sections under consideration has been confined exclusively to equitable actions, while the ancient common-law rules as to parties have been declared controlling in all legal actions. A reference to two or three cases in which this ancient distinction has been still preserved will be sufficient for my purpose.

[1] [Indiana, Burns' St., 1901, §§ 263, 270.]

[2] Tate *v.* Ohio & Miss. R. Co., 10 Ind. 174; citing McKenzie *v.* L'Amoureux, 11 Barb. 516; Bouton *v.* Brooklyn, 15 Barb. 375; Murray *v.* Hay, 1 Barb. Ch. 59. The following cases, among others, assert the general doctrine that the provisions of the code apply to legal and equitable actions alike. Cummings *v.* Morris, 25 N. Y. 625; Grinnell *v.* Schmidt, 2 Sandf. 706; Cole *v.* Reynolds, 18 N. Y. 74. Earle *v.* Burch, 21 Neb. 702; Schiffer *v.* Eau Claire, 51 Wis. 385; Home Ins. Co. *v.* Gilman, 112 Ind. 7; Hughes *v.* Boone, 81 N. C. 204.

[In the recent case of Trompen *v.* Yates (1902), — Neb. —, 92 N. W. 647, the court said, affirming the liberal interpretation indicated in the text: "We think, under the holding of this court in Earle *v.* Burch, 21 Neb. 710, and in the earlier case of Kaufman *v.* Wessel, 14 Neb. 162, and the approval that has been often given to both those cases, that this court is committed to the applying in law actions of the equity doctrine that interest in the subject of the action gives a right to join as plaintiff."]

Two persons, A. and B., entered into a written contract with a third, C., for the performance of certain work and labor at a stipulated price. The work having been completed, and C. refusing to pay the price agreed upon, A. brought an action upon the contract; demanding judgment for one half of said sum, and making B., his co-contractor, a defendant, alleging that he had refused to be a party plaintiff, and had confederated with C. to hinder and delay the plaintiff from obtaining his demand. The Supreme Court of Missouri, in affirming a nonsuit which had been ordered at the trial, said: "If C. has violated his contract, he is liable to an action; but that action could only be brought in the joint names of A. and B., the contractors. That provision of the Practice Act which allows a party to be made a defendant when he will not join as a plaintiff, has nothing to do with this question. That was a rule of equity practice which was necessarily incorporated into a system *which abolished all distinction of actions.* In adopting it, it was not designed that it should have any operation but in cases where it was applicable under the former system of practice. It was never intended that it should affect the rights of parties arising out of written contracts. Nothing is better settled than the rule that, on an undertaking to two, both must join in an action on it, otherwise there is no cause of action. It is a part of the contract that both shall sue, otherwise no action shall be brought. If one will say that he had no right of action, and will not sue, why should he not have as much right as the other who says there is a cause of action?"[1] The same general doctrine was accepted as the basis of interpretation, and the same restriction of the statutory provisions to suits in equity was announced by the Supreme Court of California in an early case arising upon similar facts. "The simple question presented for our consideration is, whether there was a non-joinder of parties plaintiff or not; it being contended that § 14 of the Practice Act has introduced a new rule, and that one of several parties may maintain an action on a joint contract, in his own name, by simply suggesting the impossibility of obtaining the consent of the others to join in the action. Upon examination of this section, we are satisfied that it was intended

[1] Rainey *v.* Smizer, 28 Mo. 310, per Scott J. See, *per contra*, Hill *v.* Marsh, 46 Ind. 216.

to apply to suits in equity, and not to actions at law."[1] I have placed in a foot-note a number of cases which contain expressions of opinion by individual judges, that the sections and clauses of the codes and practice acts regulating the choice and joinder of parties are confined in their scope and operation to equitable actions alone, and were not intended by the legislature to interfere with the former rules applicable to legal actions.[2]

§ 122. * 205. **Recapitulation of Judicial Views. Cases in which there is an Election.** The citations given in the foregoing paragraphs confirm the conclusions which were reached by a mere analysis of the language. That these provisions as to the parties plaintiff do enact the general doctrines which had prevailed in courts of equity, is admitted by both schools of interpretation; and that these equitable rules, thus embodied in a statutory form, do apply to all actions, and are not by any implied limitation restricted to equitable actions, is now, I think, declared by the courts in most of the States which have adopted the reformed procedure. Assuming these facts as premises, all the other propositions stated in my preliminary analysis follow as a necessary consequence. In this immediate connection it should be remarked that individual judges will give greater or less scope to the liberty granted by the legislative rule, according to their personal notions of expediency. There was a numerous class of cases, under the former system, in which courts of equity recognized an election on the part of claimants either to join in one proceeding or to sue separately. This power of choice, then confined of course to suits in equity, still remains in similar instances, and may even be extended to certain controversies in which the cause of action is legal. Thus, where the right is strictly several, and would be regarded as such by the common law, equity might have allowed them an election to sue separately or jointly. This power of choice, contained in the equity doctrine, is introduced into the new procedure, and is of course not confined to suits equitable in their nature. We must therefore expect to find, within certain narrow bounds, some conflict

[1] Andrews *v.* Mokelumne Hill Co., 7 Cal. 330, 333. The same court has, in later cases, pursued a course of decision more in accordance with the spirit of the code, and has, as completely perhaps as any other tribunal, abandoned all attempt to preserve a distinction between actions at law and suits in equity.

[2] Voorhis *v.* Child's Ex., 17 N. Y. 354, per Selden J.; Habicht *v.* Pemberton, 4 Sandf. 657; Van Horne *v.* Everson, 13 Barb. 526.

of decision from judges who accept and heartily approve the general principles of interpretation which have been developed in the foregoing discussion.

§ 123. * 206. **Manner of Raising Question as to Proper Parties Plaintiff. Defect of Parties means too Few.** Before proceeding to the discussion of particular cases and special rules, a preliminary question may be here properly answered: How can the objection that an action has not been brought by the proper plaintiff or plaintiffs be raised and regularly presented to the court for its decision? The codes of procedure all agree in prescribing, among other grounds of demurrer to the complaint or petition, the following: "When it shall appear on the face of the complaint or petition; 2, that the plaintiff has not legal capacity to sue; or, 4, that there is a defect of parties plaintiff or defendant; or, 6, that the complaint or petition does not state facts sufficient to constitute a cause of action;" [1] and also that, "when any of the matters enumerated in section [the foregoing] do not appear on the face of the complaint or petition, the objection may be taken by answer;" [2] and, finally, "if no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction

[1] New York, § 144 (488); Kansas, § 89; Nebraska, § 94; Ohio, § 87; Oregon, § 66; California, § 430; N. C. § 95; S. C. § 167. [Arizona, Rev. St., 1901, § 1351; Arkansas, Sand. & Hill's Dig., § 5717; Idaho, Code Civ. Pro., 1901, § 3206 (including misjoinder as a ground); Iowa, Code, 1897, § 3561; Indiana, Burns' St., 1901, § 342; Kentucky, Codes, 1895, §§ 92, 93; Montana, § 680 (including misjoinder as a ground); Missouri, Rev. St., 1899, § 598 (including misjoinder as a ground); Minnesota, Gen. St., 1894, § 5232; North Dakota, Rev. Codes, 1899, § 5268; Oklahoma, St., 1893, § 3967; Utah, Rev. St., 1898, § 2962 (including misjoinder as a ground); South Dakota, Ann. St., 1901, § 6115; Washington, Bal. Code, § 4907; Wyoming, Rev. St., 1899, § 3535 (including misjoinder as a ground); Wisconsin, St., 1898, § 2649.]

[In Connecticut the statute provides merely that "all demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient." Gen. St., 1902, § 608.]

In the following codes it is made a special cause of demurrer that there is a *misjoinder* of plaintiffs or defendants. Cal. § 430; Nevada, § 40; Colorado, § 50. Misjoinder of plaintiffs is now a ground of demurrer in New York, § 488.

[2] New York, § 147 (498); Kansas, § 91; Nebraska, § 96; Ohio, § 89; Oregon, § 69; Cal. § 433; N. C. § 98; S. C. § 170. [Arizona, Rev. St., 1901, § 1353, in respect only to the ground numbered 4 in the text; Arkansas, Sand. & Hill's Dig., § 5720; Colorado, § 54; Idaho, Code Civ. Pro., 1901, § 3209; Iowa, Code, 1897, § 3563; Indiana, Burns' St., 1901, § 346; Montana, § 684; Missouri, Rev. St., 1899, § 602; Minnesota, Gen. St., 1894, § 5234; Nevada, § 44; North Dakota, Rev. Codes, 1899, § 5271; Oklahoma, St., 1893, § 3969; Utah, Rev. St., 1898, § 2966; South Dakota, Ann. St., 1901, § 6118; Washington, Bal. Code, § 4909; Wyoming, Rev. St., 1899, § 3537; Wisconsin, St., 1898, § 2653.]

of the court, and the objection that the complaint or petition does not state facts sufficient to constitute a cause of action."[1] The construction to be placed upon these clauses, and the resulting rules prescribing the methods by which an objection as to proper parties must be interposed, in order to present a question for judicial decision, have been settled in the various States with almost complete uniformity. *In regard to defect of parties plaintiff*, the interpretation is now established, that "defect of parties," given as one ground of demurrer, means too *few*, and not too *many*. A demurrer alleging this particular objection can only be interposed, therefore, in case of a *non*-joinder of necessary plaintiffs or defendants, and never in case of a *mis*-joinder. The word "defect" is taken in its literal sense of "deficiency," and not in a broader sense as meaning *any* error in the selection of parties. Upon this point the courts are nearly unanimous.[2] It has been held, however, in Wisconsin, that this is the proper form of demurrer where the objection is to a misjoinder.[3]

[1] New York, § 148 (499); Kansas, § 91; Nebraska, § 96; Ohio, § 89; Oregon, § 70; Cal. § 434; N. C. § 99; S. C. § 171. [Arizona, Rev. St., 1901, § 1353; Arkansas, Sand. & Hill's Dig., § 5720; Colorado, § 55; Idaho, Code Civ. Pro., 1901, § 3210; Iowa, Code, 1897, §§ 3563, 3564 (substantially different from the provision given in the text); Indiana, Burns' St., 1901, § 346; Kentucky, Codes, 1895, §§ 92, 93; Montana, § 685; Missouri, Rev. St., 1899, § 602; Minnesota, Gen. St., 1894, § 5235; Nevada, § 45; North Dakota, Rev. Codes, 1899, § 5272; Oklahoma, St., 1893, § 3969; Utah, Rev. St., 1898, § 2967; South Dakota, Ann. St., 1901, § 6119; Washington, Bal. Code, § 4911; Wyoming, Rev. St., 1899, § 3537; Wisconsin, St., 1898, § 2654.]

[2] [Union Pac. Ry. Co. *v.* Smith (1898), 59 Kan. 80, 52 Pac. 102; Weber *v.* Dillon (1898), 7 Okla. 568, 54 Pac. 894; Allen *v.* Cooley (1898), 53 S. C. 414, 31 S. E. 634; Dolan *v.* Hubinger (1899), 109 Iowa, 408, 80 N. W. 514; Cedar Rapids Nat. Bank *v.* Lavery (1900), 110 Iowa, 575, 81 N. W. 775.] Palmer *v.* Davis, 28 N. Y. 242; Case *v.* Carroll, 35 N. Y. 385; Richtmyer *v.* Richtmyer, 50 Barb. 55; Powers *v.* Bumcratz, 12 O. St. 273; Berkshire *v.* Shultz, 25 Ind. 523; Bennett *v.* Preston, 17 Ind. 291; Mornan *v.* Carroll, 35 Iowa, 22; Hill *v.* Marsh, 46 Ind. 218. As the same is true of defendants, — the section including both parties in a single formula, — the decisions in reference to them are in point. See Peabody *v.* Washington, &c. Ins. Co., 20 Barb. 339; Voorhis *v.* Baxter, 18 Barb. 592; s. c. 17 N. Y. 354; Bank of Havana *v.* Magee, 20 N. Y. 355. See also Western, etc. Co. *v.* Ætna Ins. Co., 40 Wis. 373; Marsh *v.* Board of Supervisors, 38 id. 250; Willard *v.* Reas, 26 id. 540 (settling the rule as given in the text, and limiting Read *v.* Sang, 21 id. 678); Schiffer *v.* Eau Claire, 51 Wis. 385; Lowry *v.* Jackson, 27 S. C. 318; McKee *v.* Eaton, 26 Kan. 226; White *v.* Scott, 26 Kan. 476; Boldt *v.* Budwig, 19 Neb. 739; Clark *v.* Crawfordsville Coffin Co., 125 Ind. 277; Evans *v.* Schafer, 119 Ind. 49; Murray *v.* McGarigle, 69 Wis. 483.

[3] Read *v.* Sang, 21 Wis. 678. The demurrer was held proper upon the authority of an early New York decision, — Dunderdale *v.* Grymes, 16 How. Pr. 195, which has since been many times overruled in that State.

§ 124. *207. **Question of Defect of Parties must be raised by Demurrer or Answer.** When a defect of parties plaintiff — that is, a non-joinder — appears on the face of the complaint or petition, the defendant *must* raise the question by demurrer, and not by answer.[1] If he neglects to interpose a demurrer upon this specific ground, he waives the objection entirely, even though he sets up the defence in his answer. The reason given for this somewhat technical rule is the following: The mere defence of a defect of parties, not going to the real merits of the controversy, and not denying the cause of action existing in some persons, is not favored by the courts; it is regarded as a "dilatory defence," because it does nothing more than postpone the decision of the substantial issues; and, although the defendant is permitted to avail himself of it, he must follow exactly the modes prescribed by the rules of practice, or by the statute for its interposition.[2] If the defect does not appear upon the face of the complaint or petition, the defendant must set up the defence specially in his answer, or, failing this, he waives the objection.[3]

[1] [Foster *v.* Lyon County (1901), 63 Kan. 43, 64 Pac. 1037; Mason *v.* St. Paul Fire Ins. Co. (1901), 82 Minn. 336, 85 N. W. 13; Cooper *v.* Thomason (1896), 30 Ore. 161, 45 Pac. 295; Carskaddon *v.* Pine (1899), 154 Ind. 410, 56 N. E. 844; Castile *v.* Ford (1897), 53 Neb. 507, 73 N W. 945; Johnson *v.* Gooch (1894), 114 N. C. 62, 19 S. E. 62; Radant *v.* Werheim Mfg. Co. (1900), 106 Wis. 600, 82 N. W. 562; Osborn *v.* Logus (1895), 28 Ore. 306, 42 Pac. 997. But a demurrer will not lie where the complaint does not show that the party for whose non-joinder the demurrer is interposed was living when the suit was commenced: Deegan *v.* Deegan (1894), 22 Nev. 185, 37 Pac. 360.]

[2] Zabriskie *v.* Smith, 13 N. Y. 322; De Puy *v.* Strong, 37 N. Y. 372, 3 Keyes, 603; Patchin *v.* Peck, 38 N. Y. 39; Fisher *v.* Hall, 41 N. Y. 416; Wells *v.* Cone, 55 Barb. 585; Hees *v.* Nellis, 1 N. Y. Sup. Ct. 118; Alexander *v.* Gaar, 15 Ind. 89; Justice *v.* Phillips, 3 Bush, 200; Andrews *v.* Mokelumne Hill Co., 7 Cal. 330; Tennant *v.* Pfister, 45 Cal. 270; Dailey *v.* Houston, 58 Mo. 361, 366; McRoberts *v.* So. Minn. R. R., 18 Minn. 108, 110; Mechanics' Bank *v.* Gilpin, 105 Mo. 17. As the same rule applies in case of defect in parties defendant, see Dillaye *v.* Parks, 31 Barb. 132; Wright *v.* Storrs, 32 N. Y. 691; s. c. 6 Bos. 600; Abbe *v.* Clarke, 31 Barb. 238. See also Blakeley *v.* Le Duc, 22 Minn. 476; Baldwin *v.* Canfield, 26 id. 43; Gimbel *v.* Pignero, 62 Mo. 240; Kellogg *v.* Malin, id. 429; McConnell *v.* Braynor, 63 id. 461; Dunn *v.* Hannibal & St. J. R. Co., 68 id. 268; State *v.* Saffington, id. 454; Donnan *v.* Intelligencer Co., 70 id. 168; Parchin *v.* Peck, 2 Mont. 567; Ross *v.* Linder, 12 S. C. 592; Lillie *v.* Case, 54 Iowa, 177; Bouton *v.* Orr, 51 id. 473; Ryan *v.* Mullin, 45 id. 631; Taylor *v.* Collins, 51 Wis. 123; Thomas *v.* Wood, 61 Ind. 132; Cox *v.* Bird, 65 id. 277; Barnett *v.* Leonard, 66 id. 422; Davis *v.* Bechstein, 69 N. Y. 440; Risley *v.* Wightman, 13 Hun, 163; Porter *v.* Fletcher, 25 Minn. 493; Mackenzie *v.* Edinburg Sch. Trs., 72 Ind. 191 (an unincorporated association cannot sue by its name; all the members must join as plaintiffs); Becler *v.* First Nat. Bk. of Larned (Neb., 1892), 51 N. W. 857; Stelling *v.* Grabowsky, 19 N. Y. Suppl. 280; McCallister's Adm. *v.* Sav. Bk. of Louisville, 80 Ky. 684; Talmage *v.* Bierhause, 103 Ind. 270.

[3] [Johnson *v.* Gooch (1894), 114 N. C. 62, 19 S. E. 62; Moore *v.* Harmon (1895),

To sum up: if a defect of parties plaintiff appears in the pleading, the mode of raising the defence is by demurrer alone; if it does not appear in the pleading, by answer alone; and, unless the defendant complies with these requirements as to method, he waives all objection.[1] It has been expressly decided in Ohio,

142 Ind. 555, 41 N. E. 599. Held in Mason *v.* St. Paul Fire Ins. Co. (1901), 82 Minn. 336, 85 N. W. 13, that a defect of parties plaintiff, when the question is raised by answer, does not entitle the defendant to a verdict on the merits, but only to a dismissal; but if, in such a case, a motion to dismiss is not made upon proof of the defect of parties plaintiff, the objection is waived. And in Atcheson, Topeka, etc. Ry. Co. *v.* Hucklebridge (1901), 62 Kan. 506, 64 Pac. 58, it was held that the Code provision requiring defects in petitions other than those appearing on face of same to be set up by answer, does not apply to a petition by a partner who conceals the fact of partnership and wrongfully brings suit in his own name for an injury to partnership property. In such case defendant, if ignorant of partnership until disclosed upon the trial, may then raise the question without amending answer. See dissenting opinions herein.

A demurrer to a petition, stating in general terms that "there are no proper parties," is too vague and general. It should point out who would be proper parties: Dawson *v.* Equitable Mortgage Co. (1899), 109 Ga. 389, 34 S. E. 668; Parker *v.* Cochran (1895), 97 Ga. 249, 22 S. E. 961.] Also Merritt *v.* Walsh, 32 N. Y. 685; Donnell *v.* Walsh, 33 N. Y. 43; s. c. 6 Bosw. 621; Gock *v.* Keneda, 29 Barb. 120; Umsted *v.* Buskirk, 17 Ohio St. 113; Dickinson *v.* Vanderpoel, 5 N. Y. Sup. Ct. 168. See also Trenor *v.* Cent. Pac. R. R., 50 Cal. 222; Maxwell *v.* Pratt, 24 Hun, 448 (an answer setting up a defect of parties must give the names of the plaintiffs to be joined).

[1] [Engel *v.* Dado (1902), — Neb. —, 92 N. W. 629; Hannegan *v.* Roth (1896), 12 Wash. 695, 44 Pac. 256; Stephens *v.* Harding (1896), 48 Neb. 659, 67 N. W. 746; Bridge Co. *v.* Fowler (1895), 55 Kan. 17, 39 Pac. 727; Gilland *v.* Union Pac. Ry. Co. (1895), 6 Wyo. 185, 43 Pac. 508; Moore *v.* Bevier (1895), 60 Minn. 240, 62 N. W. 281; Bell *v.* Mendenhall (1898), 71 Minn. 331, 71 N. W. 1086; Allen *v.* Cooley (1898), 53 S. C. 77, 30 S. E. 721; Howe *v.* Harper (1900), 127 N. C. 356, 37 S. E. 505; Medano Ditch Co. *v.* Adams (1902), 29 Colo. 317, 68 Pac. 431; Prichard's Executrix *v.* Peace (1895), 98 Ky. 99, 32 S. W. 296; Rittenhouse *v.* Clark (1901), 110 Ky. 149, 61 S. W. 33; Radant *v.* Werheim Mfg. Co. (1900), 106 Wis. 600, 82 N. W. 562; Osborn *v.* Logus (1895), 28 Ore. 306, 42 Pac. 997; Ross *v.* Page (1902), 11 N. D. 458, 92 N. W. 822; Bates-Smith Inv. Co. *v.* Scott (1898), 56 Neb. 475, 76 N. W. 1063; Coe *v.* Anderson (1894), 92 Iowa, 515, 61 N. W. 177; Hellams *v.* Prior (1902), 64 S. C. 296, 43 S. E. 25; Wyman *v.* Herard (1899), 9 Okla. 35, 59 Pac. 1009.

A plea in abatement for defect of parties must show affirmatively the names of the parties omitted, that they are alive, and that they are within the jurisdiction of the court: Cone *v.* Cone (1901), 61 S. C. 512, 39 S. E. 748. A demurrer or plea on the ground of defect of parties should show in what the defect consists and should name the party not joined: Emerson *v.* Schwindt (1900), 108 Wis. 167, 84 N. W. 186; Johnson *v.* Gooch (1894), 114 N. C. 62, 19 S. E. 62; Boseker *v.* Chamberlain (1903), — Ind. —, 66 N. E. 448.

The objection of defect of parties cannot be raised for the first time on appeal: Thompson *v.* Rush (1902), — Neb. —, 92 N. W. 1060; nor by an instruction: Loomis *v.* Hollister (1902), 75 Conn. 275, 53 Atl. 579; Osborn *v.* Logus (1895), 28 Ore. 306, 42 Pac. 995; nor by oral demurrer at the trial: Shull *v.* Caughman (1898), 54 S. C. 203, 32 S. E. 301; nor is it ground for dismissing the complaint on the trial upon the merits: Radant *v.* Werheim Mfg. Co. (1900), 106 Wis. 600, 82 N. W. 562; nor can it be raised by motion for a new trial: Mather *v.* Dunn (1898), 11 S. D. 196, 76 N. W.

and this is plainly the correct rule, that a demurrer for want of sufficient facts does not raise the question of a defect — non-joinder — of plaintiffs or defendants.[1]

§ 125. * 208. **Meaning of Want of Legal Capacity to Sue.** A demurrer or defence for this cause must relate exclusively to some legal disability of the plaintiff, — such as infancy, coverture, idiocy, and the like, — and not to the absence of facts sufficient to constitute a cause of action.[2] The facts constituting a cause of action may be sufficiently averred, and yet the plaintiff may not have a legal capacity to sue. The objection that the plaintiff has not legal capacity cannot, therefore, be raised and

922.] See, however, *post*, § * 287, to the effect that the objection of the defect of indispensable parties is not so waived in equitable suits.

[1] Umsted *v.* Buskirk, 17 Ohio St. 113. Nevil *v.* Clifford, 55 Wis. 161; Whipperman *v.* Dunn, 124 Ind. 349. [To the same effect are Walton *v.* Washburn (1901), Ky., 64 S. W. 634; Bell *v.* Mendenhall (1898), 71 Minn. 331, 73 N. W. 1086; Carskaddon *v.* Pine (1899), 154 Ind. 410, 56 N. E. 844; Boseker *v.* Chamberlain (1903), — Ind. —, 66 N. E. 448; Beyer *v.* Town of Crandon (1898), 98 Wis. 306, 73 N. W. 771; Ross *v.* Page (1902), 11 N. D. 458, 92 N. W. 822; Svanburg *v.* Fosseen (1899), 75 Minn. 350, 78 N. W. 4.]

[2] [When the plaintiff's incapacity to sue appears on the face of the complaint the objection must be taken by demurrer or it is waived: Blackwell *v.* British-American Co. (1902), 65 S. C. 105, 43 S. E. 395; Cooper *v.* The People (1900), 28 Colo. 87, 63 Pac. 314; Meyer *v.* Barth (1897), 97 Wis. 352, 72 N. W. 748; Swing *v.* White River Lumber Co. (1895), 91 Wis. 517, 65 N. W. 174. When it does not appear on the face of the pleading, the remedy is by answer: Clark *v.* Carey (1894), 41 Neb. 780, 60 N. W. 78; Blackwell *v.* British-American Co. (1902), 65 S. C. 105, 43 S. E. 395; Hankinson *v.* Charlotte, etc. R. R. Co. (1893), 41 S. C. 1, 19 S. E. 206. In either case the grounds of the objection must be specified: Blackwell *v.* British-American Co. (1902), 65 S. C. 105, 43 S. E. 395, and they cannot be shown under a general denial: Hicks *v.* Beam (1893), 112 N. C. 642, 17 S. E. 490; Hankinson *v.* Charlotte, etc. R. R. Co. (1893), 41 S. C. 1, 19 S. E. 206. Held in State *v.* Ohio Oil Co. (1897), 150 Ind. 21, 49 N. E. 809, that the capacity of the State to sue should be questioned by demurrer under the second statutory ground, — want of legal capacity to sue. Gager *v.* Marsden (1899), 101 Wis. 598, 77 N. W. 922: Mere error of the trial court in making substitution of plaintiffs does not go to the legal capacity of the substituted plaintiffs to sue, and on a demurrer for want of such capacity the complaint stands as if the action were originally commenced by the substituted plaintiffs. Rogers *v.* Levy (1893), 36 Neb. 601, 54 N. W. 1080: A judgment of dismissal on the ground of want of legal capacity to sue is not a bar to a future action on the same cause of action. Ward *v.* Petrie (1898), 157 N. Y. 301, 51 N. E. 1002: The ground of demurrer that the plaintiff has not legal capacity to sue does not apply to a receiver duly appointed in supplementary proceedings, where the defendant claims that he cannot maintain the action by reason of the nature of the relief sought. Such objection is not waived by failure to plead or demur.

In order that this question may be raised by demurrer, the want of capacity to sue must affirmatively appear on the face of the complaint, and hence it is not enough that the complaint fails to show that the plaintiff has capacity to sue: Locke *v.* Klunker (1898), 123 Cal. 231, 55 Pac. 993; Northrup *v.* A. G. Wills Lumber Co. (1902), 65 Kan. 769, 70 Pac. 879.]

relied upon under a demurrer for want of sufficient facts, nor the objection of a want of facts under a demurrer alleging an absence of legal capacity.[1]

§ 126. *209. **Effect of Misjoinder of Parties Plaintiff. Common Law and Equity Rules.** A misjoinder of parties plaintiff is not made a specific ground of demurrer, or mentioned as a defence, except [in a few of the codes].[2] At the common law two or more persons could not be joined as plaintiffs in an action upon contract, unless they possessed a joint right; and if, on the trial,

[1] [State *ex rel.* v. Moores (1899), 58 Neb. 285, 78 N. W. 529; Berkin v. Marsh (1896), 18 Mont. 152, 44 Pac. 528, where it was held that legal disability to sue pertains to the person desiring to sue, and not to the cause of action, and the fact that the cause of action has not accrued does not give rise to the objection of disability to sue. To the same effect see Weirich v. Dodge (1899), 101 Wis. 621, 77 N. W. 906. See also Zinn v. Baxter (1901), 65 Ohio St. 341, 62 N. E. 327, where it was held that the fact of an assignment of the cause of action, upon which plaintiff sues, before the commencement of the action, goes not to plaintiff's capacity to sue but to the right of action.

The following cases support the rule stated in the text: Ætna Life Ins. Co. v. Sellers (1899), 154 Ind. 370, 56 N. E. 97; Bem v. Shoemaker (1895), 7 S. D. 510, 64 N. W. 544; Coddington v. Canaday (1901), 157 Ind. 243, 61 N. E. 567; Radabaugh v. Silvers (1893), 135 Ind. 605, 35 N. E. 694; Knight v. Le Bea (1897), 19 Mont. 223, 47 Pac. 952; Birmingham v. Cheetham (1898), 19 Wash. 657, 54 Pac. 37.

But the question of the right of plaintiff to maintain the action may be raised by general demurrer: Kinsley v. Kinsley (1897), 150 Ind. 67, 49 N. E. 819; American Trust, etc. Bank v. McGettigan (1899), 152 Ind. 582, 52 N. E. 793.]

De Bolt v. Carter, 31 Ind. 355; Berkshire v. Shultz, 25 Ind. 523; People v. Crooks, 53 N. Y. 648; Haire v. Baker, 5 N. Y. 357; Fulton F. Ins. Co. v. Baldwin, 37 N. Y. 648; Allen v. Buffalo, 38 N. Y. 280; Palmer v. Davis, 28 N. Y. 242; Bank of Lowville v. Edwards, 11 How. Pr. 216; Viburt v. Frost, 3 Abb. Pr. 120; Myers v. Machado, 6 Abb. Pr. 198, 14 How. Pr. 149; Hobart v. Frost, 5 Duer, 672; Saxton v. Seiberling, 48 Ohio St. 554. In New York, a corporation is not required to aver the acts creating its corporate character; and, in an action by a bank where the complaint omitted any such allegation, a demurrer on the ground of a want of legal capacity was overruled. Phœnix Bk. of N. Y. v. Donnell, 40 N. Y. 410, 41 Barb. 571. As to legal capacity to sue, see Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422; Beers v. Shannon, 73 id. 292, 297; Minneapolis Harvester Works v. Libby, 24 Minn. 327; White Oak Dist. Tp. v. Oskaloosa Dist. Tp., 44 Iowa, 512; Smith v. Peckham, 39 Wis. 414; Rogers v. Lafayette Agr. Works, 52 Ind. 296; De Bolt v. Carter, 31 id. 355; Langsdale v. Girton, 51 id. 99; Perkins v. Stimmel, 114 N. Y. 359; Bray v. Black, 57 Ind. 417; Wilhoit v. Cunningham, 87 Cal. 453; Beville v. Cox, 109 N. C. 265; Brookmire v. Rosa (Neb. 1892), 51 N. W. 840; Farrell v. Cook, 16 Nebr. 483; Pence v. Aughe, 101 Ind. 317; Campbell v. Campbell, 121 id. 178; Murray v. McGarigle, 69 Wis. 483. The demurrer must be overruled if any one of several plaintiffs has capacity to sue. O'Callaghan v. Bode, 84 Cal. 689. [The question of plaintiff's capacity to sue cannot be raised by an intervenor: Pitts Agricultural Works v. Baker (1898), 11 S. D. 342, 77 N. W. 586.]

[2] [This is made a specific ground of demurrer in the following codes: Colorado, § 50; Nevada, § 40; New York, § 488; Idaho, Code Civ. Pro. (1901), § 3206; Montana, § 680; Utah, Rev. St. (1898), § 2962; Wyoming, Rev. St. (1899), § 3535; Missouri, Rev. St., 1899, § 598.]

they failed to establish such right as alleged residing in all, a nonsuit was inevitable. If two or more persons were united as plaintiffs in a legal action based upon their right of property in lands or chattels, they must necessarily have been either joint owners or owners in common, and a failure to prove the joint right of action was followed by the same consequence, — a defeat of all the plaintiffs. In equity, no such doctrine prevailed; because when two or more persons were made plaintiffs in the same action it by no means followed that they held and alleged a joint right residing in themselves. When, therefore, there was an improper or unnecessary union of co-plaintiffs in an equity action, the suit did not necessarily fail as to all; the bill might be dismissed at the hearing as to certain of the plaintiffs, and a decree rendered for the others; or some might be struck off, upon motion, at any stage of the proceedings, and the cause go on in the name of the residue.

§ 127. Analysis.

* 210. **Same Subject. Under the Codes. Preliminary** Has any change in these conceptions, and in the practical rules derived from them, been wrought by the codes of procedure? If the old distinction between joint legal rights and several legal rights is maintained; if the ancient notion of the common law, that two or more parties plaintiff in a legal action, brought upon a contract or upon the ownership of land or chattels, must hold a joint cause of action, is still preserved, with all of its technical incidents; if it be considered that the reform legislation has confined its equitable doctrine as to parties to equitable actions alone, while it has left the doctrines regulating legal actions untouched, — then no change has been wrought in the practical rules which determine the effect of a misjoinder of plaintiffs, as stated in the foregoing paragraph. Under this assumption, a misjoinder of plaintiffs in a legal action, brought upon a contract or upon property in lands or chattels, must now, as formerly, entail the consequence of a complete failure; while now, as formerly, a misjoinder of plaintiffs in an equity suit does not entail such a consequence; a judgment can be recovered by a portion of the plaintiffs, and the action be dismissed as to the residue. If, on the other hand, the system is to be accepted and acted upon in the spirit which designed it, — if its requirements as to parties, which, as is universally conceded, enact the established doctrines of the equity courts,

extend the one principle to all actions, legal as well as equitable, — then there is a single rule governing all actions, and, so far as the dogmas of the common law are inconsistent therewith, they are necessarily abrogated, and form no part of the reformed American procedure. The most conspicuous and characteristic of these dogmas are the notions as to joint rights, and as to the impossibility of severing in the judgment when such rights have been averred as the causes of action; and these notions must be abandoned, if full force and effect are to be given to the language used by the legislature. The whole discussion is thus reduced to a single question: Are these provisions of the code to be accepted in their entirety, with all their legitimate and necessary consequences, or are they to be limited and restricted by some exception grafted upon them by the courts, and are their consequences to be abridged and their operation to be confined to those actions which, under the former system, would have been called equitable? I have already, in the former portion of this section, stated, as the guiding principle of interpretation adopted by most of the courts, the doctrine that the equitable rules of the codes were to be applied in all actions, whatever be their nature. This is certainly the inference to be drawn from the judicial decisions *when a general theory of interpretation was the subject of discussion;* and one theory, when accepted, ought, beyond a doubt, to be carried out in all the minor details, in the work of creating all the practical rules for administering justice, if any consistent and symmetrical result is desired.[1] But unfortunately, in comparing the decided cases, and in endeavoring to deduce from them a body of practical rules, we shall find so much inconsistency and vacillation in the judgments of even the same tribunals, that we are sometimes forced to doubt whether *any* general principle of construction was ever intended to be adopted by the courts, whether they ever accepted any theory of interpretation, and proceeded to work from it as a foundation in constructing a system of procedure. In regard to the particular matter now under consideration, if we collect and compare the

[1] [The Supreme Court of Wisconsin, in the very recent case of Castle *v.* Madison (1902), 113 Wis. 346, 89 N. W. 156, so fully and clearly supports the author's views, that the portion of the opinion dealing with the subject is set out in full as follows: "Under the technical rules of the common law it was not considered possible for two or more persons to be united as plaintiffs in the same action

decisions which have been made in the different States, it will be difficult, if not impossible, to say, *upon their authority*, that any definite rule has been established determining the effect of a misjoinder of plaintiffs.

§ 128. *211. **Misjoinder of Plaintiffs no Defence in an Equitable Action.** It is certainly settled beyond a doubt that, in all equitable actions, and in all actions where, upon equitable principles, a co-plaintiff may sometimes be added, not because he is jointly interested with the other, but because his presence as a party is considered necessary to a complete determination of the issues, — as where a husband is sometimes added in an action brought by a wife touching her separate property, — the equitable rule applies in its full force, and a misjoinder of plaintiffs is not a defence to the suit; it is neither a ground of demurrer, nor can it be set up in the answer as a bar to the relief demanded in the

upon a contract unless they were, for all the purposes of that action, equally united in interest, unless the benefit of the contract belonged to them as a unit, and unless the right in them was created at the same time and by the same act. And the same rule was applied to the joinder of defendants. The common law knew nothing of defendants against whom a judgment for the entire amount of debt and damages was not to be rendered, nor of defendants who become liable at different times, and upon separate instruments. . . . The revolution contemplated by the code has been, in a measure, defeated by attempting to interpret it according to common-law principles. It was deemed that it had not abolished the ancient legal conceptions as to parties and joint rights and liabilities, and hence the code was fenced around by a series of decisions on this subject rendering it much less revolutionary than its framers evidently designed. It has been said — and the statement appeals to us with considerable force — that these ancient rules of the common law ought to have but meagre weight as against the plain and obvious purpose of the code to simplify and remove the difficulties of the former practice. The rules of practice under the régime of equity were in every way different from these legal doctrines. The legal notion of a necessary unity in the rights of the plaintiffs or in the liabilities of defendants was not known or recognized in equity. The great range of precedents on this subject may be found in any text-book on equity jurisprudence. It is plain from a cursory reading of the sections of our statute mentioned that they are broad and comprehensive enough to cover the entire field of ancient equity rules. They are without exception or limitation, and usually have been construed as being of equal breadth and scope with the rules of equity as administered in England when applied to suits in equity. It is, perhaps, to be regretted that the early expositors of the code should have found it necessary to apply its language in one way as to legal actions, and the same language in another way as to suits in equity. The natural and fundamental ideas which seemed to control in suits in equity were that the suit should be prosecuted by the party really in interest, although there might be joined with him others who had an interest in the subject-matter and in the relief sought, and that all persons whose presence was necessary to a complete determination of the questions involved should be made parties, so that in one decree their rights, claims, interests, and liabilities, however varying in importance or extent, might be adjudicated and enforced by the court."]

complaint or petition.[1] The name of the unnecessary plaintiff may be struck out by the court, upon motion; or, if the cause proceeds to trial, a judgment may be rendered in favor of the plaintiff entitled thereto, and the action dismissed as against the others.[2] The changes made by the codes themselves, and also by special statutes relating to the property rights of married women, have certainly extended this rule to many cases not

[1] [Misjoinder was held by the Supreme Court of Indiana to constitute a defence in an action which, while not strictly equitable, involved an equitable cause of action. This was the case of McIntosh *v.* Zaring (1897), 150 Ind. 301, 49 N. E. 164. Three firms of attorneys had executed a contract with defendants, by the terms of which an action was to be brought by the said attorneys to set aside the will of the father of one of the defendants. Each firm was to receive one-third of the total fee, said total to amount to a certain per cent of the sum defendant should realize out of the estate of her father, whether by suit or compromise. The attorneys fully performed the contract on their part, but defendant falsely and fraudulently represented to them that she had received, as the result of the compromise entered into, $50,000 from her father's estate, whereas in fact she had received the sum of $250,000. Relying on her representations plaintiffs settled with her on the basis of $50,000. When the fraud was discovered this action was brought, the members of the three firms joining as plaintiffs, demanding judgment for the amount still due and unpaid on the contract, and other proper relief. One of the members of one of the firms had previously died, and his administratrix joined as plaintiff. The complaint alleged the contract, the settlement, and the facts constituting the fraud. Defendants filed a general demurrer for want of facts.

The court held that the contract was several as to each firm of attorneys, and hence did not create a joint right of action in said attorneys. "But," said the court, "there is an element in the complaint beyond the scope of the mere written contract that exerts an influence upon the right of the several obligees or payees therein to maintain a joint action thereon. That element is the allegation of fraud and misrepresentation of the defendants as to the amount Mrs. McIntosh had received from the estate of her father on the compromise. . . . While neither one of the firms of attorneys in the contract mentioned were interested in either of the other firms recovering thereon, so as to enable them to join in a suit thereon, yet they were all interested in the other element which was essential to be established, without which neither of them could recover, namely, the fraud by which they had been induced to accept a smaller sum in full settlement and discharge of the contract than was really due them In other words, they were all alike interested in avoiding the settlement." There was no specific prayer to have the settlement set aside, but the facts showed plaintiffs entitled to it, and the court held it proper to grant such relief under the general prayer. Accordingly the court held that in respect of this joinder the complaint was not bad for want of sufficient facts.

But the administratrix of one of the attorneys had joined as plaintiff, although under the law the partnership assets went to the survivor. Hence she had no interest in the action. And on this account the court held the complaint bad as against the demurrer, as to all the plaintiffs, notwithstanding that the equitable cause of action for setting aside the settlement had been deemed sufficient to warrant the joinder of the firms of attorneys.

See also People, *ex rel. v.* District Court (1893), 18 Colo. 293, 32 Pac. 819, which is controlled by the statute making misjoinder of plaintiffs a ground of demurrer.]

[2] Ackley *v.* Tarbox, 31 N. Y. 564; Allen *v.* Buffalo, 38 N. Y. 280; [Kucera *v.* Kucera (1893), 86 Wis. 416, 57 N. W. 47.]

strictly equitable, even to cases which could not have been maintained at all while the common law was in its integrity.

§ 129. * 212. **Doctrine that Demurrer will lie or Dismissal as to Party improperly Joined.** There is another class of decisions, made in actions of a similar nature to those last mentioned, — that is, actions strictly equitable, and those in which a plaintiff is added in pursuance of a supposed positive rule of practice, although no joint legal right is alleged, — in which it has been held that, if the misjoinder of a plaintiff appears upon the face of the complaint or petition, the defendant may demur as against the party, thus improperly joined, on the ground that the pleading does not state facts sufficient to constitute a cause of action in his favor; or, if no demurrer is interposed, the same objection may be raised at the trial, and the action dismissed as to him. If the misjoinder does not appear upon the face of the pleading, the defence must be set up in the answer.[1] The principle of this class of decisions is the same as that involved in the cases described in the preceding paragraph. The actions in which this method of raising the objection of a misjoinder is permitted, may be equitable or may be legal; but, if the latter, they are not based upon a joint legal right alleged to be held by all the plaintiffs. In all of them the right of action is assumed to be possessed by one or more of the plaintiffs, who are the real parties in interest, and the other parties are added through some supposed requirement of form or of policy.

§ 130. * 213. **Misjoinder Fatal as to all the Plaintiffs in a Legal Action. View of some Courts.** We are finally brought to the case of an action strictly legal in its nature, brought by two or more plaintiffs in whose favor a joint right is averred as the ground of recovery. The courts of some States have distinctly asserted and applied the ancient common-law rule under these circumstances, notwithstanding the provisions of the codes, and notwithstanding even the liberal scheme of interpretation which

[1] Palmer *v.* Davis, 28 N. Y. 242. Palmer and wife sued on an award made in her favor. The Court of Appeals held that the husband was not a proper plaintiff; that, as this appeared on the face of the complaint, the defendant might have demurred generally as to him; and that the same objection could be raised on the trial, and the complaint dismissed as to him, but not as to both. No joint cause of action was here alleged, although, *nominally*, the action was joint. See also Willard *v.* Reas, 26 Wis. 540, 544, which holds that, in an action by two or more plaintiffs, a general demurrer against *all* these plaintiffs, on the ground of a want of sufficient facts, is bad if a good cause of action is alleged in favor of one of them.

had, as a *general theory*, been adopted by the same tribunals. When, in such an action, a joint right is averred as arising from contract or from the ownership of land or chattels, while in fact no joint right in all exists, but only a several right held by one or a joint one held by some, this error, according to the construction now stated, goes to the entire proceeding and defeats the suit as against all the plaintiffs. If the error appears upon the face of the complaint or petition, the objection may be raised by a general demurrer interposed against all the plaintiffs, on the ground that facts sufficient to constitute a cause of action are not stated in the pleading; and, in the absence of a demurrer, the same objection may be taken at the trial by a motion for a nonsuit or for a dismissal of the action. Finally, if the error is not apparent on the face of the pleading, the defence may be set up in the answer, and is, perhaps, admissible under the general denial. This is plainly the original common-law doctrine, unaffected by the reform legislation, and it proceeds upon the assumption that the cause of action is a joint one, that this attribute of *jointness* is as essential to the maintenance of the alleged right as any other material fact, and that the inability to establish the particular averment is not a mere variance, but is a complete failure of proof.[1] As an illustration: if the complaint

[1] Bartges *v.* O'Neil, 13 Ohio St. 72; Masters *v.* Freeman, 17 Ohio St. 323; De Bolt *v.* Carter, 31 Ind. 355; Goodnight *v.* Goar, 30 Ind. 418; Berkshire *v.* Schultz, 25 Ind. 523; Lipperd *v.* Edwards, 39 Ind. 165; Estabrook *v.* Messersmith, 18 Wis. 545; Frans *v.* Young, 24 Iowa, 375; Giraud *v.* Beach, 3 E. D. Smith, 337. Certain of these cases *inferentially* support the propositions contained in the text, by holding that a misjoinder of plaintiffs in such actions may be taken advantage of by a general demurrer, upon the ground that sufficient facts are not alleged; the others, however, sustain these propositions to their full extent. As the subject is one of great practical importance, I shall quote from these decisions at some length. Bartges *v.* O'Neil, 13 Ohio St. 72, was an action by a husband and wife to recover damages for deceit in the sale of lands purchased from the defendant. The Supreme Court of Ohio held that the petition disclosed no cause of action belonging to the plaintiffs jointly, as was averred, and that this defect could be taken advantage of by a general demurrer for a want of sufficient facts; and that the action should have been dismissed on the trial for the same reason. Compare this decision with that made by the New York Court of Appeals in Simar *v.* Canaday, 53 N. Y. 298, which, to a certain extent, presented the same peculiar features. The Ohio court reaffirmed the doctrine in the subsequent case of Masters *v.* Freeman, 17 Ohio St. 323. Estabrook *v.* Messersmith, 18 Wis. 545, was an action by two partners, alleging their partnership, their joint ownership of certain goods, and a wrongful conversion thereof by the defendants. It appeared on the trial that one of the plaintiffs had been guilty of a fraud upon his creditors in respect of the property in question, which, as the court held, precluded him from recovery; and it was thereupon claimed by the defendants that, although the other plaintiff was innocent

should allege that the plaintiffs A. and B. were partners, and as such had sold and delivered to the defendant certain goods, for a

of the fraud, there could be no recovery in any form, — not by the plaintiffs jointly, because one of them was unable to maintain the action; and not by the innocent partner, because the right averred in the complaint was a joint one. The plaintiffs were permitted, however, to recover the value of the innocent partner's interest. This judgment was reversed by the Supreme Court, and the grounds of the decision were thus stated by Dixon C. J. (p. 549): "The plaintiffs were partners, and sued for the alleged wrongful conversion of their partnership property; and such is the nature of their legal right — they are so indissolubly blended — that they must not only join in an action at law, but a right of action must be established in both, or no recovery can be had. It is a general principle, applicable to suits of this nature, that all must be entitled to judgment, or none; and in cases where either party is precluded on the ground of fraud, the fraud binds not only the guilty partner, but the innocent partner in that suit. . . . It would seem that, if the defrauded party [meaning the innocent partner] has any remedy, it is only by a suit in equity, in which the objection of joining his guilty copartner as a party plaintiff is easily obviated." I must remark, in passing, that the last observation is certainly a strange one, in the face of the statutory provision contained in the Wisconsin code, which purports to abolish all distinctions between legal and equitable actions. That a plaintiff should be turned out of court in one action *called legal*, and should be told that he must bring another action *called equitable*, for exactly the same demand, and upon exactly the same allegations of fact, and that, in the latter suit, the particular and technical ground of his defeat in the former one could not be objected to his recovery, seems, to say the least, to be a recognition of the "distinction" which the law-making power had so expressly abrogated.

[An interesting illustration of the evolution of judicial opinion is afforded by a comparison of this case of Estabrook *v.* Messersmith with the recent case of Castle *v.* Madison (1902), 113 Wis. 346, 89 N. W. 156, in which the court fully supports the author in his view of the unity of procedure. This case is quoted at length in note to § *210.]

The Supreme Court of Indiana has approved the doctrine [of Estabrook *v.* Messersmith] in substance, although in a form somewhat modified. Berkshire *v.* Shultz, 25 Ind. 523. [See the case of McIntosh *v.* Zaring (1897), 150 Ind. 301, 49 N. E. 164, in which the court said: "It is firmly settled in this State that a complaint which does not state a good cause of action as to all, though it does as to some of the plaintiffs, is bad as to all, for want of sufficient facts to constitute a cause of action." The court in this case quoted from the case of Nicodemus *v.* Simons (1889), 121 Ind. 564, as follows: "If, therefore, two or more persons bring a joint action, alleging a joint cause of action, and it turns out upon the trial that upon the facts alleged in the complaint some, but not all, of the plaintiffs are entitled to recover, the court or jury, as the case may be, will so find, and judgment will be rendered accordingly. . . . But, as we have already held, the complaint is good, and the question before us is one of evidence, and not of pleading; upon the evidence before them, the jury found for the female appellee and the court rendered judgment in her favor. This, we think, was proper." And the court, in McIntosh *v.* Zaring, goes on to say: "It is very clear that the section quoted is in no way inconsistent with the long line of cases cited holding that a complaint by plaintiffs will be bad for want of sufficient facts if it does not state a cause of action in favor of all the plaintiffs." See also Brunson *v.* Henry (1894), 140 Ind. 455, 39 N. E. 256; Medlock *v.* Merritt (1897), 102 Ga. 212, 29 S. E. 185.] Goodnight *v.* Goar, 30 Ind. 418; De Bolt *v.* Carter, 31 Ind. 355; Lipperd *v.* Edwards, 39 Ind. 165, 170. In Viles *v.* Bangs, 36 Wis. 131, 139, 140, the case of Estabrook *v.* Messersmith, 18 id. 545, quoted *supra* in this note, was severely criticised and its correctness

stipulated price, and should demand a judgment therefor, and on the trial it should appear that A. and B. were not partners as averred, and did not jointly sell and deliver the chattels to the defendant, but that in fact the same were sold and delivered by A. alone, B. having no interest in or connection with the transaction, in pursuance of the rule adopted in these decisions no judgment could be rendered for A. separately; the action would entirely fail as respects both the plaintiffs. It thus appears that, in at least three States, the courts have, in the most explicit manner, and in well considered opinions, reaffirmed the ancient common-law doctrine in respect to legal actions brought by two or more plaintiffs jointly; and have held that the joint right must be proved as alleged, or the action must fail as to all the plaintiffs. In other States, it is merely said that a misjoinder is ground for a demurrer interposed to all the plaintiffs for the cause that the complaint or petition does not state facts sufficient to constitute a cause of action.

§ 131. *214. **New York Cases. Criticism.** The question has been presented to the New York Court of Appeals, but has not been passed upon in such an explicit manner as necessarily to establish the rule for that State. In an action brought by two plaintiffs, G. and C., to recover damages for an alleged fraud, the action being in form joint, and the demand of judgment being for damages due to the plaintiffs jointly, the complaint was dismissed at the trial, because it appeared that the right of action was held by one of the plaintiffs alone. In respect to this ruling, the Commission of Appeal said: "Probably the court had the *power* in this action, if the claim had been made, to have awarded to C. his damages, giving judgment against the other plaintiff. But the court was not bound to do this, and committed no error in defeating the plaintiffs, because they did

doubted. Cole J. made, in fact, the same criticism which I have made in the foregoing note. See also Graham Tp. Indep. Sch. Dist. *v.* Indep. Sch. Dist. No. 2, 50 Iowa, 322 (in an action to recover money, the objection to a misjoinder of plaintiffs should be made by motion, not by demurrer). As to proper or improper joinder of plaintiffs, see Bort *v.* Yaw, 46 Iowa, 323; Fuller *v.* Fuller, 5 Hun, 595; Brett *v.* First Univ. Soc. of Brooklyn, 5 Hun, 149; Marie *v.* Garrison, 83 N. Y. 14, 29; Loomis *v.* Brown, 16 Barb. 331; Great W. Compound Co. *v.* Ætna Ins. Co., 40 Wis. 373. See also Hellams *v.* Switzer, 24 S. C. 39; Sim *v.* Hurst, 44 Ind. 579; Yates *v.* State, 58 Ind. 299; Hyatt *v.* Cochran, 85 Ind. 231; Dill *v.* Voss, 94 Ind. 590; Pixley *v.* Van Nostern, 100 Ind. 34; Morningstar *v.* Cunningham, 110 Ind. 328.

not establish a cause of action in which they were *both* interested."[1] This conclusion is certainly very unsatisfactory. It can hardly be possible that it is a matter of discretion with the court, at the trial, whether it will permit a severance in the judgment or will dismiss the action entirely. The rights of litigant parties cannot depend upon so varying a criterion as the opinion or whim of an individual judge. In a subsequent case, where the action was brought by a husband and wife to recover damages for a fraud alleged to have been done to them jointly, and in which a joint right of action was distinctly averred, the same court announced the rule in the following manner, but, as it was entirely unnecessary to the decision of the case, the expression of opinion cannot be regarded as anything more than a dictum: "The defendant moved to dismiss the complaint upon several grounds, and, 1st, that the plaintiffs could not maintain a joint action, and that there was thereby a misjoinder of parties plaintiff. This point is not rested upon the marital relation of the plaintiffs, and the existence of that relation may, in considering it, be put out of view. It is an objection which may be taken on the trial. But it is not an objection which affords good grounds for a motion to dismiss the complaint of both plaintiffs, if either of them has shown that he or she has a good cause of action. In such case the motion must be for a dismissal of the complaint of the plaintiff in whom no right of action appears.[2] Whether either of the plaintiffs had shown a good cause of action will be considered under the next two heads."[3]

§ 132. * 215. **True Interpretation of the Codes as to Consequences of Misjoinder.** Although not entitled to the weight of authority as a *decision*, the doctrine last-quoted from the opinion of the New York Court of Appeals is in complete accordance with the true spirit and evident intent of the reform legislation. The conclusions reached by the courts of Ohio, Wisconsin, and Indiana, in the cases heretofore cited, plainly result from a failure

[1] Calkins *v.* Smith, 48 N. Y. 614, 619, per Earl J.

[2] Citing code, § 144 (6), § 148; Palmer *v.* Davis, 28 N. Y. 242.

[3] Simar *v.* Canady, 53 N. Y. 298, 301, per Folger J. S. P. Green *v.* Green, 69 N. C. 294, 298; Burns *v.* Ashworth, 72 N. C. 496; Warrenton *v.* Arrington, 101 N. C. 109; Oliphint *v.* Mansfield, 36 Ark. 191; Fry *v.* Street, 37 Ark. 39; Lancaster Cy. *v.* Rush (Neb. 1892), 52 N. W. 837; Wiesner *v.* Young (Minn. 1892), 52 N. W. 390; Hurd *v.* Simpson, 47 Kan. 372; Arts *v.* Guthrie, 75 Iowa, 674; White Oak Dist. Tp. *v.* Oskaloosa Dist. Tp. 44 Iowa, 512. A preponderance of recent authority supports the opinion of the author and the dictum of Folger J.

to grasp the central principle of interpretation which should be applied in construing the codes of procedure, and to push it to its legitimate consequences. That principle, which had been fully recognized by the same tribunals under other circumstances, is the purely equitable nature of the statutory provisions regulating the subject of parties, and the application of the equitable theory to the civil action in all its phases, and under all its uses, without exception or limitation. This is now conceded, almost universally, to be the true interpretation of the clauses of the codes under consideration, whenever the mode of interpretation is to be stated in a general and comprehensive manner.[1] The confusion and conflict of decision shown in the preceding para-

[1] ["A misjoinder or uniting of parties who should not be joined cannot be taken advantage of by demurrer:" Dolan *v.* Hubinger (1899), 109 Ia. 408, 80 N. W. 514. To the same effect, Cedar Rapids Nat. Bank *v.* Lavery (1900), 110 Ia. 575, 81 N. W. 775. A motion is the proper remedy: Lull *v.* Anamosa Nat. Bank (1900), 110 Ia. 537, 81 N. W. 784; Martin *v.* Clay (1899), 8 Okla. 46, 56 Pac. 715; Hornish *v.* Ringen Stove Co. (1902), 116 Ia. 1, 89 N. W. 95; Stiles *v.* City of Guthrie (1895), 3 Okla. 26, 41 Pac. 383; Powell *v.* Banks (1898), 146 Mo. 620, 48 S. W. 664 (even after judgment). The question cannot be raised by demurrer on the ground of defect of parties or misjoinder of causes of action: Wunderlich *v.* Chicago & N. W. R. R. Co. (1896), 93 Wis. 132, 66 N. W. 1144. Nor can it be raised by a demurrer for want of jurisdiction or want of facts: Svanburg *v.* Fosseen (1899), 75 Minn. 350, 78 N. W. 4.

"A misjoinder apparent upon the face of the petition is waived if not objected to before trial:" Goble *v.* Swobe (1902), 64 Neb. 838, 90 N. W. 919. The objection of misjoinder cannot be made for the first time on appeal: Brook *v.* Bayless (1898), 6 Okla. 568, 52 Pac. 738; Breault *v.* Merrill & Ring Lumber Co (1898), 72 Minn. 143, 75 N. W. 122. The objection comes too late at the trial: Harrell *v.* Davis (1899), 108 Ga. 789, 33 S. E. 852. "There is no such reason for demurrer as misjoinder of parties:" Cargar *v.* Fee (1894), 140 Ind. 572, 39 N. E. 93. In North Carolina, on the other hand, misjoinder of parties must be taken advantage of by demurrer and not by motion, but the defect is considered a mere matter of surplusage and not fatal: McMillan *v.* Baxley (1893), 112 N. C. 578, 16 S. E. 845; Tate *v.* Douglas (1893), 113 N. C. 190, 18 S. E. 202; Sullivan *v.* Field (1896), 118 N. C. 358, 24 N. E. 735; Hocutt *v.* Wilmington etc. R. R. Co. (1899), 124 N. C. 214, 32 S. E. 681. See *contra*, Wool *v.* Edenton (1893), 113 N. C. 33, 18 S. E. 76.

See in this connection the case of Hurd *v.* Hotchkiss (1900), 72 Conn. 472, 45 Atl. 11, where the court said: "Plaintiffs may ordinarily bring actions jointly or severally, as they consider their rights require; just as plaintiffs may claim the relief to which they conceive themselves to be entitled. If it turn out in the progress of the trial that the plaintiffs are not properly named, then the court makes such order as the circumstances require, or renders judgment against them all, or for only such of them as may have established a right to recover. This is authorized to be done by §§ 888 and 1108 of the General Statutes. These sections furnish the only authority of which we are aware, for a court to make an order that one or more of the persons joined as plaintiffs in a complaint shall be forbidden to prosecute." Citing the text.

In Colorado, where misjoinder is a statutory ground of demurrer, it is held that the objection cannot be raised by answer, where the defect appears upon the face of the complaint: Sams Car Coupler Co. *v.* League (1898), 25 Colo. 129, 54 Pac. 642.]

graphs arise from the fact that courts, in determining the special rules applicable to particular classes of cases, have been unwilling to carry out the principle which they have accepted in its most general form, and to adopt the results which necessarily flow from it; they have shrunk from the changes in the old and familiar methods which such a course would produce. It is very plain, however, that, if we are ever to have a uniform, consistent, simple, and symmetrical system of procedure as the outcome of the reform legislation, the courts must be willing to follow the general principles of interpretation to their legitimate conclusions. A system in which the equitable doctrine as to parties and judgments is permitted to work its effect upon legal actions to a partial extent, while the ancient legal doctrine is applied in other instances, would be more objectionable even than the former complete division between equitable and legal proceedings. As the codes do not indicate any line where the equitable doctrine is to stop and the legal to commence, in determining the practical rules, the position of this line must depend upon the views of individual judges and courts, and thus an element of uncertainty and confusion is introduced into the procedure, which can never be removed; there being no *principle* by which to settle the respective limits of the two theories or doctrines as to parties, no fixed system of practical rules would ever be established. If, on the other hand, the equitable doctrine should be not only stated as the correct general theory of interpretation, but should be honestly followed out in its application to all cases, the same practical rules would be deduced alike for legal and for equitable actions, and the resulting system would be definite, certain, and consistent, — the system beyond a doubt contemplated by the legislatures when they enacted the codes in the several States. If this were done, the ancient rules of the common law respecting the nature of joint rights when set up as the basis of recovery, and the effect of alleging such a right in favor of two or more plaintiffs, would disappear, and a severance in the judgment would be as much a matter of course in legal actions as in equitable suits.

§ 133. *216. **When Objection may be made by Demurrer or Answer against Party improperly Joined.** There is still another case in respect of which there seems to be a unanimity of decision. When an action is brought by two or more plaintiffs, and

the averments of the complaint or petition show that one or more of them have been improperly joined as co-plaintiffs with the rest, the defendant may interpose a demurrer as to such plaintiff or plaintiffs, not because of a defect of parties, nor because of a misjoinder, but because the complaint or petition does not state facts sufficient to constitute a cause of action in respect to these plaintiffs. The distinction between this case and the one last considered is evident. In the latter, the demurrer is to all the plaintiffs, and the objection extends to the entire action upon the alleged ground that no joint claim or cause of action is shown to exist in all the plaintiffs. In the present case, it is conceded that a cause of action is shown in favor of one or more of the plaintiffs, and the objection goes only to the others in whose favor no cause of action appears. This mode of objecting to a misjoinder of plaintiffs may be used in legal as well as in equitable actions. Of course, if the objection does not appear upon the face of the pleading, but exists as a matter of fact, it may and should be set up as a defence in the answer.[1]

Rules as to Plaintiffs in Particular Classes of Cases.

§ 134. * 217. **Order of Proposed Treatment.** I now pass from this examination of the doctrine in its general scope to its application in the various classes of cases which can arise in the administration of justice. The further discussion will be pursued in the following order: *First*, Parties plaintiff in legal actions; *Second*, Actions by or between husband and wife; *Third*, Parties plaintiff in equitable actions. The first of these divisions will be separated into: 1. Actions by owners in common and by joint owners of land; 2. Actions by joint owners of chattels; 3. Actions by persons having a joint right arising from contract; 4. Actions by persons having several rights arising from contract; 5. Actions by persons having a joint right arising from tort;

[1] The rule as stated in the text is either expressly approved, or is impliedly acknowledged, in several of the cases cited under the preceding paragraph. See also Willard *v.* Reas, 26 Wis. 540, 544; People *v.* Crooks, 53 N. Y. 648. In Missouri and California the codes expressly state, as one ground of demurrer, the misjoinder of the parties, plaintiff or defendant. See Parker *v.* Small, 58 Ind. 349 (a complaint must show a cause of action against all the defendants, or it is bad on a general demurrer for want of sufficient facts, as against the plaintiff improperly joined); People *v.* Haggin, 57 Cal. 579 (if an action is brought by entirely wrong plaintiff or plaintiffs, the objection can be raised by such a general demurrer). See also Tennant *v.* Pfester, 51 Cal. 511; Harris *v.* Harris, 61 Ind. 117.

6. Actions by persons having several rights arising from torts. The second and third of the general divisions do not admit of a similar subdivision.

First: Legal Actions.

§ 135. * 218. **I. Legal Actions by Joint Owners and Owners in Common of Land. Modern Statutes. Common-Law Rules.** The change in the common law produced by statute throughout the United States has practically abolished joint ownership in land, except in the case of those holding *alieni juris*, as trustees. The statutory rule is, I believe, quite universal among the States, that when two or more persons succeed by inheritance to the same land, their ownership is common and not joint, and when land is conveyed to several persons in their own right, without any express direction to the contrary, their ownership also is common.[1] The exceptions to this rule are trustees who are generally omitted from the operations of the statutes, so that a grant or devise to several as trustees creates a joint ownership; and in certain States, as in New York, the peculiar modification of joint estates created by a conveyance to a husband and wife, is held to be unaffected by the statutes, and to exist as at the common law. On the other hand, the legislation of some States has abolished joint ownership, in an absolute manner, so that it cannot be created even by the act of the parties. As a conclusion it is enough to say that the common-law joint tenancy of land by persons holding *sui juris* does not practically exist in this country.[2] At the common law all the joint owners were required to unite in any action, whether real or personal, based upon their proprietary right. With owners in common, the rule was not so uniform. In personal actions for injuries done to the land, it was proper for all the owners to unite; in actions to recover possession, however, each sued for his individual interest, although this particular doctrine was doubtless modified in many States, as it was in New York. Finally, in actions for rent, if the letting was joint, or if the reservation was of an entire rent to all, all would unite as plaintiffs; but if the rent was reserved to them separately in distinct parts, each must sue for his own

[1] Wash. on Real Prop., vol. 1, p. 409 (note).

[2] Wash. on Real Prop., vol. 1, p. 409 (note).

share.[1] It should be remembered that, in the action of ejectment at the common law, the plaintiff was the fictitious person called John Doe, and the real claimant was his lessor. It was only in the United States, where the fictions of the action had generally been abolished by statute, that it was possible for joint owners or owners in common to appear as the actual *plaintiffs* in ejectment. I now pass to cases decided since the enactment of the codes in the several States.[2]

§ 136. *219. **Decisions under the Codes.** Where the rent is entire, owners in common of the demised land may unite in an action to recover it from the lessee; and upon the same principle they may join in an action to recover the rent from a person to whom it had been paid for their use; for example, devisees in fee in remainder, after a life estate, may join in a suit against the executor of the deceased life-tenant to recover the rent which he had collected from the lessee subsequent to the death.[3] A joinder of all does not, however, seem to be absolutely necessary. It seems that each may sue for his own share of the rent, even though it accrue as an entire sum to all the owners in common.[4] The only possible alternative, however, is a suit by all or a suit by each for his own portion separately; an action cannot be maintained by a portion more than one and less than all.[5] When the lessor of land dies intestate, the term being unexpired, his administrator is the only proper party to sue for the unpaid rent which accrued prior to the death, while the heirs, either jointly or separately, must sue for that accruing subsequently thereto.[6] In actions brought to recover damages for torts done to the land, such as trespasses, nuisances, and the like, the common-law rule remains unchanged, and all the owners in common must unite as plaintiffs;[7] even when they

[1] See 1 Ch. Pl. (Springfield ed., 1840), pp. 13, 65.

[2] [Mather *v.* Dunn (1898), 11 S. D. 196, 76 N. W. 922: Tenants in common are not "united in interest" within Comp. Laws, § 4879, requiring all such persons to join in an action.]

[3] Marshall *v.* Moseley, 21 N. Y. 280, 287. See Cruger *v.* McLaury, 41 N. Y. 219, which holds that one of the owners in common may sue for his share of an entire rent. See *infra*, § *220, n.

[4] Jones *v.* Felch, 3 Bosw. 63; Porter *v.* Bleiler, 17 Barb. 149.

[5] King *v.* Anderson, 20 Ind. 385.

[6] King *v.* Anderson, 20 Ind. 385; Crawford *v.* Gunn, 35 Iowa, 543.

[7] De Puy *v.* Strong, 37 N. Y. 372; 3 Keyes, 603; Hill *v.* Gibbs, 5 Hill, 56; Parke *v.* Kilham, 8 Cal. 77 (diversion of water); Shepard *v.* Manhattan Ry. Co., 117 N. Y. 442; Wausau Boom Co. *v.* Plumer, 49 Wis. 112 (the persons in actual possession may maintain trespass).

hold under different titles, they must still join, as, for example, the heirs-at-law and devisees of the same land, in an action for injuries done to the inheritance,[1] or the owners in common of a mill, who derive their rights under different conveyances, in a suit for the diversion of water from their mill.[2] The owners in common must also join in an action to recover damages for fraud practised in the sale of the land to them; a separate suit cannot be maintained.[3] Administrators or executors cannot sue for trespasses or other injuries done to the land after the death of the owner whom they represent; the heirs or the devisees, as the case may be, are the only proper plaintiffs.[4]

§ 137. *220. **Same Subject.** Owners in common need not not unite in an action to recover possession;[5] each may bring a separate suit for his undivided share.[6] This is a very familiar

The remainder-man and life tenants may join as co-plaintiffs in suit for a nuisance, *e. g.* a dam. Schiffer *v.* Eau Claire, 51 Wis. 385; Seymour *v.* Carpenter, 51 id. 413.

The separate owners of separate lands each injured by the same nuisance, *e. g.* a dam, or diversion of water, cannot join as co-plaintiffs in an action for damages; but they can join in an equitable action to enjoin and remove the nuisance. Palmer *v.* Waddell, 22 Kan. 352; [Younkin *v.* Milwaukee, etc. Co. (1901), 112 Wis. 15, 87 N. W. 861; Linden Land Co. *v.* Milwaukee, etc. Co. (1900), 107 Wis. 493, 83 N. W. 851; Strobel *v.* Kerr Salt Co. (1900), 164 N. Y. 303, 58 N. E. 142; Beach *v.* Spokane Ranch Co. (1901), 25 Mont. 379, 65 Pac. 111; Brown *v.* Canal and Reservoir Co. (1899), 26 Colo. 66, 56 Pac. 183; Rounow *v.* Delmue (1895), 23 Nev. 29, 41 Pac. 1074; McDonough *v.* Carter (1896), 98 Ga 703, 25 S. E. 938;] Foreman *v.* Boyle, 88 Cal. 290; Hellams *v.* Switzer, 24 S. C. 39; Spanish Fork City *v.* Hopper (Utah, 1891), 26 Pac. Rep. 293 (tenants in common of water). [But where a domestic animal breaks into a pasture field and injures live stock belonging to one of the tenants in common of the field, such tenant may maintain an action against the owner of the animal without joining the other co-tenants; Morgan *v.* Hudnell (1895), 52 O. St. 552, 40 N. E. 716.] See also § *269, *post*, and cases cited.

[1] Van Deusen *v.* Young, 29 Barb. 9.

[2] Samuels *v.* Blanchard, 25 Wis. 329.

[3] Lawrence *v.* Montgomery, 37 Cal. 183, 188, per Crockett J. See Foster *v.* Elliott, 33 Iowa, 216, 224.

[4] Aubuchon *v.* Lory, 33 Mo. 99; Hart *v.* Metrop. Elev. Ry. Co., 15 Daly, 391. In a suit by tenants in common, the personal representative of a deceased co-tenant is properly joined to recover damages up to the time of the death of the decedent; and the heirs to recover damages subsequent to that date: Shepard *v.* Manhattan Ry. Co., 117 N. Y. 442.

[Indianapolis, etc. R. R. Co., *v.* Price (1899), 153 Ind. 31, 53 N. E. 1018: Where a piece of real estate is appropriated by defendant, while plaintiffs and plaintiffs' ancestor are tenants in common therein, and plaintiffs' ancestor dies before suit is brought, and suit is brought by plaintiffs both for the damages to their own interest and as heirs of the deceased tenant, the fact that they have no right to sue as heirs for the injury sustained by decedent does not render their complaint bad on demurrer.]

[5] [But where an action is joint, if it appears that the defendants have a good defence against one of the plaintiffs, the action must fail: Wooding *v.* Blanton (1900), 112 Ga. 509, 37 S. E. 720.]

[6] Brown *v.* Warren, 16 Nev. 228; Hart *v.* Robertson, 21 Cal. 346; Touchard *v.* Crow, 20 Cal. 150; Thames *v.* Jones, 97 N. C. 121; Yancey *v.* Greenlee, 90 N. C.

rule, and such actions are constantly brought by widows to recover their dower before it has been set out to them or admeasured, and by individual heirs. Of course all the owners *may* join, and *must* join if the design is to recover possession of the entire tract over which the common ownership extends, as a separate parcel of land;[1] when *one* sues, he can only demand and obtain a judgment for his own undivided portion of the common premises.[2] The election between modes of instituting the action goes no further, however; it cannot be prosecuted by a portion of the co-owners less than all; it must be by all or by one.[3] In

317; Weese *v.* Barker, 7 Colo. 178. Cruger *v.* McLaury, 41 N. Y. 219. One K. had a given lease in fee of lands, reserving rent, with a clause of re-entry on non-payment. One of his six children and heirs-at-law sues to recover an undivided sixth part of the premises, on account of the condition broken. The Court of Appeals held the action properly brought; that all the heirs need not be joined; and, also, that each of the heirs might have maintained an action for the rent. This last proposition settles the doubt expressed by Comstock J. in Marshall *v.* Moseley, cited in note to § *219, so far as the law of New York is concerned; and in that State, although the rent is entire, and accruing to all the owners in common, each may sue. See Fisher *v.* Hall, 41 N. Y. 416, in which it may seem to be intimated that all must join in a suit to recover possession of the land; but there is actually no discrepancy in the two decisions. In the case last cited all the owners but one united in a suit to recover possession of the *entire parcel* of land; and in such an action a joinder of all the owners is, of course, necessary. The court did not intimate that one co-owner may not sue for his *undivided share*. See also Hasbrouck *v.* Bunce, 3 N. Y. Sup. Ct. 309, 311; 62 N. Y. 475. The above conclusions are supported by Mattis *v.* Boggs, 19 Neb. 698; Gray *v.* Givens, 26 Mo. 291.

[It is held in North Carolina that a tenant in common may maintain ejectment against his co-tenant: Ricks *v.* Pope (1901), 129 N. C. 52, 39 S. E. 638. Same doctrine obtains in Georgia: Thompson *v.* Sanders (1901), 113 Ga. 1024, 39 S. E. 419. Under the North Carolina code, § 627, a tenant in common may bring an action for waste against his co-tenant, and, by analogy, he may bring an action to restrain waste: Morrison *v.* Morrison (1898), 122 N. C. 598, 29 S. E. 901.]

[1] [But see Winborne *v.* Lumber Co. (1902), 130 N. C. 32, 40 S. E. 825, where the court said: "One tenant in common can recover the entire tract against a third party, for each tenant is entitled to possession of the whole, except against a co-tenant." So in Shelton *v.* Wilson (1902), 131 N. C. 499, 42 S. E. 937.]

[2] [In Winborne *v.* Lumber Co. (*supra*), it was held that the court erred in directing the jury to respond to the first issue "Yes, one-fifth of the land," if they believed the evidence; whereas the defendant had no right to have the amount of the plaintiff's right to possession determined, for, as against defendant, the plaintiff was entitled to recover possession of the whole.]

[3] Fisher *v.* Hall, 41 N. Y. 416. See Hubbell *v.* Lerch, 58 N. Y. 237, 241; Hasbrouck *v.* Bunce, 62 N. Y. 475. [The doctrine announced in Hasbrouck *v.* Bunce (*supra*) has been rendered obsolete in New York by statute, Code Civ. Pro. § 1500, which reads as follows: "Where two or more persons are entitled to the possession of real property, as joint tenants or tenants in common, one or more of them may maintain such an action, to recover his or their undivided shares in the property, in any case where such an action might be maintained by all." See Deering *v.* Reilly (1901), 167 N. Y. 184, 60 N. E. 447, where this statute is construed.] One co-tenant may, in general, sue alone for

pursuance of this general principle, the same rule has been extended to actions brought to recover a fund, or a portion thereof, when by reason of some judicial proceedings this fund stands in the place of the land itself. Thus, where the land of two co-owners had been taken for public purposes, and the amount awarded as compensation had not been paid over, because the owners were at the time unknown, one of them was permitted to recover his portion of the whole sum in a separate action, the money representing the land, and the action itself being analogous to one brought to recover an undivided share of that land.[1] In certain States, the subject now under consideration is regulated by express statute.[2] Thus, in California, joint owners and owners in common may sue jointly or severally, or any number

his share. Morenhaut *v.* Wilson, 52 Cal. 262. But in an action to recover land for a breach of a condition subsequent, all the grantors or their heirs must join; an action cannot be maintained by one of the co-tenants for his share. Cook *v.* St. Paul's Church, 5 Hun, 293. It seems that in South Carolina a joint action for recovery of possession may be brought by a portion of the co-owners less than all to recover their shares. See Bannister *v.* Bull, 16 S. C. 220. Two tenants in common joined in an action to recover possession of land, making the remaining tenants in common, who refused to join, defendants. It was held that a verdict for the whole land was improper, and should have been for the undivided shares of the plaintiffs only. The joinder as defendants of the non-consenting co-tenants was unnecessary for the recovery of the partial interest, and ineffectual for the recovery of the whole.

[A joint grantee in a deed is not a necessary party in a suit in ejectment by the other: McNear *v.* Williamson (1902), 166 Mo. 358, 66 S. W. 160. Where the land of a deceased person is sold for taxes and one of his heirs is not made a party to the suit, such heir may maintain an action for the whole tract and recover his aliquot part: Walcott *v.* Hand (1894), 122 Mo 621, 27 S. W. 331.

Where an action for the recovery of land is brought by three plaintiffs jointly, and the evidence does not show title in all of them, none of them are entitled to recover: Towns *v.* Mathews (1893), 91 Ga. 546, 17 S. E. 955; McGlamory *v.* McCormick (1896), 99 Ga. 148, 24 S. E. 941.]

[1] Van Wart *v.* Price, 14 Abb. Pr. 4 (note).

[2] [California and Idaho have the following statute: "All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party." California, Code, § 384; Idaho, Code Civ. Pro., 1901, § 3173.

Utah and Montana have the following statute: "All persons holding as tenants in common or as joint tenants, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party. In all cases one tenant in common or joint tenant can sue his co-tenant." Utah, Rev. St., 1898, § 2919; Montana, Code, § 586.

The Connecticut statute reads as follows: "Any joint tenant or tenant in common of land may maintain an action in his own name for any injury thereto; but the non-joinder of the other tenants may be shown by the defendant in reduction of damages, and the plaintiff shall only recover for the damage to his interest." Gen. St., 1902, § 589.

The Georgia Code, § 4941, provides that "a tenant in common need not join his co-tenant, but may sue separately for his

of them may sue, and in like manner they may be sued.[1] Under this statute a portion of the co-owners of a mine were suffered to unite in an action, and recover possession of their shares from intruding wrong-doers.[2]

§ 138. * 221. **II. Legal Actions by Joint Owners of Chattels. At Common Law. Under the Codes.** The ownership of chattels by two or more persons is quite different in its incidents from the similar ownership of lands, and it must be described rather than defined. It is not a *joint* ownership in the pure common-law signification of that term, since it does not involve the right of survivorship; there is no survivorship among the co-owners of chattels, whether partners or not, and at the death of one his interest passes to his personal representatives. On the other hand, this united interest of the co-proprietors is so close that it cannot be separated except by mutual consent. The common law provides no mode of partition. The right of either co-owner may be transferred by any valid act *inter vivos*, and it may be devolved at his death; but it is impossible by any legal compulsory means for one to enforce a partition against his fellow-owners, even when such a division would be physically possible, unless it be true, as said in one case, that such owner may manually separate, and afterwards hold for his own exclusive use, when the chattels themselves are capable of being weighed or measured, so that an accurate division can be easily made, — as in the case of grain.[3] Even in the settlement of a partnership, the only judicial mode of a final division is a sale of all the assets, and their consequent conversion into money, which is distributed among the partners. In this respect, the ownership

interest, and the judgment in such case affects only himself."

In Nevada the statute, which is the last part of § 3109, Comp. Laws, 1900, reads as follows: "Tenants in common, joint tenants, or copartners, or any number less than all, may jointly or severally bring or defend or continue the prosecution or defence of any action for the enforcement of the rights of such person or persons."]

[1] See last preceding note.

[2] Goller *v.* Fett, 30 Cal. 481. See Touchard *v.* Keyes, 21 Cal. 202. See also Reynolds *v.* Hosmer, 45 Cal. 616, 631. The statute was held to apply to an action brought to recover damages, being the value of the land which had been sold on a judgment obtained by the defendant, which judgment had been subsequently reversed on appeal. If one of the co-owners dies, his executor or administrator may be joined with the other co-owners in California.

[3] Tripp *v.* Riley, 15 Barb. 333. See also Channon *v.* Lusk, 2 Lans. 213; Stall *v.* Wilbur, 77 N. Y. 158, 164 (a crop of grain), Lobdell *v.* Stowell, 37 How. Pr. 88 (grain); and see Potter *v.* Neal, 62 How. Pr. 158 (cattle).

of chattels by two or more persons is *more* joint in its nature than the joint ownership of lands. From this notion of the *oneness* of the interest residing in the owners of things personal, it follows that a joinder of all in any actions founded upon the property in the chattels is even more necessary, and is less open to exception, than in the case of an ownership of land, since one co-owner of a chattel has no right to its exclusive possession as against the others, and cannot recover its possession from them by action analogous to replevin,[1] or its value in actions like trover or trespass;[2] and since a direct judicial partition of the interests is unknown, it follows by the clearest logic that such exclusive possession, or such partition, cannot be permitted indirectly by means of an action against a third person in the name of one co-owner, the result of which, if successful, would be to give him an exclusive, or an apparently exclusive, right. When the object of the property is land, the interest of each co-owner is regarded as separate *for all purposes except possession;* and, in strict accordance with this notion, he is permitted to sue alone, to recover his *undivided* part of the land, or his part of the rent payable for the use of it; but when the object of the property is

[1] ["One tenant in common cannot maintain replevin for the possession of any of the common property against his cotenant, nor against one in possession of the property as the joint agent of the tenants in common:" Smith-McCord Dry-Goods Co. *v.* Burke (1901), 63 Kan. 740, 66 Pac. 1036.] Cross *v.* Hulett, 53 Mo. 397; Mills *v.* Malott, 43 Ind. 248, 251; Davis *v.* Lottich, 46 N. Y. 393; Balch *v.* Jones, 61 Cal. 234; Bowen *v.* Roach, 78 Ind. 361; Spooner *v.* Ross, 24 Mo. App. 599; Carle *v.* Wall (Ark. 1891), 16 S. W. 293. As to suits by one co-owner of chattels against the other for a conversion, see Hewlett *v.* Owens, 51 Cal 570; Stall *v.* Wilbur, 77 N. Y. 158 in last note.

[2] [But see Sullivan *v.* Sherry (1901), 111 Wis. 476, 87 N. W. 471, where the court said: "The general rule is that one tenant in common cannot maintain trespass or trover against his cotenant or the latter's licensee of the joint property in respect thereto. The trial court, supposing that such rule was controlling in this case, sustained the demurrer. It is not infrequent that courts are misled into giving a general the effect of a universal rule. There are but few of the former that are not subject to exceptions as well established and important as the general principle; and the rule in question does not belong to that few. It is subject to several exceptions, one being that if a cotenant or his licensee destroys the common property or converts it to his own use, he may be sued in trespass or trover to redress the wrong wherever such a remedy would exist in the absence of the relationship between cotenants . . . The authorities clearly indicate that the exception we have stated to the general rule is not a modern creation. It has been recognized by courts and law writers at least from the time of the Year Books." So in Wood *v.* Steina (1896), 9 S. D. 110, 68 N. W. 160, it was held that a tenant in common of chattels may maintain trover against his co-tenant who appropriates them to his own use so as to render any future enjoyment on the part of the complaining tenant impossible.] See Schouler Pers. Prop. 200; compare Waller *v.* Bowling, 108 N. C. 289, and cases cited.

a chattel or chattels, the interest of all the owners is conceived of as a unit, both in respect to the right of proprietorship and to the possession, and a single one cannot sue for his part of the thing itself, nor for his share of the profits payable for its use, or of its value if it be taken, converted, or sold, or of the damages if it be injured; all must join so as to represent this unity of interest.[1] These general doctrines, which were fully settled in the common law, are unchanged by the new procedure, as will appear from the rules established by the following cases.

§ 139. *222. **Code Decisions. Part-Owners of Ships.** The part-owners of ships and other vessels are jointly interested, so far as concerns the maintaining of actions touching the property in them or their use, and must all unite in such actions; as, for example, in a suit to recover freight, whether from the shipper or from a person to whom it has been paid by the shipper.[2] It would seem, however, that a portion, one or more, of such owners may sue when the residue refuse to join as plaintiffs, by making such dissentients defendants, and inserting appropriate averments in the complaint or petition; this course is certainly proper if full effect is to be given to the provisions of the codes regulating this particular subject, and they are not to be restricted in their application to equitable actions.[3] Under peculiar circumstances, a portion of the part-owners have been suffered to maintain an action of a similar general nature without even making the others defendants, as stated in the foot-note.[4]

§ 140. *223. **Joint Owners of Chattels.** It is clearly the rule, established under the new system as well as under the old, that, properly, all the owners of a chattel, whether partners or not, must join in an action to recover damages for injuries done to

[1] [Cinfel *v.* Malena (1903), — Neb. —, 93 N. W. 165.]

[2] Merritt *v.* Walsh, 32 N. Y. 685; Donnell *v.* Walsh, 33 N. Y. 43, 6 Bosw. 621.

[3] Coster *v.* New York & Erie R. Co., 5 Duer, 677, 3 Abb. Pr. 332.

[4] Bishop *v.* Edmiston, 16 Abb. Pr. 466 (G. T.). The two plaintiffs and one McL. owned a ship. It was insured and lost, and defendant collected the insurance money. He had settled with McL. for the latter's share, and the plaintiffs sue for their shares. The court held that they were tenants in common, and could bring the action without joining the other co-owner. This reason given for the decision was clearly wrong. The *decision* would have been in exact conformity with the letter and the spirit of the code if McL. had been made a defendant, and the facts in regard to him had been alleged. In Peck *v.* McLean, 36 Minn. 228, one of the part-owners of a certain vessel was allowed to sue alone, without joining her co-owners either as plaintiffs or defendants; since they could not be joined as defendants, being out of the jurisdiction, and refused to join as plaintiffs.

it,[1] or for a wrongful taking or conversion of it,[2] or to recover its possession.[3] This rule is so firmly settled that nothing less than an express contract in reference to the chattel with one of the co-owners in his own name, by which promises are made directly to him, will suffice to permit a severance. In such a case, while he may sue alone, in virtue of the express undertaking to and with him,[4] yet all the others may, if they so elect, join with him in an action on the contract; for example, a sale of the chattel and a promise to pay the price.[5]

[1] Wells *v.* Cone, 55 Barb. 585; Hays *v.* Crist, 4 Kan. 350. See also Swarthout *v.* Chicago, &c. R. Co., 49 Wis. 625; Pratt *v.* Radford, 52 id. 114. [Summers *v.* Heard (1899), 66 Ark. 550, 50 S. W. 78: Where partnership property is seized on execution against one of the partners, an action for damages suffered by reason of the loss of the equity to have the assets of the firm applied to the payment of the joint debts contracted on account of the partnership, should be brought by both partners, but this defect of parties is waived by failure to take advantage of it by demurrer or answer.]

[2] Gock *v.* Keneda, 29 Barb. 120. See also Fuller *v.* Fuller, 5 Hun, 595; Reeder *v.* Sayre, 70 N. Y. 180, 181, 190; Spalding *v.* Black, 22 Kan. 55; State *v.* True, 25 Mo. App. 451; Welch *v.* Sackett, 12 Wis. 243; but see Soule *v.* Mogg, 35 Hun, 79; as to action by one co-owner against another for conversion, see Stall *v.* Wilbur, 77 N. Y. 158; Hewlett *v.* Owens, 51 Cal. 570; see *ante*, § *221, and cases cited. In accordance with the principle of these cases, it was held in Soule *v.* Mogg, 35 Hun, 79, that an owner-in-common of property separable by weight or measure — in that case, money — might maintain a separate action for its conversion by a third party, as well as for its conversion by a co-owner.

[But see Balletine *v.* Joplin (1898), 105 Ky. 70, 48 S. W. 417, where it was held that where one mortgaged as his own a mare which another owned jointly with him, the mortgagee and the purchaser at a sale which he procured to be made under attachment are liable to the other joint owner as for a conversion of his interest. And Boley *v.* Allred (1903), 25 Utah, 402, 71 Pac. 869, where it was held that under Rev. St., 1898, § 2919, the owner of an undivided half interest in personal property may maintain an action for conversion without joining his co-owner as either plaintiff or defendant, and the complaint need not state who owns the other half.

Holders of mortgage liens upon chattels, created by different mortgages filed at different times, have such a joint interest in such chattels as to properly join in an action against a sheriff for conversion, such property being in their joint possession: Trompen *v.* Yates (1902), — Neb. —, 92 N. W. 647.]

[3] [Vermont Loan & Trust Co *v.* Cardin (1898), 19 Wash. 304, 53 Pac. 164; Miller *v.* Crigler (1899), 83 Mo. App. 395. See also Trompen *v.* Yates (1902), — Neb. —, 92 N. W. 647, where it was held that "Mortgagees holding mortgages of various priority on the same goods who are jointly in possession of them, may join in an action against the sheriff for depriving them of possession and converting the goods to his own use." (Syllabus by the court.)] Bush *v.* Groom, 9 Bush, 675, 678; Luke *v.* Marshall, 5 J. J. Marsh. 356. See also Russell *v.* Lennon, 39 Wis. 570. *Contra*, Stewart *v.* Brown, 37 N. Y. 350; Seip *v.* Tilghman, 23 Kan. 289; *contra*, joint owners should unite in action to recover property exempt from execution: here, however, the non-joinder had been waived.

[4] Justice *v.* Phillips, 3 Bush, 200.

[5] Silliman *v.* Tuttle, 45 Barb, 171. Action by *all* the co-owners where a sale had been made, as in the last preceding case, by one of them alone.

§ 141. *224. **Surviving Partners.** The new procedure has not, in general, changed the former rules as to the rights and powers of surviving partners when one or more of the firm have died. Now, as before, the surviving partner or partners have the exclusive possession of the firm assets, for the purpose of paying its debts and settling its affairs. They alone can prosecute all actions of a legal nature, to recover debts, or the possession of property, or its value, or damages for its wrongful conversion or misuse. The remedy on all rights of action held by or due to the firm is to be pursued in their names, and the personal representatives of the deceased member or members cannot be joined in such actions by virtue of any interest which they may have in the proceeds, and in the final winding up of the partnership accounts.[1] This doctrine, however, does not mean that every thing in action, belonging to the firm at the time of the death of a member, must invariably be enforced by the survivor, or not at all; he is simply the proper and only person to sue, as long as the thing in action or other personal property remains a part of the firm assets.[2] The survivor may assign such a firm asset, and the assignee would thereupon be entitled to sue in his own name, as in the case of any other assignment. When, therefore, a surviving partner had transferred a firm demand to the administrator of the deceased partner, such administrator would be alone able to enforce the collection by suit in his own name, not, however, by virtue of his original representative capacity, but only in his character as assignee.[3]

§ 142. *225. **Extreme Limits to which some Courts have carried Doctrine as to Joint Rights.** The rule that all the co-owners of a chattel *must* unite in any action founded upon the property in it has been pushed by some of the courts to its

[1] [See McIntosh *v.* Zaring (1897), 150 Ind. 301, 49 N. E. 164, set out at length in note to § *211, *ante*. But see, also, Hardwood Log Co. *v.* Coffin (1902), 130 N. C. 432, 41 S. E. 931, where it is said that the personal representative should be made a party.]

[2] [Robertson *v.* Burrell (1895), 110 Cal. 568, 42 Pac. 1086: The heirs of a deceased partner are not proper parties to bring an action for an accounting in respect to the partnership property, but such action can only be maintained by the personal representative of the deceased partner.]

[3] Roys *v.* Vilas, 18 Wis. 169; Brown *v.* Allen, 35 Iowa, 306, 311. See, also, especially, Robinson *v.* Hintrager (Iowa), 36 Fed. Rep. 752, per Shiras J., p. 756 Hargadine *v.* Gibbons, 45 Mo. App. 460, per Thompson J., and numerous cases cited; s. c. (Mo. Sup. 1893), 21 S. W. 726; Crook *v.* Tull (Mo. Sup. 1892), 20 S. W. 8; State *v.* Stratton (Mo. Sup. 1892), 19 S. W. 803.

extreme limits, — to the extent, as it seems to me, in fact, of nullifying an express and very salutary provision of the reform legislation. I have already discussed the general principle of interpretation referred to with sufficient fulness,[1] and shall simply state the additional decisions, without further comment. When, in the case of partners or other joint owners of personal property, one of them is legally disabled, by means of some act of his own, from asserting or maintaining any right in himself, or, in other words, when he has put himself in such a condition that, if he were the sole owner, he would not have a right of action in reference to the property, it has been held that *all* the partners or co-owners cannot prosecute an action in their joint names, even in respect of the interest of those who have done no acts impairing their individual rights. It is said that, as the right of action is essentially and completely joint, and as therefore all the co-owners must be able to sue, this unity of interest cannot be severed and a recovery permitted for that share of the interest which, as between themselves, belongs to the innocent rather than to the guilty owners. Upon the same principle, and applying in the like manner the rigid doctrine of an absolute unity of right among the co-owners of chattels, the one who had done no act affecting his individual interest cannot sue, in respect of that interest, to recover the portion of the entire demand due to himself by making the others defendants.[2] It is plain from the propositions contained in this subdivision, and from the cases cited in their support, that the courts have made no substantial changes, as results of the reformatory legislation, in the rules concerning the parties plaintiff in actions by the co-owners of personal property.

§ 143. * 226. **III. Legal Actions by Persons having Joint Rights arising from Contract.** The general effect of the provisions contained in the codes upon the common-law doctrines respecting joint rights of action has already been discussed with sufficient

[1] See *supra*, §§ *221–*223, and cases cited.

[2] Estabrook *v.* Messersmith, 18 Wis. 545; Frans *v.* Young, 24 Iowa, 375; Nightingale *v.* Scannell, 6 Cal. 506; and see Rainey *v.* Smizer, 28 Mo. 310; Clark *v.* Cable, 21 Mo. 223; Andrews *v.* Mokelumne Hill Co., 7 Cal. 330; Russell *v.* Allen, 13 N. Y. 173; Tripp *v.* Riley, 15 Barb. 333. See Hill *v.* Marsh, 46 Ind. 218. The case of Estabrook *v.* Messersmith, cited above in this note, has been severely criticised, and its correctness questioned, in Viles *v.* Bangs, 36 Wis. 131, 139, 140, per Cole J.

fulness, and I shall simply add to that discussion some examples and illustrations furnished by the decided cases. It was shown that the ancient rule, requiring all the joint obligees, covenantees, and promisees to unite in actions brought upon their contracts, had not been abrogated, and only modified perhaps in the single particular of permitting parties to be made defendants who refuse to join as plaintiffs. The doctrine of equity in this respect was substantially the same as that of the law, and demanded a union of all joint claimants to prosecute their joint right by a suit in chancery. When the doctrine of equity was made statutory, and was applied to all classes of actions, it therefore wrought no change in the practical rules. Of course these provisions of the codes as to parties have not of themselves altered in any manner the principles which the common law had established for determining whether a right created by any contract is joint or several. In actions *ex contractu*, all the persons having a joint interest must be made plaintiffs, and, when one of them dies, the action must be brought or must proceed in the names of the survivors, the personal representatives of the deceased obligee or promisee cannot be joined as co-plaintiffs; and in the same manner, in actions *ex delicto* for injuries to personal property, all the joint owners must unite, and, if one of them dies, the action is to be prosecuted by the survivors alone. These common-law rules remain in full force.[1] It has been held that two or more

[1] [McIntosh *v.* Zaring (1897), 150 Ind. 301, 49 N. E. 164, quoting the text.] Indiana, B. & W. Ry. Co. *v.* Adamson, 114 Ind. 282; Bucknam *v.* Brett, 35 Barb. 596; 13 Abb. Pr. 119; Daby *v.* Ericsson, 45 N. Y. 786. The survivor was held to be the proper party to sue, although, by an arrangement between himself and the representatives of the estate of the deceased, the proceeds were to belong exclusively to them, and he disclaimed all interest therein. See also Carrere *v.* Spofford, 15 Abb. Pr. N. S. 47, 48, 49. That all joint creditors or promisees must join as plaintiffs, see Porter *v.* Fletcher, 25 Minn. 493; McConnell *v.* Brayner, 63 Mo. 461; Marie *v.* Garrison, 83 N. Y. 14, 29; Tinkler *v.* Swaynie, 71 Ind. 562; Henry *v.* Mt. Pleasant Tp., 70 Mo. 500; Lyford *v.* No. Pac. C. R. Co., 92 Cal. 93; McNamee *v.* Carpenter, 56 Iowa, 276 (one of two joint owners of a promissory note cannot maintain an action thereon in his own name without joining the other owner, though the note is payable to bearer and is in his possession). All persons entitled to shares in the same debt may join in an action to recover it, *e. g.* assignees of different portions. Brett *v.* First Univ. Soc. of Brooklyn, 5 Hun, 149. Where the wards should be joined as co-plaintiffs in a suit by a new guardian on the former guardian's bond, see Wilson *v.* Houston, 76 N. C. 375.

[See, however, Hardwood Log Co. *v.* Coffin (1902), 130 N. C. 432, 41 S. E. 931, in which it is held that where a firm is a party plaintiff, and a member of the firm dies, his personal representative should be made a party. Jameson *v.* Bartlett (1902), 63 Neb. 638, 88 N. W. 860: "Where one of several plaintiffs or defendants dies, in an action pending in this court on error, the right of action, if it survives to

obligees in an injunction undertaking, although their interests were entirely separate, and no joint claim for damages existed, may unite in an action upon it;[1] but in another similar case, where the action was joint in form, the recovery was limited to the damages suffered by the plaintiffs jointly, and they were not permitted to show what each had separately sustained.[2] In an action on a penal bond running to several persons jointly, the common-law rule required all the obligees to be made plaintiffs, although the condition was to perform distinct acts for the benefit of the obligees severally.[3] When a deed of conveyance

or against the remaining parties, may be enforced without bringing the representative or successor of the deceased party into the case."]

[1] Loomis *v.* Brown, 16 Barb. 325. See opinion of Gridley J. The decision was not placed upon the ground that the plaintiffs' rights were joint. It was considered that the code permitted a union of plaintiffs in legal actions, which was not possible at the common law. ["A contract entered into and performed jointly by two or more persons, the compensation for the performance of which is separate and distinct as to each of such persons, may be sued upon separately by each of them, to recover the amount due to him or the damages sustained by him:" Curry *v.* Railway Co. (1897), 58 Kan. 6, 48 Pac. 579. See, to the same effect, McIntosh *v.* Zaring (1897), 150 Ind. 301, 49 N. E. 164. In the enforcement of a joint contract all must join: Slaughter *v.* Davenport (1899), 151 Mo 26, 51 S. W. 471.

Where a contract is made by a carrier with a funeral party jointly to hold a train for them, each member of the party has a separate cause of action for the breach of the contract: Southern Ry. Co. *v.* Marshall (1901), 111 Ky. 560, 64 S. W. 418, following Baughman *v.* Railroad Co., 94 Ky. 150.

In a joint action by several plaintiffs, if the evidence shows that at least part of them cannot recover, a verdict for the defendant must result: Medlock *v.* Merritt (1897), 102 Ga. 212, 29 S. E. 185.]

[2] Fowler *v.* Frisbie, 37 Cal. 34. A number of persons were in possession of land, not jointly, nor in common, but each possessing and cultivating a separate parcel of the whole. An action was brought to recover the entire tract, and, by the provisions of the California statute referred to in a preceding paragraph, all these occupants were made defendants. An injunction was granted restraining them all from interfering, etc. with the crops, and the ordinary undertaking was given to them. The persons thus enjoined bring this action on the undertaking; and the rule stated in the text was expressly laid down by the court. It would be difficult to reconcile these two cases.

[3] Pearce *v.* Hitchcock, 2 N. Y. 388, per Jewett C. J. See also Koeniger *v.* Creed, 58 Ind. 554; Thomas *v.* Irwin, 90 Ind. 557; McLeod *v.* Scott, 38 Ark. 72. See, however, Sprague *v.* Wells, 47 Minn. 504; Alexander *v.* Jacoby, 23 Ohio St. 358, 383. Vandermulen *v.* Vandermulen, 108 N. Y. 195, 204, was an action on a covenant running to several persons jointly, conditioned to pay distinct amounts for the benefit of the covenantees severally. It was held that a separate action was maintainable by each of the covenantees; and, strangely enough, Pearce *v.* Hitchcock was cited as authority for this ruling. The learned judge appears to have overlooked the fact that the actual decision in Pearce *v.* Hitchcock, which, contrary to the common-law rule there stated, allowed separate actions by the obligees, was based entirely on the statute relating to attachment bonds. [Where an attachment bond is made to two jointly, both are necessary parties to an action for the full amount of the bond: King *v.* Kehoe (1894), 91 Ia. 91, 58 N. W. 1071.]

of land is given to two or more grantees, the implied covenants of title, if there be any, are joint, and give only a joint right of action, so that one of the grantees cannot sue alone for a breach.[1] This is a reaffirmance of the rule applicable to the same circumstances under the common law.[2]

§ 144. *227. **Same Subject. Illustrations.** It has been said, in a decision made since the code, that in an action, whether legal or equitable, by a firm, all the partners, *even those that are dormant*, must unite as plaintiffs;[3] but this case can hardly be

[1] Lawrence *v.* Montgomery, 37 Cal. 183.

[2] [Proctor *v.* Georgia Ins. Co. (1899), 124 N. C. 265, 32 S. E. 716: A mortgagor of realty took out a fire insurance policy, expressed to be paid to the plaintiff (the mortgagee) and assured, "as their interests may appear." Held that the mortgagor is a necessary party.

Ermentrout *v.* American Fire Ins. Co. (1895), 60 Minn. 418, 62 N. W. 543: The owner of certain property took out a policy of insurance upon the same, the loss to be paid to the assignee of the mortgagee "as interest may appear," said assignee being named in the policy. After the loss the said assignee assigned all his interest under the policy to a third party, and it was held that the third party and the owner might properly be joined in an action upon the policy.] The defendant, C., entered into a contract with the plaintiff, D., for the construction of a building upon a lot belonging to them, upon which the other plaintiff, S., held a mortgage; and for the faithful performance of the contract C. gave his bond to S. for the benefit of all the plaintiffs; in an action for a breach of the bond it was held that both mortgagor and mortgagee were properly joined as plaintiffs. Daley *v.* Cunningham, 60 Cal. 530. Where an insurance policy is made payable to the mortgagee of the property "to the extent of his interest," or "as his interest may appear," the mortgagor and mortgagee may join in suing on the policy, as they have a common interest in enforcing the contract: Winne *v.* Niagara F. Ins. Co., 91 N. Y. 185; Home Ins. Co. *v.* Gilman, 112 Ind. 7. When, in such a case, the mortgage debt, after the loss becomes payable, is greater than the sum insured the mortgagee may sue alone. Hammel *v.* Queen Ins. Co., 50 Wis. 240; Travelers' Ins. Co. *v.* Cal. Ins. Co., 1 N. D. 151. Where, however, the interest of the mortgagee in the premises insured has ended, he is no longer a proper party, either plaintiff or defendant. So held in Great W. Compound Co. *v.* Ætna Ins. Co., 40 Wis. 373. See, however, *ante*, § *139, and cases cited. A policy having been assigned by the assured to his mortgagees as collateral security, the assured, it has been held, was properly joined as co-plaintiff with the assignees, although he had, by alienation of the property, rendered the policy void except as to the interest of his assignees; to this extent he was interested, as payment of the loss to them would inure to his benefit: Boynton *v.* Clinton, etc. Ins. Co., 16 Barb. 254 (these plaintiffs, it was said, could not have been joined at common law). *Contra*, Michael *v.* St. Louis Mut. F. Ins. Co., 17 Mo. App. 23.

[3] Secor *v.* Keller, 4 Duer, 416. See Beudel *v.* Hettrick, 45 How. Pr. 198; Lewis *v.* Greider, 51 N. Y. 231; 49 Barb. 606. That dormant partners need not be joined, see Platt *v.* Iron Exch. Bk. (Wis. 1892), 53 N. W. 737.

[In Williams *v.* Southern Pac. R. R. Co. (1895), 110 Cal. 457, 42 Pac. 974, plaintiff brought an action to recover compensation for certain work which he alleged was done by him at defendant's request. The answer consisted of denials. It was disclosed by the evidence that the contract was made by the plaintiff in behalf of a partnership of which he was a member and was executed at joint expense. Thereupon defendant moved for a non-

regarded as correct, for it was well settled at the common law that dormant partners need not be joined, and it does not seem that anything in the code has changed the rule in this particular. When eleven officers, harbor masters, all engaged in the same duties, and each entitled to an equal share, one-eleventh of the total fees, made an agreement by which one of them undertook to collect all the fees, and to account for and pay over to the other ten their portions of the same, it was held that all of the ten must unite in an action brought against the eleventh to recover from him the amounts due to them which he had received; one could not sue alone.[1] Persons may sometimes be united as plaintiffs in an action upon a written contract, even though they are not parties thereto, and the terms of the agreement make no direct reference to them, if they, notwithstanding, have an actual interest jointly with the ostensible parties in the subject-matter of the contract, and in the cause of action arising upon it.[2] The authorities of a county appropriated $117,600 to procure volunteers to fill the quota of the county, and ordered $300 to be paid as bounty to each volunteer out of this fund. Eighty-six persons, who had already enlisted in the military service, agreed with the county officials that, in consideration of being paid said bounty, they would form a part of its quota, and they were thereupon actually enrolled in and credited to the

suit, on the ground that one partner could not maintain an action to enforce a partnership demand, which motion was overruled. On appeal the ruling was approved. The court said: "We are of opinion, following the incontestable trend of authority, that the absence as parties of some of the partners from a complaint by one or more of them on a partnership demand does not, speaking strictly, affect the merits, and in order to be considered must be pleaded by the defendant. The motion for non-suit was therefore properly denied." Cases are cited from New York, Minnesota and Missouri.

As to actions between partners, see § *104, *ante*.

In some states the statute permits partnerships to sue in the firm name. See § *121, *ante*. The Supreme Court of Ohio, in Phœnix Ins. Co. *v.* Carnahan (1900), 63 O. St. 258, 58 N. E. 805, held that where a suit is commenced in the partnership name, under § 5011, R. S., and one of the partners dies while it is pending, the action cannot go on in the name of the partnership, even under order of the court, for it has ceased to exist, and the action must be revived and proceed in the name of the representative or successor of the firm, and the court held further, in the same case, that where a suit is brought in the partnership name, an averment as to who the partners are is mere surplusage. Citing Winters *v.* Means, 50 Neb. 209, and Dimond *v.* Bank, 70 Minn. 298.]

[1] Dean *v.* Chamberlin, 6 Duer, 691. The complaint, stating these facts, and alleging that defendant had refused to account for and pay over to the single plaintiff his share, was held bad on demurrer; all should have joined as plaintiffs.

[2] Rutledge *v.* Corbin, 10 Ohio St. 478. See the facts and opinion, *supra*, § *202. Moore *v.* Jackson, 35 Ind. 360.

number of volunteers required from the county. The bounty not being paid, the entire eighty-six united in an action demanding judgment for the total amount of their bounties, $25,800, and the action was held to be properly brought.[1]

§ 145. * 228. **Criticism of Cases holding that a Joint Promisee cannot be made a Defendant.** The common-law theory of joint right, growing out of contract, equally with the joint right arising from the ownership of chattels, has been carried by certain cases so far that manifest injustice has been done, and the enforcement of conceded rights has been defeated, in order that the courts should not depart from an arbitrary and technical rule. These cases have held that, where a contract is made by or with two or more on the one part, so that a joint right of action is held by them, the only possible action is one brought by all, if living; that one of them cannot sue on the contract making his co-contractor a defendant, with proper averments in the pleading, whether he seeks to recover the whole amount due, or only his own individual interest therein, and though the co-contractor refuses to join in the suit for any reason, even if the latter has been paid his share.[2] I have already discussed this topic at large, and fully expressed my opinion upon it.[3] The decisions last mentioned, and the rule which they approve, are directly opposed to the letter of the codes, which makes no restriction to equitable

[1] Young *v.* Franklin Cy. Com'rs, 25 Ind. 295, 299. Each plaintiff was only interested to the extent of $300. There was no joint right in the whole fund. This case therefore illustrates, in a clear manner, the proposition heretofore made, — that the code admits of a *joinder of plaintiffs* in instances where such joinder was not permitted at the common law.

For a single premium a joint policy of insurance was issued to the owner of a building and to the owner of a stock of goods therein, neither having any interest in the property of the other, except as it arose from their relation as husband and wife, and his occupancy of her store building. It was held, that they properly joined as plaintiffs in an action on the policy: Graves *v.* Merchants' & B. Ins. Co., 82 Iowa, 637. Property of a married man on the land of his wife was insured in their joint names; it was held that they might join in an action on the policy. Kausal *v.* Minn. Farm. Mut. F. Ins. Ass'n, 31 Minn. 17. Sureties who have paid money for their principal may have a joint action for the whole amount; or each may, as before the code, bring a separate action for the amount he has paid: Skiff *v.* Cross, 21 Iowa, 459. Two persons were allowed to join in suing a common carrier for the value of a chest, their joint property, and of its contents, part of which was the property of one plaintiff, part of the other; a check having been issued to them jointly for the transportation of the chest and its contents: Anderson *v.* Wabash, etc. Ry. Co., 65 Iowa, 131.

[2] Rainey *v.* Smizer, 28 Mo. 310; Clark *v.* Cable, 21 Mo. 223; Andrews *v.* Mokelumne Hill Co., 7 Cal. 330; Ryan *v.* Riddle, 78 Mo. 521; Hogendobler *v.* Lyon, 12 Kans. 276.

[3] See *supra*, § *204, and notes, and Hill *v.* Marsh, 46 Ind. 218.

suits, and are in violent antagonism with the evident intent of the reformed procedure. It was said by the court, in one case, that if an action by one of the creditors was permitted, under the circumstances stated, the debtor would be exposed to subsequent suits and recoveries from the other creditors. This remark shows an entire misapprehension of the meaning and purpose of the statutory provision. It requires the dissenting creditor or co-contractor, who refuses to be a plaintiff, to be made a defendant, for the very purpose of concluding him, by the judgment, from any subsequent prosecution on his own behalf. He is added as a party, and "has his day in court," and this will be a complete bar to a future attempt on his own part, if he should change his mind. No possible injustice could therefore be done to the defendant, and great injustice would necessarily be done to the creditor who desires to enforce his lawful demand, if the utterly arbitrary rule sustained by these and similar cases should be generally approved as the correct interpretation of the codes. The New York Court of Appeals has determined that an action may be maintained by one firm against another firm to recover a sum ascertained to be due, although the two partnerships have a common member who is made a defendant, with proper averments, in the complaint; and the action need not be brought for the equitable relief of an accounting, but for the legal relief of an ordinary money judgment.[1]

§ 146. * 229. **IV. Legal Actions by Persons having Several Rights Arising from Contract.** As the principles have been already stated in the preliminary discussions of this section, it is only

[1] Cole *v.* Reynolds, 18 N. Y. 74. [Willis *v.* Barron (1898), 143 Mo. 450, 45 S. W. 289. The court said: "At common law partnership contracts were construed to be joint only, not joint and several. As a consequence of this rule in actions by or against partners it was necessary that all the partners should join as plaintiffs or be joined as defendants. A further consequence of this doctrine was that a partner could not sue a firm of which he was a member on a note executed by the firm to himself. . . . All the law writers and all the adjudged cases place the disability of one partner to sue his firm upon its note to him upon the ground that a man cannot contract with himself, and because it was deemed absurd to permit a party to be both a plaintiff and a defendant in the same action, and for the further reason that until the partnership affairs were adjudged and the balance struck it could not be said one partner was indebted to another. . . . But since the statute now makes the note the several contract of each member of the firm, and makes each partner liable *in solido*, the payee is no longer under the necessity of suing himself, and hence so far as the question of parties to pleadings is concerned, he can sue either or all of the other partners without infringing the common-law rule of pleading."]

necessary to add some further illustrations furnished by the decided cases. The common-law doctrine in respect to several rights and actions does not seem to have been changed, unless, possibly, under the operation of the equitable rule embodied in the codes, plaintiffs having strictly several rights may be allowed to unite in legal actions, under circumstances which establish a certain community of interest among them, although under the same circumstances they would have had no such election at the common law. There is at least a tendency shown by some of the decisions towards such a modification of the rule which formerly prevailed in reference to several rights and causes of action.[1] The following examples will serve to illustrate the nature of several rights, and the doctrine as to parties plaintiff in suits brought to enforce them. Tenants in common of a tract of land, who hold their titles by different conveyances from the same grantor, each of which contains covenants relating to the land and its use, cannot unite in an action brought against the grantor to recover damages for the breach of such covenants; their interests under the covenants and their rights of action are in every sense several.[2] The obligees in an injunction bond, where the interests interfered with by the injunction are separate, and the injury done to each is distinct, cannot join in a suit to recover damages for these several causes of action; their recovery in such proceeding must be limited to the damages that are strictly joint.[3] Certain persons executed the following written agreement: "We, the undersigned, agree to guarantee the depositors of W. E. C. [a banker] in the payment in full of their demands against said W. E. C. on account of money deposited with him." Each depositor, it was held, must sue separately upon this guaranty to recover the amount of his individual claim; all the depositors could not join in a single action, because their interests were entirely several, neither one having

[1] See *ante*, § *227 and note.

[2] Samuels *v.* Blanchard, 25 Wis. 329.

[3] Fowler *v.* Frisbie, 37 Cal. 34; but, *per contra*, see Loomis *v.* Brown, 16 Barb. 325. It is held in Ohio that the interests of the obligees in an attachment bond are several, although the undertaking is in terms joint. Where such a bond was given to three persons, an action on it by two of them, who were partners, and whose firm property had been wrongfully seized under the attachment, was sustained. Alexander *v.* Jacoby, 23 Ohio St. 358, 383. See *ante*, § *266, and notes, and Vandermulen *v.* Vandermulen, 108 N. Y. 195, 204, there cited. For further illustrations see Great West. Compound Co. *v.* Ætna Ins. Co., 40 Wis. 373; Hubbard *v.* Burrell, 41 id. 365; Eldridge *v.* Putnam, 46 id. 205; Brett *v.* First Univ.

any interest in the demand of another.[1] A number of persons having each subscribed different sums of money for a loan to a certain party in aid of a proposed enterprise, and a committee of three having been appointed to act as agents for the subscribers, which committee entered into a written contract with him containing various stipulations concerning the use of the money, and also an undertaking on his part to repay the amounts advanced, each of the subscribers was held entitled to maintain a separate action against the borrower to recover the sum loaned by himself.[2] Five persons entered into a written agreement stipulating that, if either or any of them should be drafted during the late war, the others would contribute equal sums to enable him or them to hire substitutes. Three of the parties having been drafted and procured substitutes, one at a cost of $1,500, and the others for $1,100, each, it was held by the Supreme Court of Indiana that each must sue the others in a separate action for the stipulated indemnity, and a joint action by the three was dismissed.[3] A number of persons, being interested in opposing a certain claim and in defending suits thereon, appointed a committee to employ counsel and to conduct the defence, and agreed to pay the expenses incurred by such committee. The cost of the defence not having been contributed, the committee paid the same, and thereby became entitled to reimbursement. This right, it was held, was a several one in each member thereof, and a separate suit by each to recover the sum paid out by himself was proper, rather than a joint action by all to recover the whole amount which had been disbursed.[4] Under the general statutes of New York, providing for the formation of corporations for various purposes, and making the stockholders personally liable under certain circumstances to the creditors of the corporation for the debts thereof, this right of action in the creditors is a several one, and a separate action may therefore be maintained by each creditor. It is admitted, however, that a proper action

Soc. of Brooklyn, 5 Hun, 149; Small *v.* Robinson, 9 id. 418; Koeniger *v.* Creed, 58 Ind. 554; Durham *v.* Hall, 67 id. 123; Graham Tp. Indep. Sch. Dist. *v.* Indep. Sch. Dist. No. 2, 50 Iowa, 322; Goldsmith *v.* Sachs, 8 Sawy. 110, 17 Fed. Rep. 726.

[1] Steadman *v.* Guthrie, 4 Met. (Ky.), 147, 151.

[2] Rice *v.* Savery, 22 Iowa, 470. The court held that the committee might also sue as trustees of an express trust, the promise having been made directly to them, and also that each creditor could sue.

[3] Goodnight *v.* Goar, 30 Ind. 418.

[4] Finney *v.* Brant, 19 Mo. 42.

may be brought against all the stockholders for the benefit of all the creditors.[1] A bond having been given for the payment of a certain sum to the heirs of A., eight in number, upon the death of their mother, it was held by the Supreme Court in New York that an action might be maintained by one heir against the obligor, or, he being dead, against his administrator, to recover one-eighth of the entire sum; that the right of the obligees was several and not joint.[2] Where three towns were each liable for a share of the cost of erecting a bridge, and the proper officers of each — the highway commissioners — procured the same to be erected, but the entire expense thereof was actually advanced and paid out by two of these commissioners, their right of action against the third commissioner to recover the amount thus disbursed for his use was declared to be several, and a joint action against him, it was held, could not be maintained.[3]

[1] Weeks *v.* Love, 50 N. Y. 568. It was said that all the cases impliedly hold the doctrine above stated; and the following were cited: Briggs *v.* Penniman, 8 Cow. 387; Mann *v.* Pentz, 3 N. Y. 415; Osgood *v.* Laytin, 5 Abb. Pr. N. S. 1; Garrison *v.* Howe, 17 N. Y. 458.

[2] Hees *v.* Nellis, 1 N. Y. Sup. Ct. 118.

[3] Corey *v.* Rice, 4 Lans. 141. There was no joint or common interest held by the towns which the plaintiffs represented in the sum which was thus advanced; it was not like an advance made by a partnership, or made out of a fund owned by the plaintiffs together. The implied promise of the defendant was, therefore, not to the plaintiffs jointly.

Where a policy of insurance provided for the payment of different sums to different parties, it was held improper for the beneficiaries to join in one action to recover the several sums due: Keary *v.* Mutual Reserve Fund L. Ass'n, 30 Fed. Rep. 359. Two of three contracting parties agree to perform certain services for the third, and each of the two is to receive therefor a separate and distinct compensation; each may bring a separate action, it being quite immaterial that in the rendition of the services for which they were to receive their several compensation their joint action may have been necessary: Richey *v.* Branson, 33 Mo. App. 418; Bowman *v.* Branson (Mo. 1892), 19 S. W. 634. The plaintiff and two others, H. and B., acting on behalf of the S. Company, covenanted that the plaintiff should perform certain work for the defendants, in consideration of which the defendants promised to pay the plaintiffs a stipulated sum. It was held that the plaintiff could maintain an action to recover a balance alleged to be due on the contract price, without joining H., B., or the S. Company: Craig *v.* Fry, 68 Cal. 363. One of the sureties in an official bond covenanted to indemnify his co-sureties against liability on the bond, and one of the latter was compelled to pay part of a defalcation of the principal; it was held that he could sue alone upon the covenant. Cross *v.* Williams, 72 Mo. 577: "If the consideration for the promise of indemnification made by the defendant was that the sureties should go on H.'s bond, though it moved from many persons, yet it moved from each one severally," citing Parsons on Contracts, p. 18. See also Bush *v.* Haeussler, 26 Mo. App. 265. In general, one surety can sue alone at law to enforce contribution from a co-surety, without joining his other co-sureties: Voss *v.* Lewis, 126 Ind. 155.

[Duncan *v.* Willis (1894), 51 O. St. 433, 38 N. E. 13; Defendant, having knowledge that the plaintiff and his brother were desirous of purchasing, each for his own separate use, a number of head of

§ 147. *230. **V. Legal Actions by Persons having Joint Rights Arising from Personal Torts.** The common-law rule governing the selection of parties plaintiff in such actions is entirely unchanged. When the personal tort produces a common injury to all, and thus creates a common damage, all the persons affected by the wrong must join in an action to recover the damages. In pursuance of this principle, all the members of a partnership may and must unite in an action for a libel or slander on the firm, by which its business is injured. Undoubtedly, the instances in which a common, as distinguished from a several injury, can be done to a number of individuals by personal torts, must neces-

light feeding hogs, represented to them that he had one hundred hogs to sell of the kind and quality desired, which were sound, healthy and free from disease, and for which he had paid $5.00 per hundred pounds, but declined to sell in separate lots; he would sell the Duncans the entire lot and they could divide them to suit themselves. Relying upon these representations the brothers purchased the one hundred hogs, paying $5.12½ per hundred pounds, the plaintiff and his brother each to have fifty head of the hogs as his separate and individual property, and to feed separately on their respective farms. On the same day the hogs were divided in accordance with the agreement, and plaintiff took his fifty at once to his own farm, where some of them died on the same day by reason of hog cholera. They had been exposed to this disease and were infected with it at the time of the sale, all of which was known to the defendant, who had in fact purchased them as diseased hogs, and for a much less sum than $5.00 per hundred pounds. Not only did plaintiff lose the diseased hogs which died, but the disease was communicated to his other hogs, and he was greatly injured thereby. *Held*, that this contract of purchase, though joint in form, and based upon a consideration moving jointly from the two, was in spirit and essence, a separate contract as to each, and that the rights acquired under it by the purchasers were separate and distinct. Citing many cases, English and American.

Union P. R. Co. *v.* Vincent (1899), 58 Neb. 171, 78 N. W. 457: "A railroad company made with two persons a contract, in form joint, for the transportation of horses, a portion of which belonged to one of the shippers and the remainder to the other. None was owned in common. The horses of one were injured, and he sued, naming the other as a defendant because he refused to join as plaintiff. No objection was made for defect of parties until the trial began. *Held*, without deciding how an action in such case should be brought, that the railroad company could not complain because one of three situations must exist. The suit was sufficiently brought by the person whose stock was injured, as the real party in interest; or else it was sufficient to make the other a defendant alleging that he would not join as plaintiff; or if he must necessarily have joined as plaintiff, the defect appeared on the face of the petition and was waived by not demurring on that ground."

Baughman *v.* Louisville, etc. R. R. Co. (1893), 94 Ky. 150, 21 S. W. 757: Where a contract for the shipment of horses owned by different persons was made with the carrier by one person acting as agent for them all, each owner had a separate action for damages suffered by him for breach of the contract of shipment, and all could not unite in one action.

Brown *v.* Farnham (1893), 55 Minn. 27, 56 N. W. 352; In an action upon a composition agreement, any creditor being a party thereto may bring a several action for his damages for the breach thereof.]

sarily be rare; but when they do occur, the rule as stated must be applied.[1] A single illustration will suffice. False and fraudulent representations concerning the pecuniary responsibility of a certain person having been made to a partnership, by which it was induced to sell goods to him on credit, and the price of the goods not being paid or recoverable by reason of the purchaser's insolvency, it was decided by the New York Court of Appeals that an action to recover damages for the deceit should be brought by all the partners jointly.[2]

§ 148. *231. **VI. Legal Actions by Persons having Several Rights Arising from Personal Torts.** The converse of the proposition stated in the preceding paragraph is also as true now as it was prior to the new system of procedure. Where a personal tort has been done to a number of individuals, but no joint injury has been suffered and no joint damages sustained in consequence thereof, the interest and right are necessarily several, and each of the injured parties must maintain a separate action for his own

[1] [McIntosh *v.* Zaring (1897), 150 Ind. 301, 49 N. E. 164: Where several contracts are made between defendant and three firms of attorneys for legal services, the fees to depend upon the amount of recovery or the sum obtained through compromise, and defendant fraudulently represents that as a result of compromise a smaller sum was obtained than was in fact the case, upon the basis of which representations the firms of attorneys settle with defendant, a joint right of action arises in the firms of attorneys by reason of such fraud, since all are alike interested in avoiding the settlement.

Beetle *v.* Anderson (1897), 98 Wis. 5, 73 N. W. 560: "Where several persons induced by false representations, purchased a mortgage, each contributing one-fourth of the money, *held*, that their interests in the securities were joint; and they might properly sue jointly for the fraud."

Cohen *v.* Wolff (1893), 92 Ga. 199, 17 S. E. 1029: Where different persons have been induced by fraud to sell goods to a firm, and the firm executes mortgages upon the goods so purchased, all the persons so defrauded may join in an action to have the mortgages declared void.

Wunderlich *v.* Chicago & Northwestern R. Co. (1896), 93 Wis. 132, 66 N. W. 1144: An insurer who has paid the loss on insured property to the assured, becomes subrogated *pro tanto* to the latter's right of action against the third person through whose negligence the loss occurred, and the insurer and assured should properly join in an action for the negligent burning.

Elliott *v.* Pontius (1893), 136 Ind. 641, 35 N. E. 562: Several plaintiffs who have independent demands as creditors against a defendant debtor, may sue jointly for relief against a fraudulent scheme to remove the debtor's property, but when the fraud alleged is shown not to exist, the joint right ceases and each must revert to his several right against the debtor.]

[2] Zabriskie *v.* Smith, 13 N. Y. 322. See also Cochrane *v.* Quackenbush, 29 Minn. 376 (joint action by partners for a malicious prosecution, to recover for injuries thereby caused to their joint credit, business, and property); Peakes *v.* Graves, 25 Neb. 235 (joint action by partners for deceit). An action brought by members of a firm to recover damages for an alleged slander relating to the credit of the firm does not abate by the death of a member; the entire cause of action vests in the survivors. Shale *v.* Schantz, 35 Hun, 622.

personal redress.[1] It follows, therefore, that when a tort of a personal nature, an assault and battery, a false imprisonment, a libel, a slander, a malicious prosecution, or the like, is committed upon two or more, the right of action must, except in a very few special cases, be several. In order that a joint action may be possible, there must be some prior bond of legal union between the persons injured — such as a partnership relation — of such a nature that the tort interferes with it, and *by virtue of that very interference* produces a wrong and consequent damage common to all. It is not every prior existing legal relation between the parties that will impress a joint character upon the injury and damage. Thus, if a husband and wife be libelled or slandered, or beaten, although there is a close legal relation between the parties, it is not one which can be affected by such a wrong, and no joint cause of action will arise. The doctrine above stated has been fully recognized and asserted by the courts since the codes were enacted.[2] A fire company — a voluntary association — having been libelled, a joint action by its members to recover damages against the libeller was held improper; not being partners, and not having any community of *legal* interest whereby they could suffer a common wrong, the right of action was several, and each must sue alone.[3] The same rule has been applied in the case of two or more persons, not partners, suing jointly to recover damages for a malicious prosecution; the action cannot be maintained.[4]

§ 149. * 232. **VII. Actions in Special Cases.** Some special cases which do not fall within the foregoing classification will conclude this branch of the discussion.[5] A policy of fire insur-

[1] [See, however, Shull *v.* Barton (1899), 58 Neb. 741, 79 N. W. 732, where the court said: "This court is committed to the doctrine that two parties having separate and distinct claims to the possession of the same property may join in an action of replevin therefor."]

[2] Shull *v.* Barton (1898), 56 Neb. 718, 77 N. W. 132: "Two creditors who lost their several claims and attachment liens, because a coroner negligently approved a worthless replevin bond in a suit in which the attached property was taken from the sheriff, cannot join as plaintiffs in an action for damages against the coroner for approving such bond." Two persons cannot join in a suit against a telegraph company for mental anguish; each has a separate cause of action, if any: Morton *v.* Western Union Tel. Co. (1902), 130 N. C. 299, 41 S. E. 484.

[3] Giraud *v.* Beach, 3 E. D. Smith, 337; Hinkle *v.* Davenport, 38 Iowa, 355, 358; Stepank *v.* Kula, 36 id. 563.

[4] Rhoads *v.* Booth, 14 Iowa, 575. See Swales *v.* Grubbs (Ind. App. 1893), 33 N. E. 1124, and see also, on the general subject of this paragraph, Hellams *v.* Switzer, 24 S. C. 39.

[5] [A proceeding in mandamus is properly brought in the name of the State, even though the application is made in

ance, containing the clause, "loss, if any, payable to E. B. G., mortgagee," the assured, it was held, could not maintain an action without making E. B. G. a co-plaintiff, unless it was alleged and proved that the mortgage to him had been paid off so that his interest had ended.[1] In several of the States, by virtue of special provisions contained in their codes, partnerships may sue and be sued by the use of the firm name as the parties plaintiff or defendant, in the same manner as though they were corporations. The judgments recovered in such actions against the partnership can only be enforced, in the first instance, against the firm property, and can only be extended so as to bind the individual property of the several partners by a subsequent direct proceeding against them, or some of them, in the nature of a *scire facias*.[2] The Kentucky code contains a peculiar provision in

the interest of a private person: State *v.* Pac. Brewing Co. (1899), 21 Wash. 451, 58 Pac. 584.

In a suit for a penalty the person suing and not the State is the proper party plaintiff, unless the statute otherwise directs: Burrell *v.* Hughes (1895), 116 N. C. 430, 21 S. E. 971. In such a suit several may sue jointly for their joint use: Carter *v.* Wilmington, etc. R. R. Co. (1900), 126 N. C. 437, 36 S. E. 14.

State *ex rel. v.* Bradley (1901), 10 N. D. 157, 86 N. W. 354: Under § 7605, Rev. Codes, a citizen of a county in which a liquor nuisance exists may maintain an action in the name of the State without authority from the State's attorney or the attorney general.

Persons whose interests are separate and independent cannot be joined as relators in mandamus: State *ex rel. v.* Fraker (1901), 166 Mo. 130, 65 S. W. 720. But where a board of election commissioners refuses to place the names of a number of nominees for the office of appellate judge upon the official ballot, such nominees have sufficient common interest in obtaining a unit of mandate against the board, to unite in an action therefor: State *ex rel. v.* Mount (1898), 151 Ind. 679, 51 N. E. 417.]

[1] Ennis *v.* Harmony F. Ins. Co., 3 Bosw. 516. [Where an insurance policy is payable absolutely to a mortgagee, the mortgagee is a necessary party plaintiff, though the assured may properly be made a party also to protect his interest in the policy: Burlington Ins. Co. *v.* Lowery (1895), 61 Ark. 108, 32 S. W. 383. See also § *226, *infra*, and notes.] And see Hammell *v.* Queen Ins. Co., 50 Wis. 240; Winne *v.* Niagara F. Ins. Co., 91 N. Y. 185; Connecticut F. Ins. Co. *v.* Erie Ry. Co., 73 N. Y. 399. Where insured property is destroyed by fire, caused by the wrongful act or negligence of a third party, if the value of the property exceeds the amount of insurance paid, the insurer paying the loss acquires thereby to the extent of the payment a joint interest with the owner in the cause of action against the wrongdoer, hence, in prosecuting such cause of action the insurer must join the owner as co-plaintiff. Home Mut. Ins. Co. *v.* Oregon Ry. & Nav. Co., 20 Oreg. 569. That such joinder is, at any rate, permissible, see Crandall *v.* Goodrich Transp. Co., 16 Fed. Rep. 75. But where the insurance company has paid the insured the full value of the property destroyed, it may maintain the action in its own name. Marine Ins. Co. *v.* St. Louis, etc. Ry. Co., 41 Fed. Rep. 643; Home Mut. Ins. Co. *v.* Oregon Ry. & Nav. Co., 20 Oreg. 569.

[2] See *supra*, § *121. Ryerson *v.* Hendrie, 22 Iowa, 480. See Wills *v.* Simmonds, 8 Hun, 189, 200 (legal action by one of several partners against another one without joining the remaining co-partners).

reference to actions brought by an assignee of a thing in action where the assignment is *equitable*, merely, — that is, where it is not expressly authorized by statute; in such a case the assignor must be joined as a party *either plaintiff or defendant*, at the option of the assignee who brings the suit.[1] The code of the same State expressly authorizes the owner of land to maintain approriate actions to recover damages for any trespasses or other injuries committed thereon, although he may not be in the actual possession, or have the right to the immediate possession, at the time when the trespass or other injury complained of was committed.[2] This is undoubtedly the true interpretation of the codes of all the States without any express provision to that effect. The common-law distinction between "trespass" and "case" being abolished, the owner is entitled to maintain an action and recover damages, by alleging the actual facts which constitute the cause of action, although under the former procedure he would, under certain circumstances, sue in "trespass," and under other circumstances in "case." The nature of the *right of action* has not been changed, nor has the amount of damages recoverable been affected, but the special and technical rules which governed the use of the two common-law actions mentioned have certainly been abrogated.[3] A legatee or dis-

[1] Dean *v.* English, 18 B. Mon. 135. This provision is somewhat different from that found in the code of Indiana, which requires the assignor, in all cases, where the thing in action is not assigned by indorsement, — that is where it is not a negotiable instrument, — to be joined as a *defendant*, in order to answer to the assignment. [Indiana, Burns' St., 1901, § 277.]

[2] Bebee *v.* Hutchinson, 17 B. Mon. 496.

[3] Brown *v.* Bridges, 31 Iowa, 138, 145. A plaintiff suing, as owner of land, for injuries done by a wrongdoer, cannot, consistently with the plain import of the codes, be nonsuited, because he was out of possession, and not entitled to possession. Undoubtedly, he may not be able to recover such damages as he would have recovered if the action was the common-law "*trespass*," — that is, damages for the wrong done to his *possession* as well as to the inheritance; but he is certainly entitled to recover such damages as he would have obtained if the action was the common-law "case," — that is, damages for the injury to the inheritance. To nonsuit the plaintiff is to restore the old distinctions between these technical actions. This doctrine is expressly sustained by the Supreme Court of Missouri: Fitch *v.* Gosser, 54 Mo. 267; and by a very recent decision in New York: Adams *v.* Farr, 5 N. Y. Sup. Ct., 59, citing Robinson *v.* Wheeler, 25 N. Y. 252. S. P. Foster *v.* Elliott, 33 Iowa, 216, 224; Rogers *v.* Duhart (Cal. 1893), 32 Pac. 570 (an allegation, not sustained by the evidence, that the plaintiff was in possession may be treated as surplusage). But see Townsend *v.* Bissell, 5 N. Y. Sup. Ct. 583, per Gilbert J., a contrary dictum, which, in the face of these authorities, and of the code itself, is clearly a mistake. The character of the possession required to maintain "trespass" is illustrated in Alexander *v.* Hurd, 64 N. Y. 228. The plaintiff's wife

tributee of an estate in the hands of an executor or administrator may, under certain circumstances, maintain an action to recover a debt or demand due to the deceased, if for any reason the personal representative is legally disabled from suing. Thus, for example, where B. in his lifetime was indebted to A., both die, and the same person is made administrator or executor of each estate, a legatee or distributee of A.'s estate may bring an action in his own name against the one who is thus the administrator of B.'s estate, as well as executor or administrator of A.'s estate. This person, as the representative of one estate, cannot sue himself as representative of the other, and therefore the beneficiaries of the creditor estate are permitted to prosecute the action. It seems, also, that such action can be brought either by one of the legatees or distributees, or by all of them jointly.[1]

§ 150. * 233. **Actions by Parents or Guardians for the Seduction of, or Injury to, their Children or Wards.** It is held in New York

owned the farm; the plaintiff built the house on it, in which he and his family had lived for years, and were still living; he worked the farm, owned the stock and tools, and provided for his family. It was held that he had such a possession of the farm that he could maintain an action for trespass upon it in breaking into and injuring it.

[1] Fisher *v.* Hubbell, 65 Barb. 74; s. c. 1 N. Y. Sup. Ct. 97. It was also held that Hubbell — the common trustee — should be made a defendant, both as administrator of A.'s estate, and as executor of B.'s estate; of the latter, because he thus represented the debtor; and of the former, because he was the regular plaintiff, and should be made a party in order to conclude the estate by the judgment. It was said that, in order to bind the estate of a deceased person, his administrator or executor must be made a party *in his representative capacity;* it is not sufficient that he be made a party. See Haynes *v.* Harris, 33 Iowa, 516. In Missouri, the distributees of an estate in the hands of an administrator may, before an order for distribution is made, all unite in a joint action on the administrator's bond against him and his sureties. Whether such joint action would be proper after the order for a distribution, *quære.* Kelley *v.* Thornton, 56 Mo. 325. In Kentucky it has been expressly decided that several distributees cannot unite in a legal action against the administrator to recover the shares found due to each upon a settlement of the estate. Pelly *v.* Bowyer, 7 Bush, 513. For various actions by administrators, executors, legatees, and heirs, see Smith *v.* Van Ostrand, 64 N. Y. 278; Tyson *v.* Blake, 22 N. Y. 558; Dunning *v.* Ocean Nat. Bank, 61 id. 497; Cashman *v.* Wood, 6 Hun, 520; Pendleton *v.* Dalton, 77 N. C. 67; Filbey *v.* Carrier, 45 Wis. 469; Catlin *v.* Wheeler, 49 id. 507; Harris *v.* Harris, 61 Ind. 117; Taylor *v.* Fickas, 64 id. 167; McDowell *v.* Hendrix, 67 id. 513; Colton *v.* Onderdonk, 69 Cal. 155 (a sole devisee in possession of the estate may sue for trespass); Segelken *v.* Meyer, 94 N. Y. 473 (special circumstances under which plaintiff may recover personal property of a deceased person as next of kin, without the intervention of an administrator); Grubb *v.* Lookabill, 100 N. C. 267 (in an action by an administrator against his decedent's vendee to recover the purchase-money due on a bond for title by selling the land, the vendor's heirs-at-law are necessary parties). As to co-plaintiffs in action for contribution, see Hughes *v.* Boone, 81 N. C. 204.

that a mother may maintain an action for the seduction of her infant daughter where the father is dead, and the daughter is dependent upon the mother, although the latter has remarried.[1] This rule has also been extended to the case where the father is not dead, but has abandoned his wife, who lives separate and apart from him, and maintains herself and family by carrying on a business in which the daughter is actually employed as an assistant, rendering substantial services. The action being founded upon the relation of master and servant, and not upon that of parent and child, and the mother carrying on a business in which the daughter is employed as a servant, all the requisites of the general doctrine relating to the action of seduction are fully complied with.[2] These decisions are based upon common-law principles independently of any changes made by statute.[3] The codes of several States, however, contain special provisions authorizing actions to be brought by fathers, or, in case of their death or desertion of their families, by mothers, and by guardians, to recover damages for the seduction of, or for the death of, or injuries to, their children or wards.[4] A woman is per-

[1] Lampman *v.* Hammond, 3 N. Y. Sup. Ct. 293; Gray *v.* Durland, 50 Barb. 100, 51 N. Y. 424; Furman *v.* Van Sise, 56 N. Y. 435; Badgley *v.* Decker, 44 Barb. 577.

[2] Badgley *v.* Decker, 44 Barb. 577. See Certwell *v* Hoyt, 6 Hun, 575 (by a grandfather). Actions to recover earnings of an infant child; see Hollingsworth *v.* Swedenborg, 49 Ind. 378; Monaghan *v.* Randall Sch. Dist., 38 Wis. 100; Matthews *v.* Mo. Pac. Ry. Co., 26 Mo. App. 75 (action by widow to recover for loss of services of her minor child, sustained, independently of statute). [Senn *v.* Southern Ry. Co. (1894), 124 Mo. 621, 28 S. W. 66: Where the mother dies pending an action brought by both parents for the death of an unmarried minor son, the father may continue the action in his own name. Keller *v.* City of St. Louis (1899), 152 Mo. 596, 54 S. W. 438: Where a wife secures a divorce from her husband, and the "care and custody" of the child is awarded to the wife, but no order is made respecting the "maintenance" of the child, the duty of supporting the child still devolves upon the husband, and the wife cannot, during the husband's life, maintain an action alone for damages due to injuries to the minor child. Pierce *v.* Conners (1894), 20 Colo. 178, 37 Pac. 721: By statute the father and mother have an equal interest in the judgment recovered for wrongfully causing the death of a minor child. But suit may be brought either by the father alone or by both together. Buechner *v.* Columbia Shoe Co. (1895), 60 Minn. 477, 62 N. W. 817: Under G. S. 1894, § 5164, a father may maintain an action in his own name to recover damages for an injury to his minor child. Same holding in Lathrop *v.* Schutte (1895), 61 Minn. 196, 63 N. W. 493.]

[3] [But see Anthony *v.* Norton (1899), 60 Kan. 341, 56 Pac. 529 and Snider *v.* Newell (1903), 132 N. C. 614, 44 S. E. 354, where it was held that, under the general code provisions, without any special statute, a parent might recover for the seduction of a daughter without showing any loss of services.]

[4] See *supra*, § *120, where the States are enumerated. A statute which dispenses "with any allegation or proof of loss of service" does not change the rules of the law as to the parties; the seduced

mitted, in a few States, to maintain an action and recover damages for her own seduction.[1]

Second: Actions by and between Husband and Wife.

§ 151. *234. **Common Law and Equity Rules.** The common-law rules as to the power of a wife to bring actions in her own name, and as to the necessity of making husband and wife co-plaintiffs in all actions where she could be party at all, relating to her property or to wrongs suffered by her, have been either swept away or greatly modified in all the States which have adopted the reformed system of procedure. These common-law requisites were concisely stated in a former paragraph of this section.[2] In equity, while as a general rule the husband was joined as a co-plaintiff even in suits touching her equitable separate estate, yet when their interests were at all antagonistic, and especially when the proceeding was in any manner adverse to him, she was permitted to sue without uniting him with her, and even to make him a defendant. Her action, however, was prosecuted in her name by a next friend.[3]

[§ 152. **Statutory Provisions.** There are two general types of the statutory provision as found in most of the codes. The statutes of the first type abolish the necessity of joining the husband and wife where such joinder would not be necessary aside from the marriage relation. The Kansas statute is illustrative of this type, and reads as follows: "A married woman may sue and be sued in the same manner as if she were unmarried."[4] The statutes of Oklahoma and Utah are identically the same, and those of Colorado, Montana, and Nebraska differ only slightly.[5]

woman cannot bring the action. Woodward *v.* Anderson, 9 Bush, 624.

[*Conflict of laws.* In Thorpe *v.* Union Pacific Coal Co. (1902), 24 Utah, 475, 68 Pac. 145, it was held that where the statute of Wyoming requires an action for the negligent death of a person to be brought by and in the name of the personal representative of the deceased, and the statute of Utah allows such action to be brought by the heirs, the statutes of Wyoming must control where such an action is brought in the courts of Utah for the death of a person negligently killed in Wyoming.]

[1] See *supra*, § *120. And see Thompson *v.* Young, 51 Ind. 599; in such an action the complaint must allege that the plaintiff is unmarried.

[2] See *supra*, § *191.

[3] Story, Eq. Pl. §§ 61, 631; Daniell Chan. Pl. (4th Am. ed.), pp. 109, 110.

[4] [Gen. St., 1901, § 4457.]

[5] [*Oklahoma:* St., 1893, § 3901. *Utah:* Rev. St., 1898, § 2804.

Colorado: "A married woman may sue, and be sued in all matters, the same as if she were sole." Code, § 6.

Montana: "A married woman may sue and be sued in the same manner as if she were sole." Code, § 572.

Nebraska: "A woman may, while married, sue and be sued, in the same

Substantially the same provision, but expressed in different form, is found in Iowa, Minnesota, North Dakota, Ohio, South Dakota, and Wyoming.[1] The Missouri statute allows a married woman to sue "with or without joining her husband" in the same manner as though she were sole.[2] The New York statute also falls in this group, but in addition to the general provision allowing a married woman to sue or defend "alone or joined with other parties as if she were single," it specifies certain classes of cases where the husband should not be joined.[3] The second type requires that the husband and wife be joined except in certain enumerated cases. The Indiana statute is a good example of this form. It reads as follows: "A married woman may sue alone: *First.* When the action concerns her separate property. *Second.* When the action is between herself and her husband; but in no case shall she be required to sue or defend by guardian or next friend, except she be under the age of twenty-

manner as if she were unmarried." Comp. St., 1901, § 3661.]

[1] [*Iowa:* "A married woman may in all cases sue and be sued without joining her husband with her, and an attachment or judgment in such action shall be enforced by or against her as if she were single." Code, 1897, § 3477.

Minnesota: "A married woman may sue or be sued as if unmarried, and without joining her husband, in all cases where the husband would not be a necessary party aside from the marriage relation." St., 1894, § 5159.

North Dakota: "When a married woman is a party, her appearance, the prosecution or defence of the action, and the joinder with her of any other person or party, must be governed by the same rules as if she were single." Rev. Codes, 1899, § 5224.

Ohio: "A married woman shall sue and be sued as if she were unmarried, and her husband shall be joined with her only when the cause of action is in favor of or against both her and her husband." Bates' St., § 4996.

South Dakota: Identical with North Dakota statute, *supra*. Ann. St., 1901, § 6073.

Wyoming: "In any civil action, suit or proceeding, whenever any married woman is a party, it shall not be necessary to join her husband with her as a party except in such cases where it would be necessary to join such husband without reference to the fact of his marriage to such woman." Rev. St., 1899, § 3470.]

[2] [*Missouri:* "A married woman may, in her own name, with or without joining her husband as a party, sue and be sued in any of the courts of this State having jurisdiction, with the same force and effect as if she was a *feme sole*, and any judgment in the cause shall have the same force and effect." Rev. St., 1899, § 546.]

[3] [*New York:* "In an action or special proceeding a married woman appears, prosecutes or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of his wife, and all sums that may be recovered in such actions or special proceedings shall be the separate property of the wife. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of another on account of the wrongful acts of his wife committed without his instigation." Code Civ. Pro. § 450.]

one years."[1] This statute is found in substantially the same form in Arizona, Arkansas, Nevada, North Carolina, Oregon, South Carolina, and Wisconsin.[2] In California a third class of exceptions is added, namely, where the husband has deserted the wife or where there is an agreement in writing between them.[3] Idaho has adopted the California statute, and Washington has a statute very similar to it.[4] The statutes of Connecticut, Georgia, and

[1] [Burns' St., 1901, § 255.]

[2] [*Arizona:* "When a married woman is a party, her husband shall be joined with her, except that: First, When the action concerns her separate property, she may sue alone. Second, When the action is between herself and her husband, she may sue or be sued alone." Rev. St., 1901, § 1302.

Arkansas: "Where a married woman is a party, her husband must be joined with her, except in the following cases: First, She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this state. Second, She may maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character or property. Third, Where the action is between herself and her husband, she may sue and be sued alone." Sand. & Hill's Dig., § 5641.

Nevada: Identical with the statute of Arizona, *supra*. Comp. Laws, 1900, § 3102.

North Carolina: Identical with the statute of Arizona, *supra*, adding "and in no case need she prosecute or defend by a guardian or next friend." Code Civ. Pro., 1883, § 56.

Oregon: "Where a married woman is a party, her husband shall be joined with her, except that, — 1. Where the action affects her separate property, or where the cause of action is for a wrong committed against her person or character, or is for wages due for her personal services, she may sue or be sued alone; 2. Where the action is between herself and her husband, she may sue or be sued alone; and in no case need she prosecute or defend by a guardian or next friend." Hill's Code, § 30.

South Carolina: "Where a married woman is a party her husband must be joined with her, except that (1) Where the action concerns her separate property, she may sue or be sued alone: *Provided*, That neither her husband nor his property shall be liable for any recovery against her in any such suit; but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole. (2) Where the action is between herself and her husband she may sue or be sued alone; and in no case need she prosecute or defend by a guardian or next friend." Rev. St., 1893, Code Civ. Pro., § 135.

Wisconsin: "Where a married woman is a party her husband must be joined with her, except that where the action concerns her separate property or business or alleged antenuptial debts, or is between herself and her husband, she may sue or be sued alone." St., 1898, § 2608.]

[3] [*California:* "Where a married woman is a party, her husband must be joined with her, except: (1) Where the action concerns her separate property, or her right or claim to the homestead property, she may sue alone; (2) Where the action is between herself and her husband, she may sue or be sued alone; (3) Where she is living separate and apart from her husband, by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone." Code, § 370.]

[4] [*Idaho:* Code Civ. Pro., 1901, § 3158.

Washington: "Where a married woman is a party, her husband must be joined with her, except — 1. Where the action concerns her separate property, or her right or claim to the homestead property, she may sue alone; 2. Where the action is between herself and her husband, she may sue or be sued alone;

Kentucky are peculiar and do not fall within either of these groups.] [1]

§ 153. * 239. **Wife must sue Alone in Some States.** The following are instances in which it has been held, under the special provisions of the New York statutes, that the wife must sue alone, although the joinder of the husband does not, as decided by the Court of Appeals, defeat the action entirely. The doctrine which lies at the foundation of these decisions is also embodied in the statutes of the other States which have followed the example of New York by abrogating the common-law rules concerning suits by husband and wife. The cases themselves are therefore authoritative precedents in interpreting the corresponding statutory provisions of those States. The wife should sue alone on an award made in her favor; [2] to recover damages for the taking or the conversion of her personal property; [3] in an action on a lease executed in her name; [4] to recover possession of

3. Where she is living separate and apart from her husband, she may sue or be sued alone." Bal. Code, § 4826.]

[1] [*Connecticut:* "Where a married woman shall carry on any business, and any right of action shall accrue to her therefrom, she may sue upon the same as if she were unmarried.

"In any civil action by or against a married woman, her husband may be joined with her, as a co-plaintiff or co-defendant, as the case may be; and when so joined, if a cause of action is found to exist in favor of or against one of them only, a judgment or decree shall be rendered accordingly; and in such cases no costs shall be taxed for such husband or wife in favor of whom no cause of action is found, nor against such husband or wife against whom no cause of action is found." Gen. St., 1902, §§ 593, 594.

Georgia: "If a tort be committed upon the person or reputation of the wife, the husband or wife may recover therefor; if the wife is living separate from her husband, she may sue for such torts, and also torts to her children, and recover the same to her use. She may enforce contracts made in reference to her own acquisition." Code, 1895, § 2475.

Kentucky: 1. "In actions between husband and wife; in actions concerning her separate property; and in actions concerning her general property, and in actions for the personal suffering of or injury to her person or character, in which he refuses to unite, she may sue or be sued alone. 2. In all other actions by or against a wife, she and her husband may join or be joined as plaintiffs or defendants. 3. She may defend an action against her and her husband for herself, and for him also if he fails to defend. 4. If a husband desert his wife she may bring or defend for him any action which he might bring or defend, and shall have the powers and rights with reference thereto which he would have had but for such desertion. 5. If a female party to an action marry, her husband may be made a party by a motion, causing the fact to be stated upon the record; and the action shall not be delayed by reason of the marriage. 6. But if a wife be of unsound mind, or imprisoned, the actions mentioned in subsections one, three, and four of this section must be prosecuted or defended by her committee or curator, if she have one; and if she have none, must be prosecuted by her next friend, or defended by her guardian *ad litem.*" Codes, 1895, § 34.]

[2] Palmer *v.* Davis, 28 N.Y. 242.

[3] Ackley *v.* Tarbox, 31 N. Y. 564.

[4] Draper *v.* Stouvenel, 35 N. Y. 507.

her lands;[1] to recover damages for trespasses upon her lands;[2] to recover damages for an assault and battery upon herself;[3] to recover damages for the seduction of her own female servant, when she carries on a business in which the servant is employed;[4] to recover damages for the alienation of her husband's affection and deprivation of his society;[5] to recover damages for false and fraudulent representations by which she was induced to convey her lands;[6] in an action against a common carrier to recover the value of articles lost or destroyed, although gifts from her husband;[7] to recover the price agreed to be paid for personal services rendered to the defendant.[8]

§ 154. *240. **Result of New York Statutes.** As the result of the New York statutes modifying the legal relations between the husband and wife, either may, under certain circumstances, maintain actions of a legal nature; that is, upon a legal cause of action, and seeking to obtain legal relief, against the other. It would seem, however, that such actions must be based upon rights of property or of contract. When the husband, prior to the marriage and in consideration thereof, gave his intended wife a promissory note, it is a valid demand in her hands, and she may, subsequent to the marriage, maintain an action against him upon it.[9] The wife may bring an action in her own name against her husband to recover the possession of land which is her separate property.[10] She may also sue him to recover her personal

[1] Darby *v.* Callaghan, 16 N. Y. 71; Hillman *v.* Hillman, 14 How. Pr. 456.

[2] Fox *v.* Duff, 1 Daly, 196.

[3] Mann *v.* Marsh, 35 Barb. 68. And also in Iowa for torts to her. Mewhirter *v.* Hatten, 42 Iowa, 288.

[4] Badgley *v.* Decker, 44 Barb. 577. In this case, the wife, living separate from her husband, kept a boarding-house, and her daughter aided her by personal services.

[5] Bennett *v.* Bennett, 116 N. Y. 584.

[6] Newberry *v.* Garland, 31 Barb. 121.

[7] Rawson *v.* Pennsylvania Railroad, 2 Abb. Pr. N. S. 220.

[8] Adams *v.* Honness, 62 Barb. 326; but see, *per contra*, Beau *v.* Kiah, 6 N. Y. Sup. Ct. 464. Brooks *v.* Schwerin, 54 N. Y. 343; Sloan *v.* New York Central R. Co., 4 N. Y. Sup. Ct. 135. See also Reynolds *v.* Robinson, 64 N. Y. 589, 593. See further, to the same effect, Wyandotte *v.* Agan, 37 Kan. 528; Porter *v.* Dunn, 131 N. Y. 314. For further illustrations in suits on contracts, or concerning her own property, see Bitter *v.* Rathman, 61 N. Y. 512; Curtis *v.* Del., L. & W. R. Co., 74 N. Y. 116; Fitch *v.* Rathbun, 61 id. 579; Kavanagh *v.* Barber, 131 N. Y. 211 (nuisance); Hufnagel *v.* Mt. Vernon, 49 Hun, 286.

[9] Wright *v.* Wright, 54 N. Y. 437, 59 Barb. 505.

[10] Wood *v.* Wood, 83 N. Y. 575; Minier *v.* Minier, 4 Lans. 421. The court in the latter case draw a distinction between a suit like this, affecting her separate property, and one brought to recover damages for a tort, such as slander, or assault and battery. See, however, *per contra*, Gould *v.* Gould, 29 How. Pr. 441. This decision is in plain opposition to the spirit and letter of the remedial statutes.

property; or for money loaned to him; or to recover the value of services rendered in his business under an express contract, or under such circumstances that a promise to pay therefor would be implied.[1] When the husband and wife are owners in common of land, she may maintain a suit against him for a partition.[2] The foregoing cases all involve and are based upon rights of action growing out of her ownership of property, or out of contract in reference to such property, or to her services. No rights of action arise from personal torts committed by the husband, and she is not permitted to maintain actions against him to recover damages for such torts, as an assault and battery,[3] or a slander.[4] A husband cannot recover in an action against his wife for his services rendered to her in the oversight and management of her separate property, there having been no express agreement for the payment of a compensation, and the circumstances being such that no promise could be implied.[5]

§ 155. *241. **Actions for Personal Torts and for Fraud and Deceit.** At the common law the husband and wife were required to join as plaintiffs in all actions for damages from the wife's personal suffering, either bodily or mental, while he sued alone in all actions for damages suffered by himself exclusively, from the loss of her society, and from expenses and the like occasioned by her injuries. Except in New York, and the other States

[1] Adams *v.* Curtis, 4 Lans. 164. The action was against a firm of which the husband was a member. She may be his creditor. *Re* Alexander, 37 Iowa, 454. He may sue her for conversion of his property; Berdell *v.* Parkhurst, 19 Hun, 358. She may sue him for conversion; Ryerson *v.* Ryerson, 55 Hun, 191, 38 N. Y. St. Rep. 375; to recover her personal property; Howland *v.* Howland, 20 Hun, 472. She may sue her husband, or be sued by him, on a contract made for the benefit of her separate estate; Granger *v.* Granger (1886), 2 N. Y. St. Rep. 211 (suit by husband on promissory note of wife); Benedict *v.* Driggs, 34 Hun, 94, and cases cited. Whether a partnership agreement is such a contract is a question on which the decisions are at variance. It is held in Fairlee *v.* Bloomingdale, 67 How. Pr. 292, in Noel *v.* Kinney (1885), 31 Alb. Law J. 328, and in Kaufman *v.* Schoeffel, 37 Hun, 140, that husband and wife cannot legally enter into a business copartnership: to the contrary, Graff *v.* Kinney, 1 How. Pr. N. S. 59; Zimmerman *v.* Erhard, 58 How. Pr. 11. See also, on the general subject of the wife's mental disabilities, Bertles *v.* Nunan, 92 N. Y. 152; Coleman *v.* Burr, 93 N. Y. 17.

[2] Moore *v.* Moore, 47 N. Y. 467. The husband and wife may sue jointly for the conversion of chattels which they own jointly. Chambovet *v.* Cagney, 35 N. Y. Superior Ct. 474.

[3] Longendyke *v.* Longendyke, 44 Barb. 366; Schultz *v.* Schultz, 27 Hun, 26, 63 How. Pr. 181, *contra*, was reversed without opinion by the Court of Appeals, 89 N. Y. 644.

[4] Freethy *v.* Freethy, 42 Barb. 641.

[5] Perkins *v.* Perkins, 62 Barb. 531. Alward *v.* Alward (1888), 2 N. Y. Suppl. 42.

which have made the wife in all respects like the single woman in regard to the capacity of instituting and prosecuting judicial controversies, these ancient doctrines of the common law have been preserved.[1] The wife should certainly not be joined as a plaintiff with her husband in any action for tort to *his* property, or for fraud in relation thereto, unless she has some interest in or ownership of the subject-matter which has also been affected by the wrong.[2] Thus, where a husband is induced by the false and fraudulent representations of the grantor to purchase land, and the title is taken in his wife's name, but the consideration is wholly paid by him, she having in fact no prior legal interest in the land or in the price, an action for the deceit cannot properly be brought in their joint names; he is the only person interested, and should be the sole plaintiff.[3] The same has been decided in respect to an action for fraud practised upon a husband and wife, by which a conveyance of land was obtained from them. The land thus conveyed was alleged to have been their homestead, but in fact the wife had no legal interest in it, the title having been exclusively in the husband. A joint action to recover damages for the deceit under these circumstances was held to be improper.[4] If, however, the wife has a legal interest or ownership in the subject-matter which has been injured or lost by the wrongful act or fraud of the defendant, a joint action in the names of both husband and wife to recover damages is proper. This doctrine has very recently been approved by the New York Court of Appeals, and applied to the following state of facts. The owner in fee of land in which his wife had no interest except her inchoate right of dower, was induced by false and fraudulent representations to sell and convey the premises to the defendant by a deed in which the wife joined, and to receive in consideration thereof certain mortgages which were in fact worthless. A joint action by the husband and wife to recover damages for the deceit was sustained, the husband, it

[1] [See notes, pp. 221, 222, *ante*.]

[2] [Edmison *v.* Zborowski (1896), 9 S. D. 40, 68 N. W. 288 : The court said :

"A wife who joins in an acceptance of an offer for her husband's property, and in a deed tendered to the person making the offer, is not a necessary party plaintiff in an action for specific performance."]

[3] Bartges *v.* O'Neil, 13 Ohio St. 72; Barrett *v.* Tewksbury, 18 Cal. 334. See Stepank *v.* Kula, 36 Iowa, 563.

[4] Read *v.* Sang, 21 Wis. 678; and see Davies *v.* Cole, 28 Kan. 259. But see Simar *v.* Canaday, 53 N. Y. 298.

was said, being entitled to sue on account of his ownership of the fee, and the wife on account of her inchoate dower right.[1]

§ 156. *242. **Actions for Personal Torts to Wife.** When a wife has suffered bodily injury, either by violence or by negligent or unskilful acts of the wrong-doer, and the injury is of such a nature as to disable her for a while and make medical or other attendance necessary, a joint action is not the proper one in which to recover the husband's damages for his loss of her society and for the expenses caused by the wrong done to her; such damages can only be recovered in an action brought by the husband as the sole plaintiff.[2] If, on the other hand, the compensation sought is for the personal wrong done to her, both must unite as plaintiffs [in all those States which follow the second

[1] Simar *v.* Canaday, 53 N. Y. 298, 305. This is certainly an extraordinary decision, and introduces a rule before, I think, unthought of, — namely, that whenever the owner in fee is induced by fraud to convey his land, and the wife joins in the deed, the two may maintain a joint action and recover a single judgment *in solido* for their joint damages. The decision cannot be supported either on principle or on authority; the essential difference between the husband's fixed, certain interest, capable of being ascertained, and the wife's uncertain, contingent interest, under all possible circumstances much less than her husband's, seems to have utterly escaped the attention of the court.

By R. S. Ind., 1881, § 2506, a wife's common-law right of dower was enlarged into a contingent fee, which may become vested, not only by the death of her husband, but by a judicial sale where her inchoate interest is not directed by the judgment to be barred or sold. It was held that by virtue of this statute the wife was a proper party plaintiff with the husband in an action to compel a railroad company to maintain a crossing over its right of way, in accordance with a condition in a deed by the husband and wife of the land for the right of way. Lake Erie & W. R. Co. *v.* Priest (Ind. Sup. 1892), 31 N. E. Rep. 77. For a nuisance to premises owned by husband and wife as tenants by the entirety, he may sue alone. Demby *v.* City of Kingston, 60 Hun, 294.

[2] Kavanaugh *v.* Janesville, 24 Wis. 618, action for injuries to wife from a defective sidewalk; Barnes *v.* Martin, 15 Wis. 240, assault and battery on wife; Smith *v.* St. Joseph, 55 Mo. 456, 458; Dailey *v.* Houston, 58 Mo. 361, 366; Tell *v.* Gibson, 66 Cal. 247. The joint action mentioned in the text was allowed by Laws of Wisconsin, 1873, ch. 96; R. S. Wis. § 2680; Holmes *v.* Fond du Lac, 42 Wis. 282. But in construing ch. 91, Laws of 1881, which allows the wife to sue alone for a personal tort, it is held that the husband's cause of action for damages special to himself cannot be so joined with the wife's. Shanahan *v.* Madison, 57 Wis. 276.

[McKune *v.* Santa Clara, etc. Co. (1895), 110 Cal. 480, 42 Pac. 980: In an action for injuries to a wife's person, husband and wife must join; but in an action for the consequential injury to the husband, in loss of service and expenses incurred, he must sue alone; and these two actions cannot be joined in one suit. Williams *v.* Casebeer (1899), 126 Cal. 77, 58 Pac. 380: Where a single act against both husband and wife has given each a cause of action for malicious prosecution, they cannot unite their separate causes of action in one complaint and sue jointly, but each must bring a separate action. The wife, however, in bringing her suit must join her husband as party plaintiff. McDevitt *v.* City of St. Paul (1896), 66 Minn. 14, 68 N. W. 178: a husband may recover damages against a city for injuries suffered

type;[1]] as, for example, in suing for a slander or libel upon the wife, the husband and wife must sue jointly, unless he has suffered some special damage, and the object of the proceeding is to obtain compensation therefor.[2] The same rule applies to all torts to the person of the wife; for the injuries to her, both husband and wife must join; for the injuries special to him, such as loss of her society, expenses incurred, and the like, he must sue alone.[3] It has even been held, in a State where the cause of action for a personal tort survives, that, when a claim for damages against a physician for malpractice existed in favor of a wife, and she died, her husband must be joined as a co-plaintiff with her administrator in prosecuting an action to enforce such demand.[4] If the gravamen of the action is a tort to the wife's person, the general rule above stated applies, and the husband

by his wife by reason of a defective sidewalk, and for expenses for medical attendance. In City of Eskridge *v.* Lewis (1893), 51 Kan. 376, 32 Pac. 1104, "An action was brought by a married woman against a city to recover for personal injuries resulting from a defective sidewalk, and her husband was joined with her as plaintiff, who sought to recover for the loss of services of the wife. *Held*, that the wife suffered a loss from the injuries sustained which was personal to herself, and that a demurrer to the petition because of misjoinder was well taken; but dismissing the husband from the case before its submission cured the error committed in overruling the demurrer."]

[1] [Giffen *v* City of Lewiston (1898), Idaho, 55 Pac. 545: Where a husband and wife sue for personal injuries received by the wife, the judgment should run to both. But the right of action for injuries received by a single woman who, before action commenced, married, is in the woman alone, and her husband is not properly to be joined with her: Kippen *v.* Ollasson (1902), 136 Cal. 640, 69 Pac. 293.]

[2] Johnson *v.* Dicken, 25 Mo. 580; Enders *v.* Beck, 28 Iowa, 86. This latter decision was made under a statute different from that which is now in force in Iowa. See also McFadden *v.* Santa Ana, etc. Ry. Co., 87 Cal. 464; Gibson *v.* Gibson, 43 Wis. 23; Barnett *v.* Leonard, 66 Ind. 422. The wife may now sue alone, in Indiana, for a personal tort. *Ante*, p. 222. [See also Lamb *v.* Harbaugh (1895), 105 Cal. 680, 39 Pac. 56; Harper *v.* Pinkston (1893), 112 N. C. 293, 17 S. E. 161: An action by a husband for slander of his wife, the wife not being a party and the complaint alleging no special damages to the husband, states no cause of action.]

[3] Long *v.* Morrison, 14 Ind. 595, 597; McKinney *v.* Western Stage Co., 4 Iowa, 420. See remark in last preceding note. Dailey *v.* Houston, 58 Mo. 361, 366; Smith *v.* St. Joseph, 55 Mo. 456, 458; Rogers *v.* Smith, 17 Ind. 323; Ohio & M. R. Co. *v.* Tindall, 13 Ind. 366; Boyd *v.* Blaisdell, 15 Ind. 73. See also Hammond *v.* Town of Muskwa, 40 Wis. 354; Beaudette *v.* Fond du Lac, 40 id. 44; Hunt *v.* Town of Winfield. 36 id. 154; Oliver *v.* Town of La Valle. 36 id. 592; Gibson *v.* Gibson, 43 id. 23; Meese *v.* Fond du Lac. 48 id. 323; Barnett *v.* Leonard, 66 Ind. 422; Matthew *v.* Cent. Pac. R. Co., 63 Cal. 450; Mann *v.* Rich Hill, 28 Mo. App. 497 (joint action for injuries to the wife not a bar to action for injuries special to the husband).

[Baltimore, etc. R. R. Co. *v.* Glenn (1902), 66 O. St. 672, 64 N. E. 438: while a wife has a right of action for injuries negligently inflicted, a husband also has a right of action for loss of her services and necessary expenses in healing her injuries, and her recovery is no bar to his.]

[4] Long *v.* Morrison, 14 Ind. 595.

must be joined, although the action might be brought in form *ex contractu*. As an example, if the wife has been injured by the negligence or other wrongful act of a carrier, who was transporting her as a passenger, although the action might be in form based upon the contract of passage made with her, the injury being proved in enhancement of damages, or might be in form directly based upon the tort, yet in either case the very gist of the claim would be the negligent or tortious act of the defendant, and the husband and wife must therefore unite as co-plaintiffs in order to recover the damages resulting from her personal injuries.[1]

§ 157. * 243. Actions for Torts to Wife's Person in New York and States having Similar Statutes. In those States whose statutes have abrogated the ancient principles respecting the marriage relation, the wife must sue alone in her own name in actions based upon torts to her own person, as well as in actions concerning her own property, or in those founded upon her contracts. Cases illustrating this rule as it prevails in New York have already been given.[2] Similar conclusions have been reached by the courts of the other States whose legislation is substantially the same as that of New York.[3] Thus it is held in Iowa, under the existing statutory provisions, that a wife must be the sole plaintiff in an action instituted to recover damages for a malicious

[1] Sheldon *v.* Steamship "Uncle Sam," 18 Cal. 526; Warner *v.* The Same, 9 Cal. 697.

[2] See *supra*, § *239.

[3] [Williams *v.* Williams (1894), 20 Colo. 51, 37 Pac. 614: The common law doctrine that the wife, as an inferior, could not bring an action for damages against one who wrongfully induces her husband to abandon her, does not exist in Colorado. The wife has rights equal to her husband in this respect. Citing Foot *v.* Card, 58 Conn. 1; Westlake *v.* Westlake, 34 O. St. 621. Mayor *v.* Smith (1900), 111 Ga. 870, 36 S. E. 955: "A married woman living with her husband may bring an action in her own name for physical injuries sustained by her. Civil Code, § 2475."

A State statute giving a married woman a right to maintain an action for personal injuries in her own name, is applicable to suits commenced in the federal courts as well as to suits brought in the courts of the State. Texas, etc. Ry. Co. *v.* Humble (1899), 97 Fed. (C. C. A. Ark.), 837. In Brockett *v.* Fair Haven, etc. R. R. Co. (1900), 73 Conn. 428, 47 Atl. 763, it was held that the joinder of the husband in an action for personal injury to the wife, was permissive.

Bains *v.* Bullock (1895), 129 Mo. 117, 31 S. W. 342: A deed of land to a husband and wife in fee creates an estate by entirety and each is entitled to the possession of the entire premises as against third persons. The married women's act has destroyed the legal unity between husband and wife which gave rise to the estate by entirety, but the estate has not been abolished. And under this act allowing a married woman to sue for the possession of her separate property in her own name, she may bring ejectment for her estate by entirety without joining her husband.]

prosecution of herself; the joinder of her husband is improper, since the damages when recovered are her own separate property, in which he has no interest or share;[1] and, on the same principle, a suit for a libel upon herself must be brought by the wife alone.[2]

§ 158. *244. **Actions for Torts to Wife's Property.** [In those states where statutes of the second type exist, a married woman] may sue alone to recover damages arising from torts and negligences and other wrongs to her own property; these actions fall within the language of the codes, and plainly "concern her separate property."[3] Thus it has been held that the wife may maintain a suit in her own name to recover damages for a trespass to land owned by her, "although her husband occupied the land in the usual manner with her and their family, and cultivated it, but had no legal or other rights in it."[4] If she can prosecute a suit for trespass, she can certainly do the same when the injury is negligent instead of violent and intentional. On the other hand, there are circumstances under which an action should be maintained by the husband alone, although the wife may have or seem to have some interest in the subject-matter of the controversy. Thus, in California he must sue alone in actions relating to the "common property" of the husband and wife, and in those relating to "homesteads" as the same are defined and regulated by the statutes of the State.[5] These subjects, however, depend

[1] Musselman *v.* Galligher, 32 Iowa, 383. [See Williams *v.* Casebeer (1899), 126 Cal. 77, 58 Pac. 380.]

[2] Pancoast *v.* Burnell, 32 Iowa, 394. See Shuler *v.* Millsap's Ex'or, 71 N. C. 297. In a suit by a married woman for personal injuries, she cannot recover for the loss of her services in the household; the husband alone can sue for these. Wyandotte *v.* Agan, 37 Kan. 528.

[3] [Hand *v.* Scodeletti (1900) 128 Cal. 674, 61 Pac. 373; where a married woman sues for conversion of her separate property, it is not necessary for her to allege that it is her separate property where she does not allege in the same count that she is a married woman.]

[4] Boos *v.* Gomber, 24 Wis. 499. [Prey *v.* Stanley (1895) 110 Cal. 423, 42 Pac. 908: A wife may bring an action to quiet title in respect of her separate property even though a homestead has been declared upon the premises for the joint benefit of herself and husband, without joining her husband. A wife may sue alone for the protection of any right she may have in her separate property, even if that right be merely that of a joint tenant. But see Friburk *v.* Standard Oil Co. (1896), 66 Minn. 277, 68 N. W. 1090, where the court said: "The fact that a wife is furnishing the dwelling in which the family resides does not change the common-law rule that the husband is the head of the family, nor will it give to the wife the right to recover for damages resulting from the maintenance of a nuisance."]

[5] Barrett *v.* Tewksbury, 18 Cal. 334; Guiod *v.* Guiod, 14 Cal. 506; Cook *v.* Klink, 8 Cal. 347; Poole *v.* Gerrard, 6 Cal. 71. [But see Anderson *v.* Davis (1898), 18 Utah, 200, 55 Pac. 363: when the legal

entirely upon the special provisions of the statutes in the several commonwealths, and have no proper connection with the general system of procedure established by the various codes. It seems that the husband alone can sue for a conversion or loss of or injury to those articles of personal use belonging to the wife, — her clothing and ornaments, — which at the common law constitute her *paraphernalia*.[1]

§ 159. *245. **Tort Actions between Husband and Wife.** Whether, under the legislation of the various States, actions for tort can be maintained by the wife against the husband, or by the husband against the wife, does not seem to have been definitively settled by judicial decision. The departure from the ancient theory of the marriage relation has been as great in New York as in any other commonwealth, and yet, as has been shown, the courts of that State have declared against the possibility of actions between the spouses for any personal torts committed by one upon the other, such as libels, assault and battery, and the like.[2] The same result would seem to be inevitable under the more restricted legislation of other States, for their statutes which modify the common-law doctrines of marriage are confined in their terms to her power over her separate property and over contracts. Actions between husband and wife, based upon torts done to property, have arisen, but their propriety has not been finally determined.[3] There does not, however, seem to be any real

title to a homestead is in a wife, but the larger portion of the purchase price was paid by the husband, their joint interest in the preservation of the homestead gives them the right to join as plaintiffs in an action to enjoin its sale.]

[1] McCormick *v.* Penn. Cent. R. Co., 49 N. Y. 302, 317. See also Curtis *v.* Del., L. & W. R. Co., 74 N. Y. 116.

[2] See § *240, and notes.

[3] Owen *v.* Owen, 22 Iowa, 270; Davidson *v.* Smith, 20 Iowa, 466. In Matson *v.* Matson, 4 Met. (Ky.) 262, the wife sued the husband in an ordinary action to recover possession of slaves devised to her as her separate property, which he refused to deliver to her, no other ground of relief, legal or equitable, being alleged. In reversing a judgment rendered for the plaintiff, Duvall C. J. points out that the husband might, as trustee for the wife of her separate property, be held accountable, in a suitable case, for the violation of his trust, but that the mere possession of the property by the husband, unexplained, was not such a breach of trust; and remarks: "It is hardly necessary to add that, if she had a right of action at all against her husband, it could only have been asserted in equity;" and that the only practical effect of § 49 of the Kentucky code was to dispense with the intervention of the next friend; that it conferred no new right of action. See also Kalfus *v.* Kalfus (Ky. 1892), 18 S. W. Rep. 366; and compare Manning *v.* Manning, 79 N. C. 293.

[But see Gillespie *v.* Gillespie (1896), 64 Minn. 381, 67 N. W. 20, where it is held that a wife may sue her husband in her own name, in any form of action, to enforce any right affecting her property,

difficulty in principle. If a wife is clothed with full authority over her own property as though she was unmarried, and if, in pursuance thereof, she is permitted to invoke the aid of judicial proceedings in enforcing contracts against her husband, and in recovering from him the possession of lands and chattels, there can be no valid ground for refusing to her the power of maintaining actions against him for the wrongful taking, detention, or conversion of her chattels, or for injuries done to her property by violence or by negligence.[1] Both classes of actions depend upon the same fundamental rights, — the rights of property which the statute fully confers upon her. If the owner may recover from her husband the very thing itself — the land or chattel — in a *real* action, it is not an enlargement of her power to suffer her to recover the *value* of such things wholly or partially in a *personal* action. The notion that the proceeding must be *equitable* is a remnant of the ancient system which has been abrogated, and is conceived in forgetfulness of the radical changes made by the statutes in the common-law theory of the marriage relation. If the facts constituting the cause of action are stated in the pleading, it is both unnecessary and improper to call the action *equitable*, since the relief, if granted, is the ordinary pecuniary judgment against the defendant personally, and not a judgment *in rem* against his property.

§ 160. * 246. Desertion by Husband as Affecting Wife's Capacity to sue. The desertion of his wife and family by the husband does not increase her powers and capacities in reference to the bringing and maintaining of judicial proceedings, unless provision is made for such an emergency by express statute. Thus,

the same as if she were a stranger. Also Grubbe *v.* Grubbe (1894), 26 Ore. 363, 38 Pac. 182. Under Hill's Code, § 2870, providing that either husband or wife, as owner, may sue to recover property of which the other has secured possession or control, either may sue the other at law not only for property wrongfully obtained, but on contracts as well. But under identically the same statute the Supreme Court of Iowa held, in Heacock *v.* Heacock (1899), 108 Ia. 540, 79 N. W. 353, that a wife cannot sue her husband on his personal contract Iowa code, § 2204.

Bohannon *v.* Travis (1893), 94 Ky. 59, 21 S. W. 354; although contracts between husband and wife are void at law, they may be held valid in equity where they are fair and just. Snedager *v.* Kincaid (1901), Ky., 60 S. W. 522; under Civ. Code Prac. § 35, the action of an infant married woman for divorce and alimony need not be brought by guardian or next friend, but may be brought in her own name.]

[1] In Wisconsin a husband may maintain "replevin" against his wife for chattels claimed by her to be her separate property; Carney *v.* Gleissner, 62 Wis. 493.

after such desertion, the wife cannot maintain an action in her own name to set aside a conveyance of land alleged to have been obtained from him by fraud.[1] In several States, however, the codes contain express provisions, which, in case of desertion by the husband, permit the wife to prosecute and defend such actions as he might have done.[2]

Third: Equitable Actions.

§ 161. *247. **Grand Principle Underlying Equity Doctrine. Scope of Inquiry.** The grand principle which underlies the doctrine of equity in relation to parties is, that every judicial controversy should, if possible, be ended in one litigation; that the decree pronounced in the single suit should determine all rights, interests, and claims, should ascertain and define all conflicting relations, and should forever settle all questions pertaining to the subject-matter. Since the chancery judges were not hampered by the legal dogma that one judgment must be rendered alike for all the plaintiffs and against all the defendants on the record, they were enabled to adopt and enforce such practical rules as would render this principle operative and efficient. In disclosing these rules, and in explaining their application, I am not confined to decisions made by courts professedly governed by the reformed procedure. The codes, as has already been shown, have taken the most general doctrines of equity in relation to parties, have put them into a statutory form, and have made them applicable without exception to all actions.[3] Whether these doctrines have been entirely incorpo-

[1] Green *v.* Lyndes, 12 Wis. 404. See also Barnett *v.* Leonard, 66 Ind. 422.

[2] See *supra*, § 152; Andrews *v.* Runyon, 65 Cal. 629; Baldwin *v.* Second Street Cable Ry. Co., 77 Cal. 390; Tobin *v.* Galvin, 49 Cal. 34 (the statute does not apply where the wife is merely temporarily absent from the husband). [Brown *v.* Brown (1897), 121 N. C. 8, 27 S. E. 998: Under the constitution and section 1832 of the Code, which declares that every woman whose husband shall abandon her shall be deemed a free trader, a wife abandoned by her husband may maintain an action in tort, in her own name, against a third party.]

[3] [In Gager *v.* Marsden (1899), 101 Wis. 598, 77 N. W. 922, the court said: "It [the Code] was designed to preserve and make more perfect by new forms the method for the settlement in one action, denominated the civil action, of all the rights of a party plaintiff, or parties plaintiff united in interest in the subject thereof, and the rights of adverse parties both as between them, and between themselves, not only as to the subject of the action, but the subjects germane thereto. . . . The system is complete, as said in Kolloch *v.* Scribner, 98 Wis. 104, enabling the court in a single action, by the presentation of issues made up by the complaint, answer, and reply, to take within its jurisdiction a single subject or controversy,

rated into the legal actions under the codes has sometimes been doubted; it is universally admitted, however, that they are operative with their full force and effect in all equitable actions which may be brought in accordance with the new procedure. For the purpose of ascertaining the existing rules which control the selection of parties in equitable actions, we are not, therefore, restricted to those States which have accepted the reform; we may and must extend our inquiry to England and to other States of this country wherever equity exists as a separate division of the municipal law. I shall endeavor, in a very condensed and summary manner, to give the doctrine of parties plaintiff, which has been established by courts of equity and in equitable actions, whether prior or subsequent to the great reform introduced into so many of the States, and the result will express the law as it now exists in those States.[1]

§ 162. * 248. **Equity Rules more Explicit respecting Defendants than Plaintiffs. Two Classes of Co-Plaintiffs in Equity.** It is impossible to lay down with precision many rules in reference to plaintiffs, because equity does not particularly concern itself with determining that such a person shall be a plaintiff, and such another a defendant, but rather requires in a more general form that the persons shall be parties, so as to be bound by the

and all parties interested therein adverse to the plaintiffs, and all necessary to be before the court for their due protection and for the determination of the entire controversy, including such matters as may be germane to the primary subject of the action."

And in Siever *v.* Union Pac. Ry. Co. (1903), — Neb. —, 93 N. W. 943, the court said: "Equitable doctrines with respect to parties and judgments are wholly unlike those which prevail at common law — different in their fundamental conception, in their practical operation, in their adaptability to circumstances, and in their results upon the rights and duties of litigants. The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in one suit the rights and duties of all the parties which really grow out of, or are connected with, the subject-matter of that suit. The primary object is that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interests of all may be bound in respect thereto by the single decree." See also Castle *v.* Madison (1902), 113 Wis. 346, 89 N. W. 156, quoted at length in note to p. 183, *ante*.

In Tobin *v.* Portland Mills Co. (1902), 41 Ore. 269, 68 Pac. 743, the court said: "Courts of law require no more parties to an action than those immediately interested in the subject-matter, but in equity all persons, including those remotely interested therein, may be joined, and are often necessary parties."]

[1] In this subdivision I have drawn very largely upon the fourth American edition of Daniell's Chancery Pleadings, and the learned notes of Mr. Perkins, the American editor, and have closely followed that most admirable work.

decree, and is in general satisfied if they are thus brought before the court either as plaintiffs or as defendants. In other words, the rules of equity seldom declare that a given person or class of persons must be plaintiffs, but simply declare that such person or class must be made parties, if not as plaintiffs, then as defendants.[1] The result is that the positive rules as announced by courts and as gathered from a comparison of decisions, are much more full and explicit in reference to defendants than they are in reference to plaintiffs. In actual practice, all persons having an interest in the subject-matter, and therefore either necessary or proper parties, except the actual plaintiff who institutes and prosecutes the suit, are generally made defendants, even though their interests may be concurrent with those of this plaintiff. Still, different individuals holding different rights may be united as plaintiffs in equitable actions; such a joinder is often provided for by well-settled doctrines, and, although their requirement is not peremptory, these doctrines must be discussed and fully stated. The persons that can be made co-plaintiffs in an equity suit may be roughly separated into two general classes: (1) Those whose rights, claims, and interests, as against the defendant, are joint, — not necessarily joint in the strict, technical sense of the common law, but in a broader and popular sense, — that is, those whose interests, claims, and rights, whether legal or equitable, are concurrent, arising out of the same events, having the same general nature, and entitled to the same sort of relief. All such persons must be brought before the court as parties, and naturally they should be plaintiffs, and so the rules primarily require; but the requirement is by no means peremptory, and in many and in even the great majority of instances, the equity principle is satisfied if all but the one who actually sets the cause in motion are placed among the defendants. (2) In the second class are found all those persons who are collaterally interested in the subject-matter of the controversy; whose interests and claims, although antagonistic to the defendant, and to that extent, therefore, in harmony with those of the real plaintiff, are still several and distinct in their nature, arising from different

[1] See Wilkins *v.* Fry, 1 Meriv. 244, 262. [Keys *et al. v.* McDermott (1903), — Wis. —, 93 N. W. 553, the court saying: "To this end, they, as well — perhaps more properly — might have been made defendants; but in equity the arrangement of parties is of little importance, and can be regulated by the court at any time, in its discretion."]

facts and circumstances, and demanding perhaps a different relief. Although the individuals or the class which have been thus vaguely described may be joined as co-plaintiffs with the one who is the chief actor in the suit, and although the rules speak of such a joinder as possible, yet in actual practice they are almost invariably placed among the defendants. With this preliminary explanation, which modifies the entire doctrine of equity in relation to plaintiffs, I shall proceed to state the general principles which underlie the whole equitable system of parties, and to illustrate the working of these principles in the more important species and varieties of actions by which equitable remedies are conferred.

§ 163. *249. **Statement of Fundamental Principle and what it assumes. Special Subject of Inquiry Stated.** The fundamental principle may be stated as follows: The plaintiff who institutes an equitable action must bring before the court all those persons who have such relations to the subject-matter of the controversy that, in order to prevent further litigation by them, they must be included in and bound by the present decree; in other words, all those persons who are so related to the controversy and its subject-matter, that, unless thus concluded by the decree, they might set up some future claim, and commence some future litigation growing out of or connected with the same subject-matter, against the defendant who is prosecuted in the present suit, and from whom the relief therein is actually obtained. The principle as thus expressed assumes, what is always true in practice, that in every equitable action there is some person, or group of persons, like a firm or joint tenants, who primarily institutes the proceeding, and demands the relief for his own benefit; and him, or them, we may designate "the plaintiff;" and there is also some person or group of persons against whom all the real demands are made, and from whom the substantial remedy sought by the action is asked, — and him we denominate "the defendant." In addition to these two contestants, there are the other individuals described in the foregoing proposition, who must also be brought before the court and made parties to the controversy either as co-plaintiffs or as co-defendants. Equity is satisfied in most instances by making them co-defendants, and they are generally so treated in actual practice, unless their interests are so identical with those of the plaintiff that they must participate

in the substantial relief awarded by the decree. The special subject of our present inquiry may therefore be stated thus: In what cases and under what circumstances are such persons primarily and naturally to be associated as co-plaintiffs rather than as co-defendants? The answer to this question embodies the principle in its most general form which equity courts have applied in all species of actions to determine the proper joinder of plaintiffs. All those persons whose rights and interests in the subject-matter, and in the relief demanded, are concurrent with the plaintiffs, must be made parties, and naturally will be made co-plaintiffs, although it is sufficient in most instances if they are brought into the cause as co-defendants. The principle in this very general form is too vague to be of any value as a practical rule, and I shall therefore take up in order the most important classes of cases in which it is applied.[1]

§ 164. * 250. **Subordinate General Principles herein. Where Actual Plaintiff holds only Equitable Right or Title, Holder of Legal Right or Title should be made Co-Plaintiff.** The first of the subordinate general principles into which the foregoing vague doctrine may be subdivided, is the following: When the actual plaintiff, as above described, has only an equitable estate, interest, or primary right in the subject-matter of the suit, the person who holds the legal estate, interest, or right therein, should be made a party, and primarily a co-plaintiff; for without such joinder the defendant might be subjected to another litigation from this legal owner or holder of the legal title, a result which equity strives in every way to prevent.[2] One of the most familiar as well as important illustrations of this general principle is the rule which prevails in suits relating to trust property. When property is held in trust, and an action concerning it is brought by the beneficiary or person claiming under the trust, the trustee, or one in whom the legal title is vested, must be made a co-plaintiff.[3] As, for example, when a mortgage has

[1] See Jones *v.* Williams, 31 Ark. 175; Pfohl *v.* Simpson, 74 N. Y. 137.

[2] 1 Daniell's, p. 192.

[3] 1 Daniell's, p. 193. See Western R. Co. *v.* Nolan, 48 N. Y. 513; Malin *v.* Malin, 2 Johns. Ch. 238; Fish *v.* Howand, 1 Paige, 20; Cassiday *v.* McDaniel, 8 B. Mon. 519; Covington & Lex. R. Co. *v.* Bowler's Heirs, 9 Bush, 468. See also Weetjin *v.* Vibbard, 5 Hun, 265; Sandford *v.* Jodrell, 2 Sm. & G. 176; O'Brien *v.* O'Connell, 7 Hun, 228; Holden *v.* N. Y. & Erie Bk., 72 N. Y. 286, 297; Eldridge *v.* Putnam, 46 Wis. 205; Dewey *v.* Moyer, 9 Hun, 473; Fort Stanwix Bk. *v.* Leggett, 51 N. Y. 552; Fox *v.* Moyer, 54 id. 125; Bowdoin

been given to a trustee in trust for certain beneficiaries, the trustee and the beneficiaries must unite in a suit to foreclose.[1] The principle applies to all cases where the legal title to sue stands in one, and the beneficial interest in the subject and in the result is held by another; both must unite as plaintiffs.[2] Thus, if a covenant is made with a trustee for the benefit of a *cestui que trust*, both must join in an action to compel a specific performance.[3] The case of a simple contract, made by an agent, when the agency appears on the face of the agreement, or can be easily established by extrinsic evidence, does not fall within the operation of this rule, for the principal can sue alone and prove the agency if it is disputed. If, however, the agency does not appear in the contract itself, and the principal or person for whom the agreement is made cannot prove it with ease and certainty, then the agent may be made a party so as to bind his interest.[4] When an agent acts in any transaction on his own account as well as on account of his principal, so that he has a beneficial interest in the subject-matter, he must be made a co-plaintiff with his principal.[5]

§ 165. * 251. **Case of Suits by Assignees. Change Effected by Codes.** The case of suits brought by the assignees of things in action is another special example of this general principle.

College *v.* Merritt, 54 Fed. Rep. 55 (suit to remove cloud from title to trust property; *cestuis que trustent* may bring suit if the trustees neglect to sue, making the latter defendants); Sawtelle *v.* Ripley (Wis. 1893), 55 N. W. 156 (action to construe trust in a will; the trustee named therein is a necessary party).

[1] Story Eq. Pl. §§ 201, 209; Wood *v.* Williams, 4 Mad. 86; Hichens *v.* Kelly, 2 Sm. & G. 264; Boyd *v.* Jones, 44 Ark. 314; Tyson *v.* Applegate, 40 N. J. Eq. 305; Applegate *v.* Tyson, 39 N. J. Eq. 365; Harlow *v.* Mister, 64 Miss. 25; Wolff *v.* Ward, 104 Mo. 127.

[2] [But see Cape *v.* Plymouth Congregational Church (1903), 117 Wis. 150, 93 N. W. 449, where it was held that a *cestui que trust*, entitled to possession of real estate, may, without the trustees, maintain an action to enjoin interference with its rights. And in Goble *v.* Swobe (1902), — Neb. —, 90 N. W. 919, the court said: "Where a trustee refuses to carry out the terms of a trust, the party or parties beneficially interested may maintain an action in their own right to enforce the trust, and to obtain the benefit thereof." Same rule announced in Zimmerman *v.* Makepeace (1899), 152 Ind. 199, 52 N. E. 992.]

[3] Story Eq. Pl. § 209; Cope *v.* Parry, 2 Jac. & Walk. 538. See McCotter *v.* Lawrence, 6 N. Y. Sup. Ct. 392, 395.

[4] 1 Daniell's, p. 196; Botsford *v.* Burr, 2 Johns. Ch. 409; Bartlett *v.* Pickersgill, 1 Cox, 15. It should be remembered that when a contract is made by an agent in his own name expressly for the benefit of another, he is, according to the codes, a trustee of an express trust, and may sue upon it in his own name, without joining the beneficiary as a party. To this extent the new procedure has modified the rule which prevailed in equity, and which required that both persons should join in bringing the action.

[5] Small *v.* Attwood, 1 Younge, 407.

Where a legal thing in action had been assigned, the assignee was permitted to sue in equity for its enforcement in his own name, but the assignor, or his personal representative if he was dead, was an indispensable party, if not as a co-plaintiff, then as a defendant; otherwise the debtor might be subjected to a second action at law in the name of the assignor.[1] This particular rule, however, as has been shown in the preceding sections of the present chapter, has been entirely abrogated in most of the States that have adopted the new procedure, since their codes expressly permit the assignee to sue alone without joining the assignor either as a co-plaintiff or as a defendant; but it is substantially retained by the codes of Kentucky and of Indiana.

§ 166. * 252. **Case of Suits for Administration of Decedents' Estates.** In ordinary suits for the administration of the estates of deceased persons brought by creditors, legatees, or distributees, a general personal representative of the estate — an administrator or executor — is indispensable, and is a necessary party, and should properly be made a co-plaintiff, although he may be put with the defendants.[2] These ordinary administration suits, which are the common means in England of winding up and settling the estates of decedents, are practically unknown in this country. It is only under some exceptional circumstances that the equity jurisdiction is with us invoked, not to supersede the action of the probate courts, but to aid it, when if left to itself it would fail to afford complete relief and to do complete justice. Whenever such exceptional circumstances exist, and by reason of fraud, collusion, or other similar cause on the part of the executor or administrator, a creditor, or legatee, or distributee of an estate, may and does bring an action on behalf of the estate, even in such a case the personal representative — the adminis-

[1] 1 Daniell's, pp. 197–200, and cases there cited. Where an equitable thing in action, or an equitable interest, was assigned, the assignee could sue alone, since there was no possible danger of an action at law by the assignor. Fadwick *v.* Platt, 11 Beav. 503; Bagshaw *v.* Eastern Union R. Co., 7 Hare, 114; Blake *v.* Jones, 3 Anst. 651. There is no difference, under the codes generally, between the assignment of a legal and of an equitable thing in action in respect to the parties.

[2] 1 Daniell's, p. 201; Penny *v.* Watts, 2 Phil. 149, 153; Donald *v.* Bather, 16 Beav. 26; Croft *v.* Waterton, 13 Sim. 653. For illustrations of suits by administrators, heirs, etc., see Marsh *v.* Waupaca Cy. Sup., 38 Wis. 250; Jones *v.* Billstein, 28 id. 221; Chipman *v* Montgomery, 63 N. Y. 221; Allison *v.* Robinson, 78 N. C. 222; Harris *v.* Bryant, 83 id. 568.

trator or executor — is a necessary party; if he is not united as a co-plaintiff, he must be added as a defendant.[1]

§ 167. * 253. **Rule Applicable to Persons Having Legal Demands Arising out of Same Subject-Matter.** In all the foregoing instances the rule has been applied to the holders of a legal and of an equitable estate or interest in the subject-matter; it extends also to all persons having legal demands against the defendant arising out of the same subject-matter or event. Thus, where a lease has been assigned by the lessee, both the lessor and the lessee may each sue the assignee at law for a breach by him of the covenants. In equity, however, neither is permitted to sue the assignee without joining the other also, so that the defendant cannot be subjected to a double action and recovery.[2]

§ 168. * 254. **All Holders of Concurrent Equitable Rights against the Defendant should be made Co-Plaintiffs.** In the class of cases thus far examined, either an equitable right existed in one person and a legal right in another, or a legal right was held by all. The same principle extends to the very numerous class of cases in which the rights against the defendant arising from the same subject-matter or event are all equitable. Whenever, therefore, in addition to the plaintiff who actually institutes the action, there are other persons having concurrent equitable rights against the defendant growing out of the same subject-matter, they should in general be made parties to the action, primarily no doubt as co-plaintiffs, but, if not, then as defendants.[3] The doctrine thus stated in general terms has a very wide application, and upon it

[1] Attorney General *v.* Wynne, Mos. 126; Wilson *v.* Moore, 1 My. & K. 126, 142; Saunders *v.* Druce, 3 Drew. 140. As examples of such actions, see Fisher *v.* Hubbell, 7 Lans. 481, 65 Barb. 74, 1 N. Y. Sup. Ct. 97; in which the same person was executor of the estates of A. and of B., and the plaintiffs, legatees of A., had claims which placed them in the position of creditors to the estate of B.; and Lancaster *v.* Gould, 46 Ind. 397, which was an action by legatees and next of kin, against a creditor of the estate and the executor, to set aside a fraudulent allowance and payment of a claim made by the executor to the creditor; and Stronach *v.* Stronach, 20 Wis. 129, 133. See also Hills *v.* Sherwood, 48 Cal. 386, 392; Haynes *v.* Harris, 33 Iowa, 516, 518–520; Hardy *v.* Miles, 91 N. C. 131. For a full discussion of the circumstances under which the equity jurisdiction may be invoked in this country in aid of the probate courts, see 3 Pom. Eq. Jur. §§ 1152–1154, and extended note to § 1154.

[2] 1 Daniell's, pp. 206, 207; Sainstry *v.* Grammer, 2 Eq. Cas. Abr. 165; London *v.* Richmond, 2 Vern. 421; 1 Bro. P. C. 516.

[3] [Sanborn *v.* People's Ice Co. (1900), 82 Minn. 43, 84 N. W. 641: In a suit to restrain defendant from cutting and carrying away ice from a lake on which plaintiff is a riparian owner, there is no defect of parties plaintiff where the plaintiff shows himself specially affected by defendant's acts, on account of his peculiar relations to the water, not shared in common by other shore owners.]

is based a very large portion of the special rules as to parties which prevail in equity. It includes not only those who have concurrent rights in the whole subject-matter of the suit, but those also who have similar rights in a part of it, such as joint tenants, who must all be parties in an action concerning the property.[1] In a suit by joint tenants or tenants in common for a partition, all must be before the court; but it is not necessary of course that all should be plaintiffs.[2] There have been relaxations of this general rule. An action by three out of forty-seven tenants in common, brought to restrain the defendants from quarrying stone upon the land which was owned in common by the whole number, has been sustained, notwithstanding an objection on the ground of the non-joinder was interposed.[3] And where one tenant in common had leased his share for a long period of years, the lessee was permitted to maintain a partition against the other tenants in common, without making the reversioner of his own share — the lessor — a party.[4] And generally a tenant for life may institute a partition without bringing in the remainder-men.[5] When land is held by tenants in common for

[1] 1 Daniell's, pp. 207, 208; Haycock *v.* Haycock, 2 Ch. Cas. 124; Weston *v.* Keighley, Finch, 82; Stafford *v.* London, 1 P. Wms. 428; 1 Stra. 95. Where there are two or more trustees, they must all unite, since their interest is strictly joint. Thatcher *v.* Candee, 33 How. Pr. 145 (N. Y. Ct. of App.). In a suit by tenants in common to restrain a nuisance, the widow of a deceased co-tenant is properly joined as plaintiff, for the protection of her dower interest. Shepard *v.* Manhattan Ry. Co., 117 N. Y. 442, 446, 447. In Woodruff *v.* No. Bloomfield Gravel Min. Co., 8 Sawy. 628, s. c. 15 Fed. Rep. 25, it was held that one tenant in common might bring suit to enjoin a nuisance affecting the property without joining his co-tenants. And one heir may bring an action to restrain the desecration of his ancestor's grave, and for damages, without joining the other heirs. Mitchell *v.* Thorne, 57 Hun, 405. Where tenants in common of a tract have by separate deeds and at separate times and places conveyed their interests to a common vendee, they cannot join in a suit to cancel the deeds, as neither vendor has an interest in the relief demanded by the other. Jeffers *v.* Forbes, 28 Kan. 174, 179, per Brewer J. See *ante*, § *219, and notes.

[2] Anon., 3 Swanst. 139; Brashear *v.* Macey, 3 J. J. Marsh. 93; Braker *v.* Devereaux, 8 Paige, 513; Borah *v.* Archers, 7 Dana, 176; Cornish *v.* Gest, 2 Cox, 27. In partition by a tenant in common, his wife is not a necessary co-plaintiff; she should be made a party to the action, but rather as a defendant than as a plaintiff. Rosekrans *v.* White, 7 Lans. 486. The administrator of a deceased tenant in common may, under certain circumstances, be a proper party, together with his heirs, in a partition. Scott *v.* Guernsey, 60 Barb. 163, 181. See Sullivan *v.* Sullivan, 4 Hun, 198 (partition).

[3] Ackroyd *v.* Briggs, 14 W. R. 25. [Hannegan *v.* Roth (1896), 12 Wash. 695, 44 Pac. 256: Any or all of the tenants in common may maintain an action to quiet title, under Code § 529.]

[4] Baring *v.* Nash, 1 Ves. & B. 551; Heaton *v.* Dearden, 16 Beav. 147.

[5] Wills *v.* Slade, 6 Ves. 498; Brassey *v.* Chalmers, 4 De G., M. & G. 528.

life, or when there are future contingent interests which may finally vest in persons not yet in being, a partition may be had between those who possess the present estates; but it will only be binding upon the parties who are before the court and those who are virtually represented by such parties.[1] In an action brought to determine boundaries, all persons interested, whether their estates are present or future, remainder-men and reversioners, must be parties, although of course all need not be plaintiffs.[2] It is not necessary, as a general rule, to make the actual occupying tenants or lessees parties in suits relating to real property. They must, however, be parties in special cases where they are directly interested and their concurrence is necessary;[3] as, for example, in a partition suit where a tenant in common has leased his share, and in a suit brought to restrain an ejectment which was instituted against the tenants themselves instead of against their lessor.[4] If, on the other hand, lessees, or any persons holding limited interests, sue to establish some general right, that is, some right belonging to or affecting the whole estate and not merely their own temporary possession and user, the ultimate owners of the inheritance must also be made parties, so that they may be bound by the decree, but the requirement will be satisfied by making them defendants.[5] Thus, where a lessee brought an action to establish a right of way against a person who had erected an obstruction, it was held that his lessor should have been joined as a party to the suit.[6]

[1] Wotten *v.* Copeland, 7 Johns. Ch. 140; Striker *v.* Mott, 2 Paige, 387, 389; Woodworth *v.* Campbell, 5 Paige, 518; Gaskell *v.* Gaskell, 6 Sim. 643; Gayle *v.* Johnston, 80 Ala. 395.

[2] 1 Daniell's, p. 209; Story Eq. Pl. § 165; Bayley *v.* Best, 1 Russ. & My. 659; Miller *v.* Warmington, 1 Jac. & Walk. 484; Speer *v.* Crawter, 2 Meriv. 410; Attorney General *v.* Stephens, 1 K. & J. 724; 6 De G., M. & G. 111; Pope *v.* Melone, 2 A. K. Marsh. 239.

[3] [United Coal Co. *v.* Canon City Coal Co. (1897), 24 Colo. 116, 48 Pac. 1045: Where a lessee coal company is under contract to pay the lessor company a certain royalty on every ton of coal mined, as rental for the property, both the companies may join as plaintiffs in an injunction suit against other parties who are wrongfully extracting coal from the leased premises.]

[4] 1 Daniell's, p. 209; Story Eq. Pl. § 151; Lawley *v.* Walden, 3 Swanst. 142; Poole *v.* Marsh, 8 Sim. 528. See Saloy *v.* Bloch, 136 U. S. 338.

[5] 1 Daniell's, pp. 209, 210.

[6] Poore *v.* Clarke, 2 Atk. 515. [Columbia Water Power Co. *v.* Electric Co. (1894), 43 S. C. 154, 20 S. E. 1002: The plaintiff was the purchaser of a canal from the State. The defendant was lessee from the State of 500 horse power of water power in said canal, reserved by the State in the sale to plaintiff, the lease providing that defendant should supply the State penitentiary with 100 horse power, and should have the remainder for its own profit. Defendant erected a steam plant on the banks of the canal as supplemental

§ 169. *255. **Doctrine extends to Actions relating to Personal Property. Illustrations.** The doctrine that persons having or claiming a joint interest or estate must unite, extends to actions which relate to personal property as well as to those which relate to real property.[1] The following particular instances will illustrate this application. If a legacy is given to two jointly, both must sue for it; but if legacies are given separately, there being no common interest in any particular one, each legatee may sue for his own.[2] Where two or more persons are jointly interested in the money secured by a mortgage, that is, according to the law prevailing in this country, when they are joint mortgagees or joint assignees of a mortgage, they must all unite in a foreclosure.[3] And it is not even necessary that they should be joint holders of the debt secured by the mortgage. All persons who are entitled to share in the proceeds, whether their interest is joint or in common, or several, must be made co-plaintiffs, or at least must be brought into the action as defendants.[4] When,

to its use of the leased water power. Plaintiff brought a suit in equity to enjoin defendant from using the water power, and also asked for damages for the erection of the steam plant on plaintiff's land. *Held*, that inasmuch as the State, being owner of the penitentiary, is interested in the use of the water power, the State is an indispensable party to the injunction proceedings, but that in the law action the State is not a necessary party.]

[1] 1 Daniell's, p. 211.

[2] Haycock *v.* Haycock, 2 Ch. Cas. 124; Hughsen *v.* Cookson, 3 Y. & C. 578.

[3] Story Eq. Pl. § 201; Stucker *v.* Stucker, 3 J. J. Marsh. 301; Wing *v.* Davis, 7 Greenl. 31; Noyes *v.* Sawyer, 3 Vt. 160; Woodward *v.* Wood, 19 Ala. 213; Palmer *v.* Earl of Carlisle, 1 S. & S. 423; Lowe *v.* Morgan, 1 Bro. C. C. 368; Stansfield *v.* Hobson, 16 Beav. 189. For an example of misjoinder, because there was no community of interest, see Ferris *v.* Dickerson, 47 Ind. 382. See also Thompson *v.* Smith, 63 N. Y. 301 (a vendor's lien); Simpson *v.* Satterlee, 64 id. 657, 6 Hun, 305 (where the holder of a mortgage has assigned it as collateral security, he may foreclose, but the assignee must also be joined as a necessary party); see also Cerf *v.* Ashley, 68 Cal. 419; Church *v.* Smith, 39 Wis. 492 (in an action by a grantor to enforce the grantor's lien, when a portion of the notes given for instalments of the fund have been assigned, the assignees are necessary parties). Mesechaert *v.* Kennedy, 4 McCrary C. Ct. 133 (joint owners of bonds must join in a suit to declare them a lien on property). *Contra*, Swenson *v.* Moline Plow Co., 14 Kan. 387 (where a mortgage was given to secure two notes, and one of the notes was assigned, the mortgagee and the assignee of the note cannot maintain a joint action on the notes and mortgage).

[4] Story Eq. Pl. § 201; Goodall *v.* Mopley, 45 Ind. 355, 358. In this case a mortgage had been executed to several different mortgagees. All but one joined in a foreclosure, and he was afterwards permitted to foreclose for his own behalf, making the other mortgagees, as well as all other persons interested, defendants. See, *per contra*, Montgomerie *v.* Marquis of Bath, 3 Ves. 560. — a case which has been severely criticised. Two mortgagees of land, holding several mortgages given at the same time to secure several obligations, are tenants in common, and may join in a suit to foreclose their mortgages. Cochran *v.* Goodell, 131 Mass. 464.

however, the mortgage has been assigned to trustees in trust for the benefit of creditors, the trustees are the only necessary parties plaintiff in a foreclosure suit, and the creditors, being represented by them, need not be joined.[1] Actions to foreclose mortgages upon land, and those to enforce and foreclose the vendor's lien upon land for the purchase-price thereof, are in all respects based upon the same principles. The equitable doctrine prevailing in by far the greater part of the States, and which has entirely displaced the legal notion, regards the debt as the essential fact, and the mortgage as a mere incident thereto. The holder of the mortgage has therefore no estate in the mortgaged premises.[2] Whoever is interested in the debt as one of the creditors is therefore interested in the mortgage or in the vendor's lien, and, upon the well-settled rules of equity procedure, all must be made parties in order to avoid a division of the claim and a multiplicity of actions.[3] In the Western States it is very common, on the sale of land, for the vendor to take the vendee's notes payable at successive dates for the price, and either to receive back a mortgage given to secure such notes, or to rely upon the equitable lien arising from the sale as the security. All the holders of such notes must join as plaintiffs in an action to foreclose, whether the security be a mortgage or the mere vendor's lien.[4] A note and mortgage having been given to a husband and wife as security for money of the wife loaned to the mortgagor, and the husband dying, the wife was held to be the proper party to sue in her own name, either as the surviving promisee and mortgagee, or because the contract concerned her separate estate.[5]

[1] Morley *v.* Morley, 25 Beav. 253; Thomas *v.* Dunning, 5 De G. & S. 618; Knight *v.* Pocock, 24 Beav. 436.

[2] [It was held in Sidney Stevens Implement Co. *v.* South Ogden Land Co. (1899), 20 Utah, 267, 58 Pac. 843, that since by the law of Utah trustees in a deed of trust are not vested with any title to the property, legal or equitable, they are not necessary parties in an action to foreclose the deed of trust.]

[3] [Held in Casey *v.* Gibbons (1902), 136 Cal. 368, 68 Pac. 1032, that the plaintiff, in her individual capacity as distributee of one half the mortgage, might join with herself as executrix representing the other half of the mortgage.]

[4] Pettibone *v.* Edwards, 15 Wis. 95; Jenkins *v.* Smith, 4 Metc. (Ky.) 380; Merritt *v.* Wells, 18 Ind. 171; Goodall *v.* Mopley, 45 Ind. 355, 358. See, however, Rankin *v.* Major, 9 Iowa, 297. Upon the death of a vendor, it is held, in Kentucky, that his heirs must be joined as plaintiffs in a suit to enforce the lien for purchase-money, that the administrator cannot maintain the action alone. Anderson *v.* Sutton, 2 Duv. 480, 486; Smith *v.* West's Ex., 5 Litt. 48; Edwards *v.* Bohannon, 2 Dana, 98; Thornton *v.* Knox's Executors, 6 B. Mon. 74; Etheridge *v.* Vernoy, 71 N. C. 184, 185, 187. [See, however, § *340, and cases cited in the note.]

[5] Shockley *v.* Shockley, 20 Ind. 108.

§ 170. * 256. **Suits to Redeem.** The rule which regulates actions to foreclose prevails also in those brought to redeem. As all the persons entitled to share in the mortgage debt must unite in the foreclosure suit, so in a suit to redeem, the mortgagor, and all others who have a common right with him to redeem, must be made parties; in strict theory they should be co-plaintiffs, but it is sufficient if the one who for his own purposes institutes the action adds the others as defendants.[1] Where a judgment of foreclosure had been obtained on a mortgage, and, with the authority or knowledge of the mortgagee, the sheriff sold the premises in the usual manner, but at a merely nominal price, it was held, in Indiana, that the mortgagor and the mortgagee might unite in an action to set the sale aside, and to redeem the land from the purchaser, — the mortgagor by virtue of his ownership, and the mortgagee by virtue of his interest in having a price produced at the sale large enough to pay his entire claim.[2] The general doctrine above stated is strictly enforced in redemption suits of all varieties, the underlying principle being that a redemption must be complete and total, that the creditor shall not be compelled to accept a partial payment of his claim, or to make a partial surrender of his securities. When two tracts of land are mortgaged to the same person to secure the same debt, and they afterwards come into the hands of different proprietors, one of them cannot be redeemed without the other; the owners of both the parcels, and all persons interested in them, must be parties to the action, if not all as plaintiffs, then at least as defendants.[3] This joinder of the persons interested in the two estates is only necessary, however, while the mortgages are held by the same mortgagee or other holder. If one of them is assigned, or if by any other means they come into the hands of different holders, they being on dis-

[1] 1 Daniell's, pp. 212, 213; Story Eq. Pl. § 201; Chapman *v.* Hunt, 1 McCarter, 149; Large *v.* Van Doren, 1 McCarter, 208. See also Haggerson *v.* Phillips, 37 Wis. 364 (widow of a deceased mortgagor is not a necessary party); Parker *v.* Small, 58 Ind. 349 (in a suit to redeem by a grantee, the grantor is not a necessary party); Southard *v.* Sutton, 68 Me. 575.

[2] Berkshire *v.* Shultz, 25 Ind. 523. See also McCulloch's Administrator *v.* Hollingsworth, 27 Ind. 115; Stringfield *v.* Graff, 22 Iowa, 438.

[3] Story Eq. Pl., §§ 182, 287; Palk *v.* Lord Clinton, 12 Ves. 48; Lord Cholmondeley *v.* Lord Clinton, 2 Jac. & W. 1, 134; Ireson *v.* Denn, 2 Cox, 425; Jones *v.* Smith, 2 Ves. 372, 6 Ves. 229 (n.); Watts *v.* Symes, 1 De G., M. & G. 240; Tassell *v.* Smith, 2 De G. & J. 713; Vint *v.* Padget, 2 De G. & J. 611; Selby *v.* Pomfret, 1 J. & H. 336, 3 De G., F. & J. 595; Bailey *v.* Myrick, 36 Me. 50.

tinct parcels of land, all connection between them is severed, and the actions to redeem must be separate.[1] If the action to redeem is brought by an incumbrancer, the same rule applies. In a suit by an incumbrancer, who seeks to redeem from a prior incumbrance, the mortgagor or owner of the land subject to the incumbrances, whatever they may be, is an indispensable party, although not necessarily a plaintiff.[2] While a second mortgagee, in an action to redeem, must thus bring in the mortgagor or his heir or other owner of the land, he may foreclose the mortgagor and a third mortgagee without joining the first mortgagee as a party, since his proceeding does not in the least affect the rights of such first mortgagee, but its effect is merely to put himself in the place of the mortgagor and of the third mortgagee.[3] This rule may be stated in a more general form. In suits brought to enforce subsequent claims, interests, or incumbrances, on property subject to prior charges which are to be left unaffected, the holders of such prior liens or interests need not be made parties.[4]

§ 171. *257. **Suits for Accounting. All Persons interested in having an Account Taken, or in its Result, should be made Co-Plaintiffs.** The general principle that all persons concurrently interested in the subject-matter of the suit or in its result, whether that relate to real or to personal property, must be parties, is invoked and strictly enforced in all species of actions which are brought to obtain an accounting against the defendant. The remedy of accounting is multiform, and it is often made the basis of some further and ulterior relief, such as rescission and cancellation, redemption, and the like; but wherever an accounting is sought, either for its own sake or as the preliminary step to further judicial action, the rules as to parties are controlling. When several persons are interested in having an account taken, or in its result, one of them cannot be permitted to institute a

[1] Willie *v.* Lugg, 2 Eden, 78.

[2] 1 Daniell's, p. 214; Story Eq. Pl. §§ 84, 186, 195; Thomson *v.* Baskervill, 3 Ch. Rep. 215; Farmer *v.* Curtis, 2 Sim. 466; Hunter *v.* Macklew, 5 Hare, 238; Fell *v.* Brown, 2 Bro. C. C. 276; Palk *v.* Lord Clinton, 12 Ves. 48; Hallock *v.* Smith, 4 Johns. Ch. 649.

[3] 1 Daniell's, p. 214; Story Eq. Pl. § 193; Rose *v.* Page, 2 Sim. 471; Briscoe *v.* Kenrick, 1 Coop. temp. Cott. 371; Arnold *v.* Bainbrigge, 2 De G., F. & J. 92; Audsley *v.* Horn, 26 Beav. 195, 1 De G., F. & J. 226; Person *v.* Merrick, 5 Wis. 231; Wright *v.* Bundy, 11 Ind. 398. In England, if the plaintiff in such an action brings in the prior mortgagee, he must offer to redeem his mortgage. Gordon *v.* Horsfall, 5 Moore, 393.

[4] 1 Daniell's, p. 214; Rose *v.* Page, 2 Sim. 471; Parker *v.* Fuller, 1 R. & M. 656.

proceeding for that purpose by himself alone and without joining the others in some manner, so that they shall be bound by the decree, for otherwise the defendant would be exposed to as many actions as there are persons interested, each brought and maintained for the same purpose and upon substantially the same proofs.[1] The actions in which an accounting is necessary are very numerous, and arise out of external circumstances very unlike, but, in all of them, the rule as thus stated must be followed in the selection of the parties. Thus in a partnership, or any other like adventure where there is a sharing of profits or losses, all the persons having shares must be made parties to a suit brought for an accounting.[2] Under the proper circumstances one may sometimes sue on behalf of himself and all the others interested, and it is not indispensable that the individuals having concurrent rights should all be joined as plaintiffs in the action.[3] If, however, one or more of the parties are non-residents, and beyond the jurisdiction of the court, the rule, under such circumstances, is sometimes relaxed, and the action is allowed to proceed with those parties who are within the reach of the court and its process. The admission of this exception, or of similar ones, is not, however, a matter of absolute right; it depends rather upon the sound discretion of the court regulated by considerations of equity and justice.[4] The heirs of a deceased partner must be parties in an action brought to sell real estate of the firm in winding up the partnership and paying the firm debts; although the land is, for the purpose of paying firm debts, treated in equity as a personal asset, yet the legal title of the heir must be divested, and to that end he must be brought in as a party.[5]

[1] 1 Daniell's, p. 216; Petrie *v.* Petrie, 7 Lans. 90. See also Getty *v.* Develin, 70, N. Y. 504 (accounting); Pfohl *v.* Simpson, 74 id. 137 (action against a fund or a class of persons); Eldridge *v.* Putnam, 46 Wis. 205 (all the *cestuis que trustent* must join in an action against the trustee for an accounting); Hughes *v.* Boone, 81 N. C. 204 (action for contribution); Hammond *v.* Pennock, 61 N. Y. 145 (rescission on account of fraud).

[2] Ireton *v.* Lewes, Finch, 96; Moffat *v.* Farquharson, 2 Bro. C. C. 338.

[3] Story Eq. Pl. § 166; Good *v.* Blewitt, 13 Ves. 397; Cullen *v.* Duke of Queensbury, 1 Bro. C. C. 101; Hills *v.* Nash, 1 Phila. 594; Wells *v.* Strange, 5 Ga. 22; Mudgett *v.* Gager, 52 Me. 541.

[4] The following cases will show to what extent, and under what circumstances, the rule has been relaxed: Story Eq. Pl. § 78; Darwent *v.* Walton, 2 Atk. 510; Walley *v.* Walley, 1 Vern. 487; Towle *v.* Pierce, 12 Metc. 329; Vose *v.* Philbrook, 3 Story, 335; Lawrence *v.* Rokes, 53 Me. 110, 116; Fuller *v.* Benjamin, 23 Me. 255; Drage *v.* Hartopp, 28 Ch. D. 414; Palmer *v.* Stevens, 100 Mass. 461. See Bowdoin College *v.* Merritt, 54 Fed. Rep. 55.

[5] Pugh *v.* Currie, 5 Ala. 446; Lang *v.* Waring, 25 Ala. 625; Andrews *v.* Brown, 21 Ala. 437.

On the death of a partner, his personal representative may at once maintain an action against the survivors for an accounting; and when there was no real estate held by the firm as a part of its assets, so that no question can arise as to the title of any lands, the heirs of the deceased are neither necessary nor proper parties to such action.[1]

§ 172. *258. **Residuary Legatees, Distributees, and Next of Kin. Statement of General Rule herein.** Another example is found in the action by a residuary legatee, brought to obtain an account of his share of the residue; he must make all persons interested in the residue parties, even though their interest may be quite remote and contingent.[2] One residuary legatee may sometimes sue on behalf of all others interested.[3] Also in a suit by next of kin or distributees against the administrator for an account, all of the next of kin or distributees must be parties, naturally as plaintiffs, but if not, then as defendants. This is the established equity rule prior to or independent of any changes made by statutes.[4] These instances of distributees and residuary legatees thus given are in fact particular cases of a more general rule in reference to actions which have for their object, in whole or in part, an accounting by the defendant, which may be stated as follows: When the persons assert the claim to an account as a portion of a *class* entitled under a general description, all the members of that class, or all the individuals included under that general description, must be before the court; if not among the original parties to the suit, they must be brought in before the final hearing, so that the rights of the entire body can be deter-

[1] Cheeseman *v.* Wiggins, 1 N. Y. Sup. Ct. 595.

[2] 1 Daniell's, pp. 216, 217; Story Eq. Pl. §§ 89, 203, 204; Parsons *v.* Neville, 3 Bro. C. C. 365; Cockburn *v.* Thompson, 16 Ves. 328; Brown *v.* Ricketts, 3 Johns. Ch. 553; Davoue *v.* Fanning, 4 Johns. Ch. 199; Pritchard *v.* Hicks, 1 Paige, 270; Sheppard *v.* Starke, 3 Munf. 29; West *v.* Randall, 2 Mason, 181, 190–199; Huson *v.* McKenzie, Dev. Eq. 463; Arendell *v.* Blackwell, Dev. Eq. 354; Bethel *v.* Wilson, 1 Dev. & Bat. Eq. 610. See McArthur *v.* Scott, 113 U. S. 340, 395. As illustrations of such remote and contingent interests, see Sherrit *v.* Birch, 3 Bro. C. C. 229 (Perkins's ed. note); Davies *v.* Davies, 11 Eng. L. & Eq. R. 199; Lenaghan *v.* Smith, 2 Phil. 301; Smith *v.* Snow, 3 Mad. 10; Hares *v.* Stringer, 15 Beav. 206; Grace *v.* Terrington, 1 Coll. 3.

[3] Kettle *v.* Crary, 1 Paige, 417, 419, 420; Ross *v.* Crary, 1 Paige, 416; Hallett *v.* Hallett, 2 Paige, 15, 19; Egberts *v.* Woods, 3 Paige, 517.

[4] 1 Daniell's, pp. 217, 218; Story Eq. Pl. § 89; Hawkins *v.* Hawkins, 1 Hare, 543, 546; Noland *v.* Turner, 5 J. J. Marsh. 179; West *v.* Randall, 2 Mason, 181, 190; Kellar *v.* Beelor, 5 Monr. 573; Oldham *v.* Collins, 4 J. J. Marsh, 50. See Petrie *v.* Petrie, 7 Lans. 90; McArthur *v.* Scott, 113 U. S. 340, 395; Bland *v.* Fleeman, 29 Fed. Rep. 669; Richtmyer *v.* Richtmyer, 50 Barb. 55.

mined in one decree, and the defendant relieved from the possibility of a multiplicity of actions. Primarily, all these persons being interested in the account adversely to the defendant, they should all be made co-plaintiffs; but, as has often been observed, the rules of equity do not demand this strict distinction between plaintiffs and defendants, and they are satisfied if all the individuals, besides the one actually instituting the suit, are placed among the defendants. It is also often possible, when the class is numerous, that one should sue on behalf of all the others. This general rule is most comprehensive in its practical application, and must be invoked in a very large number of cases which have little external resemblance; it was well established both in England and in this country as a doctrine of equity procedure, but has of late years been much modified and relaxed in England by statutes.[1]

§ 173. *259. **Same Subject. Exceptions. Statement of Distinction herein referred to.** There are some exceptions, however, to the foregoing rule which requires all persons interested in the result of an accounting to be made parties. When some of the individuals who were originally interested have been already separately accounted with and paid, they need not be made parties to the suit.[2] And when the accounts and shares of the different persons have been kept entirely separate and distinct from each other, so that neither one is interested in that of the others, although all relate to the same adventure or undertaking, there need be no joinder of all.[3] And where persons are each entitled to a certain fixed portion of an ascertained sum in the hands of a trustee, each may sue for his own share without joining his co-beneficiaries.[4] The distinction here referred to is important, and should be stated more fully, as follows: If a trustee holds a fund which he is bound to distribute to different beneficiaries in unequal proportions, and the proportionate share of each has not yet been ascertained, all the persons who are

[1] See 1 Daniell's, p. 217; Story Eq. Pl. § 90. See Lancaster Baptist Church *v.* Presb. Church, 18 B. Mon. 635; Hutchinson *v.* Roberts, 67 N. C. 223.

[2] D'Wolf *v.* D'Wolf, 4 R. I. 450; Branch *v.* Booker, 3 Munf. 43; Moore *v.* Beauchamp, 5 Dana, 70.

[3] Weymouth *v.* Boyer, 1 Ves. 416; Hills *v.* Nash, 1 Phil. 594, 597; Brown *v.* De Tastet, Jac. 284; Bray *v.* Fromont, 6 Mad. 5.

[4] 1 Daniell's, p. 219; Story Eq. Pl. §§ 207 *a*, 212; Perry *v.* Knott, 5 Beav. 293; Smith *v.* Snow, 3 Mad. 10; Hares *v.* Stringer, 15 Beav. 206; Lenaghan *v.* Smith, 2 Phil. 301; Hunt *v.* Peacock, 6 Hare, 361.

interested in the distribution are necessary parties to an action brought to enforce the trust; but where the proportionate share of each beneficiary has been definitively ascertained by a proceeding binding on the trustee, each is entitled to demand payment of the share belonging to himself, and when the payment is withheld he may maintain a separate action for its recovery. The liability of the trustee to each is then exactly the same as though the sum ascertained to belong to him was the only sum which the trustee had received and had been directed to pay.[1] When a person jointly interested in the account is out of the jurisdiction, the cause has sometimes been allowed to go on without him as a party.[2]

§ 174. * 260. **Special Applications of General Principles above Stated. General Rule. Important Exceptions.** I shall now briefly describe some of the most important special applications of the foregoing general principles in relation to community and concurrence of interests. As a result of these principles, it is a general rule, with but few well-defined exceptions, that trustees cannot alone maintain actions relating to the trust property, but the beneficiaries must also be made parties to the suit in some form, either as co-plaintiffs with the trustees or as defendants.[3]

[1] Gen. Mut. Ins. Co. *v.* Benson, 5 Duer, 168, 176, per Duer J.; Walker *v.* Paul, Stanton's (Ky.) code, p. 37; Hubbard *v.* Burrell, 41 Wis. 365. A fund had been devised to a trustee for the benefit of the superannuated preachers of a certain "conference." It was held that the superannuated preachers of that body might unite in an action to enforce the trust for their own benefit and that of future persons entitled under it. Lancaster Bapt. Church *v.* Presb. Church, 18 B. Mon. 635.

[2] Story Eq. Pl. §§ 78, 89; West *v.* Randall, 2 Mason, 196; Vose *v.* Philbrook, 3 Story, 335; Lawrence *v.* Rokes, 53 Me. 110; Mudgett *v.* Gager, 52 Me. 541; Drage *v.* Hartopp, 28 Ch. D. 414; Palmer *v.* Stevens, 100 Mass. 461.

[3] 1 Daniell's, pp. 220–224; Story Eq. Pl. §§ 207, 209; Covington & Lex. R. Co. *v.* Bowler's Heirs, 9 Bush, 468; Western R. Co. *v.* Nolan, 48 N. Y. 513; Large *v.* Van Doren, 1 McCarter, 208; Stilwell *v.* McNeely, 1 Green, Ch. 305; Van Doren *v.* Robinson, 1 C. E. Green, 256; Malin *v.* Malin, 2 Johns. Ch. 238; Fish *v.* Howland, 1 Paige, 20; Schenck *v.* Ellingwood, 3 Edw. Ch. 175; Helm *v.* Hardin, 2 B. Mon. 232; Burney *v.* Spear, 17 Ga. 223; Woodward *v.* Wood, 19 Ala. 213; Kirk *v.* Clark, Prec. Cha. 275; Phillipson *v.* Gatty, 6 Hare, 26; Brokaw *v.* Brokaw's Ex., 41 N. J. Eq. 215; Northampton First Nat. Bk. *v.* Crafts, 145 Mass. 444; Boyd *v.* Jones, 44 Ark. 314. Where two or more trustees have been appointed, they must all unite in actions brought by them, as their right is strictly joint; and this rule applies, although some one of them may have attempted, by assignment or otherwise, to divest himself of the trust. Thatcher *v.* Candee, 33 How. Pr. 145 (N. Y. Ct. of App.). And see cases cited *supra* under § * 250.

[It was held in Bennett *v.* Bennett (1902), — Neb. —, 91 N. W. 409, that in an action by a guardian the ward need not be joined as plaintiff, under § 32 of the code. Becker *v.* Stroeher (1902), 167 Mo. 306, 66 S. W. 1083: The court said, "It is well settled in this state that the

The following are simple illustrations of this general doctrine. Where trustees in trust to sell lands brought an action against the purchaser at their sale to compel a specific performance of their contract of purchase, it was held that the *cestuis que trustent* of the purchase-money must be made parties.[1] Again, where the trustees of a numerous unincorporated society brought an action to compel the specific performance of an agreement entered into by themselves for the benefit of the association, it was held that the members of the society should be joined, or, if they were too numerous, then some of them ought to be made co-plaintiffs, suing as representatives on behalf of the others.[2] There are, however, as already stated, certain well-defined exceptions to this general rule requiring trustees and *cestuis que trustent* to be joined in suits concerning the trust property, of which the following are the most important: (1) When trustees appointed to sell lands are expressly authorized by the deed of trust to sell in their own names, and it is further expressly provided in such deed that their own receipt of the price shall be a complete discharge to the purchaser, it is settled that they may maintain a suit to compel a specific performance against the purchaser without joining the *cestuis que trustent* with themselves as parties.[3] (2) In some special instances, where the interest of the beneficiaries was simply collateral to the rights of the trustee against the defendant, the trustee has been permitted to sue alone.[4] (3) And in suits between the trustees themselves, brought by one to compel the other to account for and restore trust property misappropriated by him, the beneficiaries need not be made parties.[5] But if the *cestuis que trustent* have concurred in the

beneficiary and trustee in a deed of trust executed upon land the subject of partition, prior to the institution of a suit for that purpose, are proper parties to such suit, but no such rule prevails with respect to a beneficiary or trustee, in a mortgage or deed of trust executed after a partition suit has been instituted."]

[1] Calverley *v.* Phelp, 6 Mad. 229.

[2] Douglas *v.* Horsfall, 2 S. & S. 184. [Held in Lilly *v.* Menke (1894), 126 Mo. 190, 28 S. W. 643, that where plaintiffs, in behalf of an unincorporated church association, bring a suit in partition, the petition should allege that plaintiffs as trustees of the church "sue for themselves and all other members of said church."]

[3] See 1 Daniell's, pp. 221, 222, and cases cited.

[4] As, for example, in Saville *v.* Tancred, 1 Ves. Sen. 101, 3 Swanst. 141, Story Eq. Pl. § 221.

[5] Story Eq. Pl. § 213; Franco *v.* Franco, 3 Ves. 77; Bridget *v.* Hames, 1 Col. 72; May *v.* Selby, 1 Y. & C. 235; Horsley *v.* Fawcett, 11 Beav. 565; Peake *v.* Ledger, 8 Hare, 313, 4 De G. & S. 137; Baynard *v.* Woolley, 20 Beav. 583; Allen *v.* Knight, 5 Hare, 272, 277; Cunningham *v.* Pell, 5 Paige, 607. But see Chancellor *v.* Morecraft, 11 Beav. 262. When the

breach of trust, they must be joined in the suit brought by one trustee against his co-trustee to repair the fault.[1]

§ 175. * 261. **Case of Suits by Executors and Administrators, and Suits by Assignees in Insolvency. Important Exceptions Continued.** (4) The most important exception by far, as well as the most familiar one, is the case of executors and administrators; they can always sue alone, without joining the legatees, distributees, creditors, or other persons interested in the estate, as parties either plaintiff or defendant. The legal title to the personalty is so completely vested in the executors and administrators, that, both in law and in equity, they are considered as fully representing the rights and interests of all the other persons who have ultimate claims upon such estate as legatees, distributees, or creditors. In all actions, therefore, relating to the estate, they sue alone. This rule is fully established in equity as well as at law.[2] All the acting executors or administrators must join;[3] but if a portion only have proved, the others need not be made parties, although they may not have formally renounced.[4] It is not indispensable, however, that all the executors or administrators should be plaintiffs; for it is enough in equity if all the parties are before the court, so that one executor or administrator may sue as plaintiff, if he make his co-executor

suit by the trustee is merely to recover or reduce to possession the trust property, and is in no way intended to control the administration or disposition of it, or to affect the right or relation of the *cestui que trust*, the latter is not a necessary party. Horsley *v.* Fawcett, 11 Beav. 565; Carey *v.* Brown, 92 U. S. 172, and cases cited; Hickox *v.* Elliott, 10 Sawy. 415, s. c. 22 Fed. Rep. 13, 19, 20; Smith *v.* Portland, 30 Fed. Rep. 734 (suit to protect the trust property by injunction); *Re* Straut's Estate, 126 N. Y. 201; Western R. Co. *v.* Nolan, 48 N. Y. 513. See also *ante*, § * 178.

[1] Jesse *v.* Bennett, 6 De G., M. & G. 609.

[2] 1 Daniell's, p. 224; Jones *v.* Goodchild, 3 P. Wms. 33; Peake *v.* Ledger, 8 Hare, 313; Smith *v.* Bolden, 33 Beav. 262. It has been held that an administrator, suing in equity to recover assets of the estate, may join the distributees as co-plaintiffs; that such uniting of parties, though not at all necessary, is not improper. Richardson's Administrator *v.* Spencer, 18 B. Mon. 450. An administrator may maintain an action to set aside transfers of his intestate in fraud of creditors, since he represents the creditors as well as the deceased. Cooley *v.* Brown, 30 Iowa, 470, 473, 474. And see cases cited *supra* under § * 252.

[3] 1 Daniell's, p. 226; Offley *v.* Jenney, 3 Ch. Rep. 92; Cramer *v.* Morton, 2 Molloy, 108.

[4] Davies *v.* Williams, 1 Sim. 5; Dyson *v.* Morris, 1 Hare, 413; Rinehart *v.* Rinehart, 2 McCarter, 44; Marsh *v.* Oliver, 1 McCarter, 262. But an executor who has not proved the will may, nevertheless, be a necessary defendant in a suit brought to carry its trusts into effect. Ferguson *v.* Ferguson, 1 Hayes & J. 300; Yates *v.* Compton, 2 P. Wms. 308; Cramer *v.* Morton, 2 Moll. 108; Thompson *v.* Graham, 1 Paige, 384.

or co-administrator a defendant.[1] When a residuary legatee sues for his share of the residue, all the other residuary legatees must be joined either as plaintiffs or defendants.[2] And in a suit for distribution, all the distributees must be brought in as parties, primarily as plaintiffs, but at all events as defendants.[3] Where legacies are charged upon real estate, the executors alone are not sufficient parties; but all the other legatees must be brought in, so that the assets may be marshalled, and the respective rights of all may be determined.[4] (5) Another important exception to the rule requiring the union of beneficiaries and trustees in suits relating to the trust property is the case of assignees in trust for creditors, and the assignees in bankruptcy or insolvency. These particular trustees, as well as executors and administrators, may always sue and defend alone in such actions, without joining with themselves the creditors whom they represent as *cestuis que trustent*.[5] Nor need the assigning debtor, bankrupt, or insolvent be made a party.[6]

§ 176. * 262. **General Principle Applicable to those Having Future and Expectant Interests. Equity Doctrine. Illustrations.** The principle which requires all persons claiming interests in the subject-matter concurrent with the plaintiff who instituted the suit to be made parties, is applicable in general to those having future and expectant interests, as well as to those whose interests are present, and whether they are in possession, remainder, or reversion. It is the established doctrine of equity that when a person claims an estate, either under a will or a deed by which successive estates or interests have been created, all the other persons claiming under the same will or deed, down to the one who is entitled to the first vested estate of inheritance, must be

[1] Wilkins *v.* Fry, 1 Meriv. 244, 262; Blount *v.* Burrow, 3 Bro. C. C. 90; Dare *v.* Allen, 1 Green, Ch. 288.

[2] 1 Daniell's, p. 225; Harvey *v.* Harvey, 4 Beav. 215, 220; Smart *v.* Bradstock, 7 Beav. 500; Bateman *v.* Margerison, 6 Hare, 496, 499; Doody *v.* Higgins, 9 Hare, Ap. 32, 38; Gould *v.* Hayes, 19 Ala. 438.

[3] Hawkins *v.* Craig, 1 B. Mon. 27; Osborne *v.* Taylor, 12 Gratt. 117. But see Keeler *v.* Keeler, 3 Stockt. 458; Moore *v.* Gleaton, 23 Ga. 142.

[4] Morse *v.* Sadler, 1 Cox, 352; Hallett *v.* Hallett, 2 Paige, 15; Howland *v.* Fish, 1 Paige, 20; Todd *v.* Sterrett, 6 J. J. Marsh. 432. [In Youngson *v.* Bond (1902), 64 Neb. 615, 90 N. W. 556, it was held that an administrator could not bring an action to quiet title, since his right to the real estate was possessory only.]

[5] 1 Daniell's, p. 224; Spragg *v.* Binkes, 5 Ves. 587. See also Jewett *v.* Tucker, 139 Mass. 566; Smith *v.* Jones, 18 Neb. 481; Warren *v.* Howard, 99 N. C. 190.

[6] De Golls *v.* Ward, 3 P. Wms. 311 (n.); Kaye *v.* Fosbrooke, 8 Sim. 28; Dyson *v.* Hornby, 7 De G., M. & G. 1.

joined in the action as parties, either as co-plaintiffs or as defendants. To illustrate by a simple example: If, by a deed, land has been given to A. for years, with remainder to B. for life, and remainder to C. in fee, and A. is in possession as the tenant for years, B. cannot alone maintain an action against A. to restrain the commission of waste; but C., the remainder-man in fee, must also be brought in as a party, naturally as a co-plaintiff, but if not, then as a defendant, so that he may be before the court representing the ultimate ownership. All those entitled to intermediate estates prior to the first vested inheritance must also be joined, so that the entire ownership may be brought before the court, and may be bound by its decree.[1]

§ 177. *263. **General Rule in Suits for Specific Performance. Illustrations.** In actions to compel the specific performance of contracts, the immediate parties to the agreement are, as a general rule, the only necessary parties to the suit; but this includes, of course, those who by substitution become clothed with the rights or duties of the original contractors, as heirs, devisees, or sometimes the personal representatives.[2] If a tract of land is sold in separate parcels to different purchasers, the latter cannot unite in an action for a specific performance against the vendor, since each sale is distinct, and depends upon its own circumstances. But if there is only one contract of sale to several persons covering the land in question, although it may have stipulated for different shares, the purchasers may unite; it is not necessary that the vendees should be jointly interested in the purchase, in the legal import of that term, it is enough if they have common or concurrent interests in the subject-matter.[3] If the vendee in a land contract dies, his heirs are the parties to

[1] 1 Daniell's, pp. 227–330; Story Eq. Pl. § 144; Finch *v.* Finch, 2 Ves. Sen. 492; Molineux *v.* Powell, 3 P. Wms. 268 (n.); Herring *v.* Yoe, 1 Atk. 290; Pyncent *v.* Pyncent, 3 Atk. 571; Sohier *v.* Williams, 1 Curtis, 479.

[2] 1 Daniell's, p. 230; Tasker *v.* Small, 3 My. & Cr. 63, 69; Wood *v.* White, 4 My. & Cr. 460; Robertson *v.* Gr. West. Ry. Co., 10 Sim 314; Humphreys *v.* Hollis, Jac. 73; Paterson *v.* Long, 5 Beav. 186; Peacock *v.* Penson, 11 Beav. 355; Petre *v.* Duncombe, 7 Hare, 24; De Hoghton *v.* Money, L. R. 2 Ch. App. 164, 170; Bishop of Winchester *v.* Mid. Hants Ry. Co., L. R. 5 Eq. 17; Aberaman Iron Works *v.* Wickens, L. R. 4 Ch. App. 101; Fenwick *v.* Bulman, L. R. 9 Eq. 165; Daking *v.* Whimper, 26 Beav. 568; Morgan *v.* Morgan, 2 Wheat. 290; Lord *v.* Underdunck, 1 Sandf. Ch. 46; Hoover *v.* Donally, 3 Hen. & Mun. 316. See McCotter *v.* Lawrence, 6 N. Y. Sup. Ct. 392, 395, and Maire *v.* Garrison, 83 N. Y. 14, 29. [For an interesting case concerning the question of parties plaintiff in an action of specific performance, see Daly *v.* Ruddell (1902), 137 Cal. 671, 20 Pac. 784.]

[3] Owen *v.* Frink, 24 Cal. 171, 177.

bring an action for a specific performance; but his administrator, when the suit is simply to recover damages.[1] It follows, from the general rule given above, that a mere stranger claiming an interest or estate under an adverse title is neither a necessary nor a proper party to the suit for a specific performance; his rights cannot be affected by the decree made therein, and must, in fact, be determined in another and distinct proceeding.[2] But a person claiming under a prior agreement is not such a mere stranger, and he is a proper party in an action brought by the vendee to compel a specific performance, and to determine the right to the purchase-money.[3] Another person than the vendor may also be so interested in the subject-matter of the contract, that his presence or aid will be needed in order to make out a complete title; and, when this is the case, such person may also be joined as a party to the suit for a specific performance, although not an actual party to the contract sought to be enforced.[4] Also, when a third person has, after the making of the contract, acquired some interest in the subject-matter under the vendor, but with notice of the vendee's rights, he may be brought in as a co-defendant with the vendor in the suit for a specific performance.[5]

§ 178. * 264. **Co-Plaintiffs in Suits to enforce the Trusts of a Will.** It was a well-established doctrine of equitable procedure, that, in suits to carry into effect and enforce the trusts of a will, the heirs-at-law must be made parties. This rule has, however, been greatly modified, if not actually abrogated, in England by recent statutory legislation; and in the United States it is not often invoked because such suits are comparatively infrequent.[6]

[1] Webster *v.* Tibbitts, 19 Wis. 438; Peters *v.* Jones, 35 Iowa, 512, 518. See Gardner *v.* Kelso, 80 Ala. 497; Hill *v.* Smith, 32 N. J. Eq. 473. The administrator is not a proper plaintiff in a suit for specific performance when the purchase-money has been wholly paid: McKay *v.* Broad, 70 Ala. 377.

[2] Tasker *v.* Small, 3 My. & Cr. 63, 69; De Hoghton *v.* Money, L. R. 2 Ch. App. 164, 170.

[3] West Midland Ry. Co. *v.* Nixon, 1 Hem. & M. 176; Chadwick *v.* Maden, 9 Hare, 188.

[4] Wood *v.* White, 4 M. & C. 460, 483; Chadwick *v.* Maden, 9 Hare, 188; Cope *v.* Parry, 2 Jac. & W. 538; McCotter *v.* Lawrence, 6 N. Y. Sup. Ct. 392, 395; Story Eq. Pl. § 209.

[5] Spence *v.* Hogg, 1 Coll. 225; Collett *v.* Hover, 1 Coll. 227; Cutts *v.* Thodey, 13 Sim. 206; Leuty *v.* Hillas, 2 De G. & J. 110. See Carter *v.* Mills, 30 Mo. 432. This rule, given in the text, must be applied under a great variety of external circumstances, and is exceedingly comprehensive in its operation.

[6] See, on the subject of the heirs being parties, and of the statutory changes in England, 1 Daniell's, pp. 231, 232; Story Eq. Pl. § 163. As to actions for the construction of wills, see Chipman *v.* Montgomery, 63 N. Y. 221, and 1 Pomeroy's Equity, § 352, n. (1).

Where, on the other hand, an action is brought to set aside a will, then all the devisees are necessary parties, and the executor, unless he has renounced;[1] and all the legatees residuary and other.[2]

§ 179. * 265. **Principle Underlying Special Rules. Connecting Link. General Principle.** The broad principle which underlies most of the foregoing special rules is, that when an action is instituted by some determinate individual for his own benefit, whom we call *the* plaintiff, all persons having interests or claims against the defendant, in relation to the subject-matter, concurrent with his, must be brought in as parties; if they do not wish to unite as co-plaintiffs, they must be added as defendants. The connecting link is the *concurrence* of the interests. If this element is wanting, the principle itself is not operative.[3] It follows, therefore, as a general principle, — the converse of that already discussed, — that when a suit is instituted by some determinate individual, whom we call the plaintiff, and there are other persons asserting claims against the defendant, even in respect to the same subject-matter, but such claims are set up under titles antagonistic to, or inconsistent with, that of the plaintiff, these persons should not be made parties to the action either as plaintiffs or as defendants, since the indispensable element of concurrence in their interests is wanting, so that if they were joined as parties, two distinct controversies at least would be carried on in the single litigation.[4] Among the examples of such improper

[1] Vancleave *v.* Beam, 2 Dana, 155; Hunt *v.* Acre, 28 Ala. 580; Vanderpoel *v.* Van Valkenburgh, 6 N. Y. 190.

[2] McMaken *v.* McMaken, 18 Ala. 576.

[3] [In an action to enjoin the threatened breach of a contract, there is a misjoinder of parties plaintiff when between some of the plaintiffs and the defendant there is no privity of contract and hence no interest, on the part of such plaintiffs, in the outcome of the litigation: Atlantic, etc. R. R. Co. *v.* Southern Pine Co. (1902), 116 Ga. 224, 42 S. E. 500.

In Bradley *v.* Bradley (1900), 165 N. Y. 183, 58 N. E. 887, the two plaintiffs, by reason of false representations respecting the value and condition of the property of a corporation in which they were stockholders, sold their shares of stock at a price much below its actual value. They joined in an action to rescind the sale. The court said: "The complaint shows that, although these plaintiffs severally owned their quota of shares, they nevertheless acted in concert respecting them and the interests represented by them, and were by the same fraud of the defendant induced to act in concert in selling their stock to him. The defendant baited and set one trap for both and caught both in it. The wrong of the defendant destroyed their unity of action as owners of the stock, and it is agreeable to equity that the plaintiffs should be extricated together, and under the facts they allege be permitted to act together in rescinding the sale and in reinstating themselves in their former position."]

[4] See 1 Daniell's, pp. 229, 230–233.

union of persons whose interests are antagonistic is the case of an action to redeem brought by an heir-at-law and a devisee under a will; the joinder is improper, since one or the other of these parties has, of course, no right to redeem in the case supposed.[1] And a person liable to account to the other plaintiffs cannot be joined as a co-plaintiff.[2] This objection, based upon the inconsistency of rights and interests, does not apply, however, to causes in which a single plaintiff unites in himself two or more conflicting claims or interests.[3]

§ 180. * 266. **Distinct Claims not necessarily Inconsistent. Conflicting Decisions.** Because claims, titles, and interests are distinct, and, in a certain sense, independent of each other, they are not therefore necessarily antagonistic or inconsistent; and persons having such distinct claims and interests, which are not antagonistic or inconsistent, may often be united in an action of which the object is their common benefit.[4] In applying this principle, there is some diversity of opinion, and even conflict among the decided cases. In certain classes of actions the doctrine is well settled, and the joinder of such persons is a matter of common practice. In other classes of suits the courts have not been so unanimous; sometimes they have yielded to the general tendency of equity, which seeks to determine all disputes concerning the same subject-matter in one litigation, and have

[1] Lord Cholmondeley *v.* Lord Clinton, 2 Jac. & W. 1, 135, 4 Bligh, 1, s. c. T. & R. 107, 115; Fulham *v.* McCarthy, 1 H. L. Cases, 703; Saumarez *v.* Saumarez, 4 M. & C. 336; Robertson *v.* Southgate, 6 Hare, 536; Bill *v.* Cureton, 2 M. & K. 503; Jopp *v.* Wood, 2 De G., J. & S. 323; Griggs *v.* Staplee, 2 De G. & S. 572; Newcomb *v.* Horton, 18 Wis. 566; Gates *v.* Boomer, 17 Wis. 455; Crocker *v.* Craig, 46 Me. 327; Fletcher *v.* Holmes, 40 Me. 364.

[2] Jacob *v.* Lucas, 1 Beav. 436, 443; Griffith *v.* Vanheythuysen, 9 Hare, 85.

[3] Miles *v.* Durnford, 2 De G., M. & G. 641; Carter *v.* Sanders, 2 Drew, 248; Foulkes *v.* Davies, L. R. 7 Eq. 42.

[4] [Troxel *v.* Thomas (1900), 155 Ind. 519, 58 N. E. 725: Miller and Troxel made a note to Freeze for $400, which Troxel for a consideration agreed to pay, said note being secured by mortgage on certain property. Thomas purchased the property and gave Troxel his note for $400, payable when Troxel should pay off the $400 due Freeze. Freeze foreclosed and took judgment against Miller and Troxel for $560. Thomas, to protect his interest in the property, purchased the judgment. Miller was thus liable to Thomas on the judgment, and hence was interested in having the amount of Thomas's note to Troxel applied on the judgment; and Thomas, having himself paid the judgment which Troxel was liable for, was interested to have the amount of his note to Troxel applied on the judgment and the note cancelled. *Held*, that Miller and Thomas had sufficient common interest to join in a suit to have the amount of the note held by Troxel applied on the judgment and the note cancelled.]

therefore permitted the union; at other times they have been controlled by the fact that there was no real legal community of interest among the parties, and have refused to allow the attempted joinder. As it will be impossible to deduce any general rule covering all such instances, I shall first mention and illustrate those classes of causes in which the doctrine has been established, and shall in the second place collect some examples of other classes in which there is no such unanimity of judicial decision. The most familiar and important case of persons having distinct but not conflicting interests, and in respect of whom the rule concerning their joinder as parties is well settled, is that of creditors. There are several species of actions brought by creditors, in which the various creditors of a single debtor may all unite as co-plaintiffs. Thus, the creditors of a deceased debtor may all join in the same administration suit brought to settle his estate, and to administer its assets; but this species of action is quite uncommon in the United States.[1] Such union, however, is not necessary; one may sue alone if he choose;[2] and when the number is great, one may sue on behalf of all the others.[3]

§ 181. * 267. **Case of Creditors' Suits.** The most common and important action by creditors, to which the rule may be applied, is the creditor's suit, or an action in the nature of a creditor's suit.[4] A single judgment creditor may alone maintain an action to enforce the payment of his judgment, to reach equitable assets, to set aside fraudulent transfers by his debtor and thus let in the lien of his judgment, and for other similar relief; and the other

[1] 1 Daniell's, p. 235; Cosby *v.* Wickliffe, 7 B. Mon. 120; Conro *v.* Port Henry Iron Co., 12 Barb. 27; Cheshire Iron Works *v.* Gay, 3 Gray, 531, 534, 535.

[2] Anon., 3 Atk. 572; Peacock *v.* Monk, 1 Ves. 127, 131. See Hills *v.* Sherwood, 48 Cal. 386, 392.

[3] [Gianella *v.* Bigelow (1897), 96 Wis. 185, 71 N. W. 111: In an action by creditors to enforce the liability of stockholders, which must be a proceeding in equity, all the creditors should join or one or more should sue for the benefit of all, such liability being, under the statute, a liability of all the stockholders to all the creditors. See to same effect, Van Pelt *v.* Gardner (1898), 54 Neb. 701, 75 N. W. 874; Smith *v.* Dickinson (1898), 100 Wis. 574, 76 N. W. 766.]

[4] [Doherty *v.* Holliday (1893), 137 Ind. 282, 32 N. E. 315: While it is a general rule that if a complaint assumes to state a cause of action in favor of two or more parties, and states a cause of action in favor of a part only of the parties thus joined, it is bad on demurrer, this rule does not apply to a complaint in the nature of a creditors' bill where there is a statement of the respective claims of creditors showing that each claim is several and distinct and there is no attempt to state a joint cause of action in favor of those who are named in the title.]

judgment creditors need not necessarily be joined, either as co-plaintiffs or as defendants.[1] On the other hand, two or more of the judgment creditors, or all of them together, may unite in bringing such an action,[2] or finally, one may sue on behalf of himself, and all others who are in the same position.[3] Since all the creditors have the same kind of interest in the common fund, the assets of the debtor, and since a receiver is frequently appointed over that fund, the utmost latitude is permitted in respect to the union of different creditors as co-plaintiffs. One may maintain the action alone, or may sue on behalf of himself and of all the others similarly situated, or all may join, or any number less than all may at their election institute the action. Such an action may also be brought by a receiver of the debtor's property, appointed in proceedings supplementary to execution, and he may either sue alone, or the judgment creditors, or some of them, may join with him.[4]

§ 182. *268. **All Beneficiaries under a Trust should join in a Suit to enforce it. Different Rule in Suits to overthrow a Trust.** Where an assignment has been made in trust for creditors, one of the creditor beneficiaries cannot maintain an action to enforce

[1] White's Bank of Buffalo *v.* Farthing, 101 N. Y. 344, 348.

[2] Gorrell *v.* Gates, 79 Iowa, 632; [Gamet *v.* Simmons (1897), 103 Ia. 163, 72 N. W. 444: Several judgment creditors may join in an action to set aside a fraudulent conveyance. Ferst's Sons *v.* Powers (1902), 64 S. C. 221, 41 S. E. 974: Two or more creditors may join in an action to set aside a sale of a stock of goods as a fraud upon creditors

Ellis *v.* Pullman (1894), 95 Ga. 445, 22 S. E. 568: The creditors of a mercantile corporation may unite in an equitable petition against the corporators who have misappropriated the assets.]

[3] Bartlett *v.* Drew, 57 N. Y. 587, 588, 589; Clarkson *v.* De Peyster, 3 Paige, 320; Parmelee *v.* Egan, 7 Paige, 610; Grosvenor *v.* Allen, 9 Paige, 74; Farnham *v.* Campbell, 10 Paige, 598; Way *v.* Bragaw, 1 C. E. Green, 213, 216; Egdell *v.* Haywood, 5 Atk. 357 See, especially, Conro *v.* Port Henry Iron Co., 12 Barb. 27, 57–60, per Willard J., for a full discussion of the subject, and an exhaustive citation of authorities. When the debtor is dead, a judgment creditor may bring an action to set aside a fraudulent transfer made by him. Hills *v.* Sherwood, 48 Cal. 386, 392. An attaching creditor merely cannot maintain the action. Weil *v.* Lankins, 3 Neb. 384, 386; but see, for numerous conflicting decisions on this last point, 3 Pom. Eq. Jur. § 1415.

[4] See cases cited in last preceding note; also Hamlin *v.* Wright, 23 Wis. 491; Gates *v.* Boomer, 17 Wis. 455, 458; Ruffing *v.* Tilton, 12 Ind. 259; Burton *v.* Anderson, Stanton's (Ky.) code, p. 34; Baker *v.* Bartol, 6 Cal. 483. For further illustrations see Hann *v.* Van Voorhis, 5 Hun, 425; Stewart *v.* Beale, 7 id. 405; Dewey *v.* Moyer, 9 id. 473; Fox *v.* Moyer, 54 N. Y. 125; Fort Stanwix Bank *v.* Leggett, 51 id. 552; Haines *v.* Hollister, 64 id. 1; Pierce *v.* Milwaukee Constr. Co., 38 Wis. 253; Hardy *v.* Mitchell, 67 Ind. 485; Smith *v.* Schulting, 14 Hun, 52; Green *v.* Walkill Nat. Bank, 7 id. 63; Enright *v.* Grant, 5 Utah, 334, 400.

the trust, to compel an accounting by the assignee, and to procure a settlement and distribution of the trust estate. All the creditors must unite in bringing such an action, either actually or by representation; for where the number of such creditors is great, one or more have been permitted to sue on behalf of themselves and all the others.[1] The rule thus stated in respect of creditors is simply a special case of the general doctrine applicable to every species of trust. In actions based upon the trust, recognizing its existence and validity, and seeking to carry out its terms and provisions, all the persons interested must be parties; all the beneficiaries must therefore unite in an action against the trustee brought to obtain an accounting, and a winding up and settlement of the estate, or, in technical phraseology, an action brought to administer the trust.[2] While the beneficiaries as a class must all unite, either actually or through a representative plaintiff, in actions based upon the trust as existing, and brought to administer it, one person who would be a beneficiary may, without joining any others, maintain a suit which is based upon a denial of the trust and seeks to overthrow it, and to set aside the instruments which created it, and the acts of the trustee done under it. Thus, for example, any judgment creditor may bring an action in his own name to set aside an assignment in trust for himself and the other creditors.[3]

[1] Story Eq. Pl. §§ 150, 207; Bainbridge *v.* Burton, 2 Beav. 539. In Harrison *v.* Stewardson, 2 Hare, 530, twenty creditors was held to be too small a number to allow a suit by representation. After a receiver of a national bank has been appointed, a creditor may maintain an action to establish his demand, and the bank and the receiver may both be joined as co-defendants; the appointment of the receiver does not absolutely dissolve the corporation. Green *v.* Walkill Nat. Bank, 7 Hun, 63; Nat. Pahquioque Bk. *v.* First Nat. Bk. of Bethel, 36 Conn. 325, 14 Wall. 283; Kennedy *v.* Gibson, 8 Wall. 506; Turner *v.* Bank of Keokuk, 26 Iowa, 262. In Wilhelm *v.* Byles, 60 Mich. 561, however, it was held that all the creditors are not necessary parties to a bill brought by a creditor to enforce the trust.

[2] De la Vergne *v.* Evertson, 1 Paige, 181; Greene *v.* Sisson, 2 Curtis, 171; Hawkins *v.* Craig, 1 B. Mon. 27; Elam *v.* Garrard, 25 Ga. 557; High *v.* Worley, 32 Ala. 709; Gould *v.* Hayes, 19 Ala. 438; Keeler *v.* Keeler, 3 Stockt. 458; Case *v.* Carroll, 35 N. Y. 385; Sortore *v.* Scott, 6 Lans. 271, 275; Munch *v.* Cockerell, 8 Sim. 219, 231. See French *v.* Gifford, 30 Iowa, 148, 158, 159; O'Connor *v.* Irvine, 74 Cal. 435; Barrett *v.* Brown, 86 N. E. 556.

[3] In Hubbell *v.* Medbury, 53 N. Y. 98, where an assignment had been made for the benefit of creditors, a *cestui que trust* under it and the assignor brought an action to set aside a wrongful purchase of the trust property by the assignee; the action was sustained, and it was held that a substituted trustee as the plaintiff was unnecessary. When a trustee is guilty of misconduct in his trust, by misapplying the assets, or converting the same to his own use, a single *cestui que trust* is permitted by a special statute, in Minnesota, to maintain an action for an account, and

§ 183. *269. **Joinder of Persons Owning Distinct Parcels of Land.** From the cases of creditors and *cestuis que trustent*, in respect of whom the rule is well settled, I now pass to other classes of persons having distinct, though not conflicting, interests and claims, and I collect a number of decisions which show the tendency of the courts in dealing with them. Owners of entirely distinct and separate parcels of land, although no community of right or interest existed among them, have been permitted to unite in equitable actions based upon their individual separate property, simply because the wrong to be remedied or prevented was a single act, and affected all of them and all of their lands in the same manner.[1] Thus, owners of separate tenements have been allowed to join in an action brought to restrain and remove a nuisance which was common to all.[2] Two or more owners of separate lots assessed for a local street improvement, when the assessment is claimed for the same reason to be invalid as to all, may unite in an action to restrain the

to enforce the trust, and to remove the trustee. This statute is general in its terms, and applies to all trustees and trusts. "Upon petition or bill of any person interested in the execution of an express trust, the Court of Chancery may remove any trustee who shall have violated, or threatened to violate, his trust." Compiled Stat. of Minn., p. 384, § 26; Goncelier *v.* Foret, 4 Minn. 13. See French *v.* Gifford, 30 Iowa, 148, 158, 159. In the case of a charitable trust, any beneficiary having an interest in the use or in the subject of the gift, has an unquestionable right to institute a proceeding in equity for the purpose of securing a faithful execution of the beneficent object of the founder of the charity. Bapt. Church at Lancaster *v.* Presb. Church, 18 B. Mon. 635, 641.

[1] [Different riparian owners of distinct parcels of riparian land, who have a common grievance for an injury of the same kind, inflicted at the same time and by the same acts, though the injury differs in degree as to each owner, may unite in a common action to enjoin a higher riparian owner from diverting or polluting the stream: Strobel *v.* Kerr Salt Co. (1900), 164 N. Y. 303, 58 N. E. 142. See, to the same effect, Beach *v.* Spokane Ranch Co. (1901), 25 Mont. 379, 65 Pac. 111; Brown *v.* Canal and Reservoir Co. (1899), 26 Colo. 66, 56 Pac. 183; Ronnow *v.* Delmue (1895), 23 Nev. 29, 41 Pac. 1074.]

[2] Peck *v.* Elder, 3 Sandf. 126. But six owners of distinct tracts of land through which a stream ran were not permitted to join in an action to restrain another riparian owner from diverting the water. Schultz *v.* Winter, 7 Nev. 130. See, *per contra*, Foot *v.* Bronson, 4 Lans. 47, 52, in which such a union of different owners was held proper; citing Reid *v.* Gifford, Hopk. 416; Murray *v.* Hay, 1 Barb. Ch. 59; Brady *v.* Weeks, 3 Barb. 157; and see Keyes *v.* Little York Gold, &c. Co., 53 Cal. 724; Churchill *v.* Lauer, 84 Cal. 233. Such suit may be maintained by separate owners of distinct parcels of land to restrain or remove a nuisance. Pettebone *v.* Hamilton, 40 Wis. 402; Williams *v.* Smith, 22 id. 594; Barnes *v.* Racine, 4 id. 454; First Nat. Bk. of Mt. Vernon *v.* Sarlls, 129 Ind. 201. Such separate owners cannot, however, join in an action to recover damages for the nuisance: *ante*, § *219, and note. See also Lutes *v.* Briggs, 5 Hun, 67 (illegal assessments). For a more full discussion of this subject, see 1 Pomeroy's Equity, §§ 245, 257, 258, 259, 260, 273, and cases cited.

collection; and when the number of such owners is great, one may sue as a representative for all the others.[1] Also a number of proprietors of adjacent and separate lots fronting on a street through which a railroad was laid out, were permitted to join in a suit for the purpose of preventing the company from constructing its track in such a manner as to interfere with access to all of their several lots alike.[2] The question as to the joinder of plaintiffs who own distinct parcels of land, or who are clothed with distinct primary rights of the same kind, which are all interfered with and affected in the same manner by a common wrong, has frequently arisen in actions brought by taxpayers and freeholders to prevent or set aside some proceeding done under the forms of public authority, and which is designed to create and impose a public burden, such as a tax for special objects, an assessment for some local improvement, a municipal bonding in aid of some *quasi* public enterprise, and numerous other like proceedings which create a public or municipal debt. Such actions are permitted, and are freely used in most of the States, although not allowed in New York and a few others. Where suits of this character are sustained by the courts, the question has arisen, whether two or more taxpayers having distinct freeholds, or distinct pieces of property subject to the burden, and who have no connection except in the common wrong and in the like relief demanded by all, may unite in the action, or whether one may sue on behalf of all, or finally, whether each must bring a separate suit to free his own property from the wrongful incumbrance.[3] It would seem, upon the principle of the decision last

[1] Upington *v.* Oviatt, 24 Ohio St. 232, 247; Glenn *v.* Waddell, 23 Ohio St. 605.

[2] Tate *v.* Ohio & Miss. R. Co., 10 Ind. 174. [Abutting land or lot owners may unite as plaintiffs to restrain the improper use of a street by a railroad company, and to abate the nuisance, but cannot join in a suit to recover damages: Younkin *v.* Milwaukee, etc. Co. (1901), 112 Wis. 15, 87 N. W. 861. The same doctrine was stated in Linden Land Co. *v.* Milwaukee Electric, etc. Co. (1900), 107 Wis. 493, 83 N. W. 851, where it was held, further, that one could not sue for all, and an allegation in the complaint that plaintiff does so is mere surplusage. In Utterback *v.* Meeker (1896), 16 Wash. 185, 47 Pac. 428, owners of separate parcels of land were not allowed to join in a suit to quiet title.]

[3] [Street *v.* Town of Alden (1895), 62 Minn. 160, 64 N. W. 157: An action to set aside a judgment fraudulently obtained, reversing an order of the town supervisors vacating a road running through plaintiff's farm, is properly brought by plaintiff who is one of the legal voters who petitioned for such vacating. See also McCann *v.* City of Louisville (1901), — Ky. —, 63 S. W. 446; Commonwealth *v.* Scott (1901), — Ky. —, 65 S. W. 596; Stiles *v.* City of Guthrie (1895), 3 Okla. 26, 41 Pac. 383. And see, generally, the subject of one plaintiff suing on behalf of others, *388 *et seq.*]

quoted, that such a joinder was not only proper, but was in every way expedient; but the cases have not been unanimous upon the point, and some of them have distinctly pronounced against a joint proceeding. In Wisconsin, where a number of freeholders, owning distinct lots of land, and having no connection except that they were all residents of the municipality, and whose personal property had been levied upon for the tax, and advertised for sale, united in an action to set aside the entire proceedings of the local authorities, and to procure the tax and all steps taken in relation to it to be declared void, and to restrain the sale of their property, it was held that these plaintiffs could not join in a suit merely to prevent the sale of their property because their interests were entirely several; but that they could unite in an action to avoid and set aside the proceedings of the municipal authorities, and that the court, having thus acquired jurisdiction, could go on and administer complete relief.[1] In another case, two plaintiffs owning distinct lots in severalty, and suing on behalf of all other taxpayers of the city, brought an action to set aside a local assessment and tax made and levied by the city authorities, and to restrain the sale of their lots. It was held that they could not maintain the joint action. The court said, if the tax was illegal there was an apparent cloud upon each lot, and each plaintiff was interested only in removing this cloud from his own land; each and all might be interested in the legal question involved in the suit; for if one had a right to remove the cloud and to enjoin the assessment as illegal, for the same reasons and upon the same evidence, each of the others might obtain relief: but there was no such common pecuniary interest as authorized them to unite in one suit and obtain the relief demanded; each could sue alone, and the others were not necessary parties; this was not an action respecting a common fund, nor to assert a common right, nor to restrain acts injurious to property in which all the plaintiffs had a common interest.[2] In Ohio, two or more owners of separate lots assessed for a local improvement may unite in an action to restrain the enforcement

[1] Peck *v.* Beloit Sch. Dist. No. 4, 21 Wis. 516.

[2] Barnes *v.* Beloit, 19 Wis. 93, 94, per Downer J. It is impossible to reconcile the reasoning in these two cases, or the conclusions which they reach. See also Newcomb *v.* Horton, 18 Wis. 566, which maintains the same doctrine as Barnes *v.* Beloit.

and collection, when the tax is claimed for the same reason to be invalid as to all.[1] In Kansas a distinction is made depending upon the nature of the tax itself. If the tax is wholly illegal, that is, illegal as applied to all persons and property, — as, for example, a tax to pay the interest on illegal bonds, — any number of taxpayers may unite in the action.[2] If, however, the tax is valid as a tax, — as, for example, the ordinary county or State tax, — and becomes illegal for some cause only as it applies to certain persons or property, then each person severally interested as the owner of distinct and separate lots of land must sue alone; there can be no joinder by taxpayers who have no common property.[3] In Iowa it has been recently held that taxpayers owning separate property cannot unite, nor can one sue on behalf of all others similarly situated, in an action to restrain the enforcement and collection of an illegal tax, but each must bring an action for himself.[4]

§ 184. * 270. **Miscellaneous Cases. Joinder of Holders of Separate Liens. Creditors of Corporations.** A few other miscellaneous cases of distinct interests may be mentioned. When several persons have simultaneous but entirely separate mechanic's liens upon the premises of the same person for work done and materials furnished by them, they cannot all, nor can any two or more of them, unite in an action brought to enforce and foreclose such liens under the statute.[5] Under the construction given to statutes of Ohio, making the shareholders in corporations liable in certain contingencies to the creditors of the companies, it is held that a suit should be brought by or for all the creditors who come within the conditions; that is, all these

[1] Upington *v.* Oviatt, 24 Ohio St. 232, 247; Glen *v.* Waddell, 23 Ohio St. 605.

[2] Wyandotte, etc. Bridge Co. *v.* Wyandotte, 10 Kan. 326; Gilmore *v.* Norton, 10 Kan. 491; Gilmore *v.* Fox, 10 Kan. 509.

[3] Hudson *v.* Atchison Cy. Com'rs, 12 Kan. 140, 146, 147.

[4] Fleming *v.* Mershon, 36 Iowa, 413, 416–420. The question was carefully examined with a reference to numerous decisions of equity courts. Cole J. dissented in a very able opinion containing a review of all the authorities, pp 421–427. For an extended discussion of this subject, see 1 Pom. Eq. Jur. §§ 259, 260, 265, 266, 270, and notes.

[5] Harsh *v.* Morgan, 1 Kan. 293, 298. The following are further illustrations of the same general doctrine: actions by a stockholder or the stockholders against the corporation or its managing officers; Osgood *v.* Maguire, 61 N. Y. 524; Young *v.* Drake, 8 Hun, 61; Dousman *v.* Wis., etc. Min. Co., 40 Wis. 418; Rogers *v.* Lafayette Agric. Works, 52 Ind. 296, and numerous cases cited; Tippecanoe Cy. Com'rs *v.* Lafayette, etc. R. R., 50 Ind. 85; action to remove a cloud, Pier *v.* Fond du Lac, 38 Wis. 470; action by one firm against another firm where there is a common partner, Ford *v.* Stuart Indep. Sch. Dist., 46 Iowa, 294.

creditors should actually be made plaintiffs, or the action should be in the name of one for the benefit of all.[1]

SECTION SIXTH.

WHO MAY BE JOINED AS DEFENDANTS.

§ 185. * 271. Statutory Provisions. The sections of the various State codes and practice acts which prescribe rules for the proper selection of defendants are as follows; one of them is found in all the statutes, and expresses the doctrine in its general form: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination, or settlement of the questions involved therein."[2] To this general declaration there is added in a few States the following particular clause: "And in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants, and any person claiming title or a right of possession to real estate may be made a party plaintiff or defendant, as the case may require, to any such action."[3] The codes also all contain the following provisions, either embraced in a single section or separated into two, namely: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint.[4] When the question is one of common or general interest of many persons, or when the parties are very

[1] Umsted *v.* Buskirk, 17 Ohio St. 113. One creditor may sue on behalf of all to enforce stockholders' liability for unpaid subscriptions in California: Baines *v.* Babcock (Cal., Sept. 23, 1891), 27 Pac. 674.

[2] Ohio, § 35; Kansas, § 36; Iowa, § 2547; Nebraska, § 41; Nevada, § 13; Oregon, § 380; but applied only to equitable actions; [Oklahoma, St. 1893, § 3908; Washington, Bal. Code, § 4833, in somewhat different form; Wyoming, Rev. St., 1899, § 3480; Colorado, § 11; Arkansas, Sand. & Hill's Dig., § 5630; Connecticut, Gen. St., 1902, § 618; Wisconsin, St., 1898, § 2603; Indiana, Burns' St., 1901, § 269; Kentucky, § 23.]

[3] New York, § 118 (447, 1503, 1598); South Carolina, § 141; North Carolina, § 61; California, § 379; [Utah, Rev. St., 1898, § 2914; North Dakota, Rev. Codes, 1899, § 5230; South Dakota, Ann. St., 1901, § 6078; Montana, § 581; Idaho, Code Civ. Pro., 1901, § 3167; Missouri, Rev. St. 1899, § 543.]

[4] ["If such a defendant answers and admits the allegations of the complaint, and asks the same relief as the plaintiff, he will be regarded as a plaintiff and given relief as such: Cole *v.* Getzinger (1897), 96 Wis. 559, 71 N. W. 75.]

numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." [1] Finally, a section is found in every code particularly referring to the case of persons severally liable on the same instrument, of which the ordinary form is as follows: "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff." [2]

§ 186. * 272. **Subject-Matter and Plan of Treatment herein.** The subject-matter of the present section is the interpretation of the general clauses of the statute quoted above, — the doctrine of parties defendant in its general scope and import, — the general rules which prescribe the choice and direct the joinder of defendants in civil actions of all kinds, whether legal or equitable. The special cases described in the other clauses of the statute, — namely, that of one person suing or being sued as the repre-

[1] These provisions are thus found as a single section in New York, § 119 (448); California, § 382; South Carolina, § 142; North Carolina, § 62; Nevada, § 14 (see page 81, *supra*, note 2); Oregon, § 381; [Utah, Rev. St., 1898, § 2917; North Dakota, Rev. Codes, 1899, § 5232; South Dakota, Ann. St., 1901, § 6079; Arizona, Rev. St., 1901, § 1313; Montana, § 584; Idaho, Code Civ. Pro., 1901, § 3170; Colorado, § 12; Indiana, Burns' St., 1901, § 270; Wisconsin, St., 1898, § 2604.] In the following States they are separated into two sections, corresponding to the two paragraphs of the text: Ohio, §§ 36, 37; Kansas, §§ 37, 38; Iowa, §§ 2548, 2549; [Nebraska, §§ 42, 43; Kentucky, §§ 24, 25; Oklahoma, St., 1893, §§ 3909, 3910; Washington, Bal. Code, §§ 4833, 4834; Wyoming, Rev. St., 1899, §§ 3481, 3482; Arkansas Sand. & Hill's Dig., §§ 5631, 5632; Connecticut, Gen. St., 1902, §§ 617, 619.] The Missouri code contains only the first paragraph, Rev. St., 1899, § 544.

[2] New York, § 120 (454); Kansas, § 39; Nebraska, § 44; Ohio, § 38; Oregon, § 36; South Carolina, § 143; North Carolina, § 63; Nevada, § 15; [Minnesota, St., 1894, § 5166, "and sureties on the same instrument;" Utah, Rev. St., 1898, § 2918; North Dakota, Rev. Codes, 1899, § 5223, in somewhat different form; South Dakota, Ann. St., 1901, § 6080, same form as in North Dakota; Arizona, Rev. St., 1901, § 1306, in somewhat different form; Oklahoma, St., 1893, § 3911; Washington, Bal. Code, § 4836; Montana, § 585; Idaho, Code Civ. Pro., 1901, § 3171; Wyoming, Rev. St., 1899, § 3483; Colorado, § 13; Indiana, Burns' St., 1901, § 271; Wisconsin, St., 1898, § 2609.] In California, § 383, is the same, adding, "and sureties on the same or separate instruments," after the words "promissory notes." For the corresponding sections in the codes of Kentucky, Iowa, and Missouri, see *infra*, § * 403. In these codes the change in the common-law doctrine is carried to a much greater length; the distinctions between joint, joint and several, and several liabilities are utterly abrogated. The same radical change is made in North Carolina. "§ 63 *a*. In all cases of joint contract of co-partners in trade or others, suits may be brought and prosecuted on the same against all or any number of the persons making such contract." Placing "co-partners" in the same position as "joint tenants" and "tenants in common," is a very strange provision, and was doubtless an oversight.

sentative of others, and that of persons severally liable upon the same instrument — will be separately discussed in the two sections which follow the present one.

§ 187. * 286. **Intent and Object of Legislation. Principle of Construction. Conclusions Reached in Preceding Section Adopted and Repeated here. Changes Made should apply to all Actions. Position of Courts.** What is the general intent and object of the legislation in reference to parties defendant, taken as a whole? What principle of construction should be adopted in arriving at the practical meaning and effect of the various provisions of the State codes already quoted? These questions, which are certainly fundamental, were thoroughly discussed in the last section, and a reiteration of the reasoning there presented would be entirely useless. It cannot be doubted that the legislature proposed to itself the same object, and was actuated by the same intent, in the rules which it has prescribed for defendants as in those which it has adopted for plaintiffs. I dwell upon the fact, which is apparent upon the most cursory reading, that the clauses concerning defendants are more full and detailed, and more clearly set forth the equitable doctrines, than those concerning plaintiffs. This fact is very obvious when we refer to the subsequent sections of the codes defining the forms of judgments, and authorizing a severance among the parties in rendering judgment, and also when we refer to the special provisions in many codes which utterly abolish the ancient legal distinctions between joint, joint and several, and several liabilities. The conclusions reached in the preceding section, and repeated here, are the following: The legislature does not seem to have intended to abandon the ancient doctrine in respect to joint and several *rights;* and, in fact, the complete adoption of the equitable principles which regulate the union of parties would not require such a change, for in equity, as well as in law, all persons having a joint right must in general unite in a suit to enforce that right. The legislature, on the other hand, does seem to have intended to effect a change more or less thorough in the common-law rules which determine the differences between joint, joint and several, and several liabilities, and which regulate the selection and union of defendants in the case of one or the other of these liabilities. This intent, sufficiently indicated in all the codes, is placed beyond a doubt by the express provisions of others. The general conclusions

of the discussion concerning plaintiffs, found in the last preceding section, are equally true of parties defendant. Believing them to be a correct interpretation of the codes, I adopt them here without any unnecessary repetition of the reasoning by which they were established.[1] The rules which the legislatures have put into a statutory form are confessedly the general doctrines of equity concerning defendants.[2] They apply in terms to the civil action appropriate for the pursuit of all remedies; no exceptions are made or suggested. The design of the legislature is therefore plain, that these equitable doctrines and rules should be controlling in all cases, and should not be confined to actions which are equitable in their nature. It must be confessed at once, however, that this conclusion has not been accepted by all the courts, nor in its full extent, perhaps, by any. The general expressions of the codes, although their main design is evident enough, have not been regarded as sufficiently explicit, detailed, and peremptory to abrogate and sweep away all of the long-settled particular rules of the former system. In other words, the change, as it has been wrought out by judicial decision, has been made partial and incomplete, and has been far more radical and perfect in certain of the States than in others. It is impossible to lay down in an explicit manner any more definite principle of interpretation than that here given. The actual position of the courts must be learned from their decision of particular cases, and from the special rules concerning defendants in various classes of actions which have been established by them, and which will be detailed in the following portions of this section.[3]

[1] See *supra*, §§ *196–*200.

[2] [In Demarest *v.* Holdeman (1901), 157 Ind. 467, 62 N. E. 17, it was said that the section of the code providing that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved, is substantially a re-enactment of the rules governing pleadings in chancery, and they apply to all suits at law as well as in equity. And "where the subject of the action has become so complicated and entangled that the rights of the parties are involved in doubt, and it is difficult to determine who is liable, and who is not, except upon a full hearing in which all the persons in any way affected or interested are before the court, equity permits the joinder of all those so related to the controversy, and who have a common interest in some one or more branches of it."]

[3] The general theory of the codes, and the principles of the new procedure in respect of parties defendant, are discussed with more or less fulness in the following cases: Wilson *v.* Castro, 31 Cal. 420; Bowers *v.* Keesecher, 9 Iowa, 422; Nelson *v.* Hart, 8 Ind. 293; Braxton *v.* State, 25 Ind. 82; Tinkum *v.* O'Neale, 5 Nev. 93;

Particular Rules and Doctrines.

§ 188. *287. **How take Advantage of Nonjoinder of Defendants. Waiver. Power of Court herein.** Before proceeding to the examination in detail of the particular rules and doctrines as to defendants, which have been established by judicial decision, I shall inquire how the questions may be raised in the progress of an action; when the objection of a misjoinder or a nonjoinder is waived; and what is the effect of such an error in the proceedings, if properly brought before the court for adjudication. I have already quoted and discussed the statutory provisions which prescribe the modes of raising the questions in reference to plaintiffs;[1] and the same rules exist in the case of defendants, for the language of the codes in defining these methods applies alike to both parties.[2] It was shown, in the paragraphs referred to, that "defect" of parties refers solely to the *non*-joinder of the proper plaintiffs or defendants, — to the fact of too *few* parties. This construction is universal.[3] It is settled by an overwhelming and unanimous array of authorities, (1) that if the defect of parties defendant — as thus defined — appears on the face of the complaint or petition, the defendant who desires to raise the question must demur upon that specific ground, an allegation of the defect in the answer as a defence being nugatory; (2) when the defect does not thus appear on the face of the plaintiff's pleading, the defendant must raise the objection in his answer as a defence; and, (3) if both of these methods are omitted, or if one of them is employed when the other is proper, the defendant waives all objection to the defect or nonjoinder.[4] In no case can

Smetters *v.* Rainey, 14 Ohio St. 287, 291; Union Bank *v.* Bell, 14 Ohio St. 200, 211. Where a demand exists in favor of a firm, and one partner refuses to join as a plaintiff, he may be made a defendant in an ordinary legal action brought by his copartners to recover the debt. Hill *v.* Marsh, 46 Ind. 218. This ruling, in my opinion, exhibits the true intent of the codes in the clearest possible manner.

[1] See *supra*, §§ *206, *207.

[2] See the citations from the codes, and the cases collected *supra*, §§ *206, *207; Hill *v.* Marsh, 46 Ind. 218; Mornan *v.* Carroll, 35 Iowa, 22, 24, 25; Beckwith *v.* Dargels, 18 Iowa, 303; Sioux City Sch. Dist. Tp. *v.* Pratt, 17 Iowa, 16; Byers *v.* Rodabaugh, 17 Iowa, 53.

[3] Ibid.; Truesdale *v.* Rhodes, 26 Wis. 215, 219, 220. Read *v.* Sang, 21 Wis. 678, laid down a different rule, but the Wisconsin court is now in harmony with those of all the other States. See also Marsh *v.* Waupaca Cy. Sup., 38 Wis. 250; Great W. Compound Co. *v.* Ætna Ins. Co., 40 id. 373.

[4] Bevier *v.* Dillingham, 18 Wis. 529; Burhop *v.* Milwaukee, 18 Wis. 431; Cord *v.* Hirsch, 17 Wis. 403; Carney *v.* La Cross, etc. R. Co., 15 Wis. 503; Lowry *v.* Harris, 12 Minn. 255; Mitchell *v.* Bank of St. Paul, 7 Minn. 252; Carr *v.* Waldron, 44 Mo. 393; Makepeace *v.* Davis, 27 Ind.

this objection be raised by a demurrer on the ground that the pleading does not state facts sufficient to constitute a cause of action.[1] Although this rule is so firmly settled, yet if, on the trial, or even on appeal, the court sees that other parties are indispensable to a full determination of the questions at issue, it may, on its own motion, even though the defect has not been pointed out by answer or demurrer, order the additional parties to be brought in.[2] This power is expressly given by all the

352; Little *v.* Johnson, 26 Ind. 170; Johnson *v.* Britton, 23 Ind. 105; Shane *v.* Lowry, 48 Ind. 205, 206; Strong *v.* Downing, 34 Ind. 300; Turner *v.* First National Bank, 26 Iowa, 562; Hosley *v.* Black, 28 N. Y. 438; Kingsland *v.* Braisted, 2 Lans. 17; Sager *v.* Nichols, 1 Daly, 1; Bridge *v.* Payson, 5 Sandf. 210; Lewis *v.* Williams, 3 Minn. 151; Hier *v.* Staples, 51 N. Y. 136; Fort Stanwix Bank *v.* Leggett, 51 N. Y. 552; Potter *v.* Ellice, 48 N. Y. 321; Pavisich *v.* Bean, 48 Cal. 364; Rutenberg *v.* Main, 47 Cal. 213; Gillam *v.* Sigman, 29 Cal. 637. See, however, Muir *v.* Gibson, 8 Ind. 187; Shaver *v.* Brainard, 29 Barb. 25. Also, Hardy *v.* Miller, 11 Neb. 395; Black *v.* Duncan, 60 Ind. 522; Gilbert *v.* Allen, 57 Ind. 524; Hardee *v.* Hall, 12 Bush, 327; Ross *v.* Linder, 12 S. C. 592; [Beach *v.* Spokane Ranch Co. (1901), 25 Mont 379, 65 Pac. 111; Coddington *v.* Canaday (1901), 157 Ind. 243, 61 N. E. 567; Wyman *v.* Herard (1899), 9 Okla. 35, 59 Pac. 1009.

Unless the objection of defect of parties defendant is made before trial, it is waived: Thurston *v.* Thurston (1894), 58 Minn. 279, 59 N. W. 1017; Bignold *v.* Carr (1901), 24 Wash. 413, 64 Pac. 519. Where the case was tried without the objection being made, it was waived: Lawrence *v.* Congregational Church (1900), 164 N. Y. 115, 58 N. E. 24; Bower *v.* Cassels (1900), 59 Neb. 620, 81 N. W. 622. The objection of defect of parties defendant must be made by answer or demurrer or it is waived: Henderson *v.* Turngren (1894), 9 Utah, 432, 35 Pac. 495; Ayres *v.* Duggan (1899), 57 Neb. 750, 78 N. W. 296; Fitzgerald *v.* Fitzgerald, etc. Co. (1895), 44 Neb. 463, 62 N. W. 899. The question cannot be raised by a motion for a nonsuit: Fourth Nat. Bank *v.* Mayer (1896), 100 Ga. 87, 26 S. E. 83; Shull *v.* Caughman (1898), 54 S. C. 203, 32 S. E. 301; nor by objection to testimony at the trial: Dickerson *v.* Spokane (1901), 26 Wash. 292, 66 Pac. 381; Greene *v.* Finnell (1900), 22 Wash. 186, 60 Pac. 144; nor by an affirmative defence setting up a novation: Scott *v.* Hallock (1897), 16 Wash. 439, 47 Pac. 968.

In State *ex rel.* *v.* Metschan (1896), 32 Ore. 372, 46 Pac. 791, the court said: "At common law a demurrer for want of necessary parties defendant was required to point out, either by name or in some other definite way, from the facts stated in the bill, those who should have been, and were not, made parties to the suit, so as to enable the plaintiff to obviate the objection by bringing them in; and this rule has not been abrogated by the provisions of the code." And in Jaeger *v.* Sunde (1897), 70 Minn. 356, 73 N. W. 171, the court said: "Under the code, as under the old chancery practice, a demurrer for defect of parties defendant is bad if it does not in some suitable manner point out the persons who ought to be made defendants."]

[1] Leedy *v.* Nash, 67 Ind. 311.

[2] [An important case dealing with the question of waiving defects of parties defendant, has very recently been decided by the New York Court of Appeals. Steinbach *v.* Prudential Ins. Co. (1902), 172 N. Y. 471, 65 N. E. 281. One Fehrman was indebted to the plaintiff, and to secure the debt a policy of insurance was taken out in the defendant company upon the life of said Fehrman, the plaintiff agreeing to pay the premiums in consideration of the policy being made payable to her. Plaintiff paid the premiums under the alleged representations by defendant that she was the beneficiary of the policy, and she did not know until after the death

codes, and was a familiar doctrine of the equity procedure. The language of the statutes is certainly broad enough to permit the exercise of this power in legal as well as in equitable actions;

of Fehrman that said policy was not payable to her by its terms. She therefore brought action against the company to have the policy reformed so as to substitute her in place of the estate of the deceased as beneficiary of the policy, and for judgment on the policy as reformed. The personal representatives of Fehrman were not joined as defendants. The company did not raise the question of nonjoinder by answer or demurrer, but at the close of the evidence, on the trial, moved the court to dismiss the complaint by reason of the defect of parties defendant. The motion was denied and defendant excepted. After affirmance by the Appellate Division, two of the justices dissenting, the defendant came to the Court of Appeals.

The court, by Vann, J., said: "By the judgments below the names of the beneficiaries in a policy of life insurance were stricken out and the name of a stranger substituted as sole beneficiary without making the former parties to the action or giving them an opportunity to be heard. This has been done upon the ground that the insurance company, which is the sole defendant, waived the objection that there was a defect of parties defendant by not taking it either by demurrer or answer as provided by section 499 of the Code of Civil Procedure. That section, however, must be read in connection with section 452, which provides that 'The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in.' The apparent inconsistency between these sections was the subject of controversy before the courts for a long time, but we think it was dispelled by the judgment in Osterhoudt *v.* Board of Supervisors of the County of Ulster (98 N. Y. 239, 243). . . . In reversing the judgment in favor of the taxpayers we said: 'Construing sections 452 and 499 together, their meaning is that a defendant, by omitting to take the objection that there is a defect of parties by demurrer or answer, waives on his part any objection to the granting of relief on that ground, but when the granting of relief against him would prejudice the rights of others, and their rights cannot be saved by the judgment and the controversy cannot be completely determined without their presence, the court must direct them to be made parties before proceeding to judgment.' . . . A complete determination of a controversy cannot be had where there are persons, not parties, whose rights must be determined, in form at least, at the same time that the rights of the parties to the action are determined according to the policy under consideration, as it was written, the personal representatives of Mr. Fehrman are entitled to the proceeds, yet the judgment below, rendered without notice to them, takes the policy away from them and gives it to the plaintiff. They had a material interest in the subject-matter of the action, yet they were deprived of it without an opportunity to be heard and were cast in judgment without being sued. While they are not bound by the judgment which does all this in form, still the determination of the controversy is necessarily incomplete because they are not bound. . . . The personal representatives of Fehrman were necessary parties and the court should have dismissed the complaint unless within a reasonable time they were brought in, not necessarily for the protection of the defendant, as it had neglected its rights, but for their own protection, as well as the seemly and orderly administration of justice."

A dissenting opinion was written by Haight, J., in which two justices concurred, holding that the opinion of the court practically annulled section 499 of the Code of Civil Procedure.

See Hannegan *v.* Roth (1896), 12 Wash. 695, 44 Pac. 256, where it was held that the complaint would not be dismissed, but would be retained until the necessary parties should be brought in.]

but, practically, the courts confine its operation to the latter class.[1] When the defendant sets up in his *answer* the defence of nonjoinder, he must state the names and places of residence of the other persons whom he alleges to be necessary defendants. This old rule of the common-law pleading has not been altered by the new legislation.[2]

§ 189. * 288. **Consequences of Nonjoinder of Defendants.** The foregoing being the methods of raising the questions as to a defect of parties defendant, the inquiry arises, What is the effect of such defect when established in either of these methods? If, upon demurrer, it is held that the plaintiff has failed to unite all the necessary defendants, he will be permitted to amend, as a matter of course, upon the terms as to costs prescribed by the practice. When the defence is set up in the answer, the same opportunity is given to the plaintiff to amend, and to reconstruct his action. If the defect is not removed in this manner, it will certainly defeat any *legal* action, although not necessarily, perhaps, an equitable one. Undoubtedly, the codes, adopting the doctrine of equity tribunals, and extending it to all cases, permit the court in its discretion to retain the cause, under such circumstances, until the other necessary parties are brought in, instead of dismissing it altogether. It is plain that the language of the statutes is general, and embraces all species of actions, no exception being expressed or intimated; and there can be no pretence that it is not as practicable and as easy to deal with legal actions in this manner as with equitable suits. Practically, however, the authority thus given to the courts is restricted to equitable actions, while legal actions are disposed of in the same manner and by the same rules as before the reformed system was

[1] As illustrations, see Muir *v.* Gibson, 8 Ind. 187; Shaver *v.* Brainard, 29 Barb. 25; O'Connor *v.* Irvine, 74 Cal. 435, 443, where it was held that the failure of the court on its own motion to order necessary parties brought in, although the defendants omitted to raise an objection of defect of parties by demurrer or answer, was fatal to the judgment. See also Osterhoudt *v.* Ulster Cy. Sup., 98 N. Y. 239; Pirsson *v.* Gillespie (Supreme, 1889), 4 N.Y. Suppl. 691; O'Fallon *v.* Clopton, 89 Mo. 284.

[2] Kingsland *v.* Braisted, 2 Lans. 17; Schwartz *v.* Wechler (Com. Pl. 1892), 20 N. Y. S. 861. Where such an answer was defective in certain particulars, although it conveyed the information needed, and all the requisites of the defence were proved on the trial, the defect was held cured. Wooster *v.* Chamberlin, 28 Barb. 602. It has been held in Indiana that a demurrer to the complaint, on the ground of a nonjoinder of defendants, must also show who ought to have been added as defendants, and that, failing to do so, it will be overruled. Willett *v.* Porter, 42 Ind. 250, 254; Nicholson *v.* Louisville, etc. Ry. Co., 55 Ind. 504.

adopted, — that is, the nonjoinder of a necessary defendant, when not cured by amendment, defeats *that* action, although it does not destroy the cause of action. It may be instructive to compare these results with the provisions of the new English procedure, which declare that under no circumstances shall a cause be defeated or dismissed on account either of a nonjoinder or of a misjoinder of parties.[1]

§ 190. * 289. **Misjoinder of Defendants. Two Cases herein. Two Aspects of True Case of Technical Misjoinder.** I pass now to the misjoinder or improper uniting of defendants.[2] Two cases present themselves which might perhaps be regarded as falling under this head: namely, (1) Where *all* of the defendants are improperly sued; and, (2) Where one or more are properly sued, and the others are improperly joined with them. The latter only is a true case of technical "misjoinder." The first is the ordinary case of an action entirely misconceived, and the complaint or petition failing to disclose any ground for relief, so that all the defendants jointly or each of them separately, according to the circumstances, might either demur for want of sufficient facts, or move to dismiss the action on the trial. Such a case does not fall within the special rules of procedure which relate to *parties*, but is to be determined by the general doctrines of the law defining rights and liabilities. The second of the two cases just described does come within the subject-matter of parties defendant, and is to be considered under two aspects, which give rise to two very different classes of questions. These two aspects are the following: It being supposed that one or more defendants, whom I will call A., are properly sued, and that one or more others, whom I will call B., are improperly joined in the action, the matters for consideration which can possibly arise from these facts are: (1) How shall the proper defendants, A., take advantage of the error, and what effect (if any) will it have

[1] The "Supreme Court of Judicature Act" of 1873; Schedule, Rule 9. [See also Steinbach *v.* Prudential Ins. Co. (1902), 172 N. Y. 471, 65 N. E. 281; Hannegan *v.* Roth (1896), 12 Wash. 695, 44 Pac. 256.]

[2] The admirable rule is adopted in North Carolina that a *mis*-joinder of parties, either plaintiffs or defendants, shall never defeat *any* action. If plaintiffs are improperly united, the defendant shall have judgment against them for costs; if defendants, they may disclaim and have their costs against the plaintiff. This is carrying out the true spirit of the reform; it fully sustains the theoretical position taken in the text, and might well be followed in all the States. Green *v.* Green, 69 N. C. 294, 298.

upon their rights? and, (2) How shall the improper defendants, B., raise the objection, and what effect (if any) will the error have upon their rights? It is plain that these two sets of defendants occupy very dissimilar positions in the action; that their rights are very different, and that while the latter are entitled to full relief, the former may not be in the least injured or affected by the misjoinder. Much confusion in practice has resulted from the neglect to distinguish between these two cases.

§ 191. * 290. **Situation of Defendants properly Sued. Change in Common-Law Rule herein. Doctrine Established by the Cases.** Proceeding to the discussion of these two cases separately, I shall state the rules established in respect to the first of them, and shall illustrate by a striking example the extent to which the common-law doctrines have been changed by the reformed procedure. When a legal action is brought against two or more defendants upon an alleged *joint* liability, even though based upon a *joint contract*, and one or more of them are, so far as they are individually concerned, properly sued, but the others are improperly united, the defendants properly sued have no cause of complaint whatsoever, in any form, on account of the misjoinder; they cannot demur or answer for defect of parties, because there is no "defect;" they cannot demur generally for want of sufficient facts, because sufficient facts are averred as against them; they cannot demur or answer on account of this *misjoinder*, because that particular ground of objection is not provided for by the codes.[1] If on the trial the cause of action is

[1] An exception must, of course, be made of those codes which expressly provide, as a distinct cause of demurrer or defence, the *misjoinder* of parties, — namely, Missouri, California, [also New York, Nevada, Colorado, Idaho, Montana, Utah, and Wyoming. See § *206, *ante*, note. See O'Brien *v.* Fitzgerald (1894), 143 N. Y. 143, 38 N. E. 371.

See, however, Gardner *v.* Samuels (1897), 116 Cal. 84, 47 Pac. 935, a case decided under a code making misjoinder of parties a cause for demurrer. The court said: "The complaint sufficiently states a cause of action against the defendant Samuels. It is urged by the respondent, however, that the demurrer of Samuels was properly sustained by reason of the misjoinder of Morris with him as co-defendant. The provision authorizing a demurrer for the misjoinder of parties defendant is taken from the system of equity pleading which formerly prevailed. Under that system such demurrer could be interposed only by the party who was improperly made a defendant. The defendant against whom there was a sufficient complaint could not object that others who had no interest in the subject-matter of this suit were made defendants, unless it also appeared that his interests were affected thereby. This ground of demurrer is authorized by the code of Missouri, and it is held in that State that the former rule in equity is to be followed. (Ashby *v.* Winston, 26 Mo. 210.)" See also Ruffatti *v.* Lexington Mining Co. (1894), 10 Utah, 386, 37 Pac.

proved against *them*, but none against them *and the others*, still the plaintiff will not be absolutely nonsuited; he will recover his judgment against them according to the right of action established by the proof; while as against the other defendants he will fail, and will be nonsuited, or his complaint be dismissed. This result of the reform legislation is a very great departure from the former practice. At the common law, if a plaintiff alleged a *joint* cause of action against two or more defendants, and failed to prove the case as set out in his pleading, he was defeated as to all; he could not recover against a part and fail as to the others. The interpretation of the codes, as thus stated, is based partly upon the sections already quoted in relation to defendants, and partly upon other sections — to be fully discussed hereafter — in relation to the form and manner of recovery and entry of judgments. By combining these various provisions, and by a construction of them in accordance with their plain spirit and meaning, the courts have deduced the rules here given. To those defendants who are sued in a legal action, even though upon an alleged joint liability, and who are actually liable upon the contract or other cause of action averred, the fact that other persons are also added as co-defendants, however improperly, is no defence, is no answer to the action in any manner or form. This doctrine is fully established by the cases collected in the foot-note, and in many others which it is unnecessary to cite.[1]

591, holding that one defendant cannot complain that another is joined who is not bound.]

[1] [Jackson *v.* McAuley (1895), 13 Wash. 298, 43 Pac. 41; Lull *v.* Anamosa Nat. Bank (1900), 110 Ia. 537, 81 N. W. 784; Curran *v.* Stein (1901), — Ky. —, 60 S. W. 839; Hassler *v.* Hefele (1898), 151 Ind. 391, 50 N. E. 361; Ruffatti *v.* Lexington Mining Co. (1894), 10 Utah, 386, 37 Pac. 591; Bunnell *v.* Berlin Iron Bridge Co. (1895), 66 Conn. 24, 33 Atl. 533; Knatz *v.* Wise (1895), 16 Mont. 555, 41 Pac. 710; North Hudson Bldg. & Loan Assn. *v.* Childs (1893), 86 Wis. 292, 56 N. W. 870; Empire Canal Co. *v.* Rio Grande County (1895), 21 Colo. 244, 40 Pac. 449; Harrison *v.* McCormick (1898), 122 Cal. 651, 55 Pac. 592: Where an action is brought jointly against three partners, and the statute of limitations has run in favor of one of them, the action against the other two is not affected thereby.] McIntosh *v.* Ensign, 28 N. Y. 169, 172, — see also, per Emmott J., pp. 174, 175; Brumskill *v.* James, 11 N. Y. 294; Marquat *v.* Marquat, 12 N.Y. 336; Harrington *v.* Higham, 15 Barb. 524; Parker *v.* Jackson, 16 Barb. 33; N. Y. & N. H. R. Co. *v.* Schuyler, 17 N. Y. 592; Coakley *v.* Chamberlain, 8 Abb. Pr. N. S. 37; Fort Stanwix Bank *v.* Leggett, 51 N. Y. 552; Truesdell *v.* Rhodes, 26 Wis. 215, 219, 220; McGonigal *v.* Colter, 32 Wis. 614; Willard *v.* Reas, 26 Wis. 540, 544; Alnutt *v.* Leper, 48 Mo. 319; Brown *v.* Woods, 48 Mo. 330; Rutenberg *v.* Main, 47 Cal. 213, 221; Aucker *v.* Adams, 23 Ohio St. 543, 548–550; Lampkin *v.* Chisom, 10 Ohio St. 450. See also cases cited, *infra*, under § *291 of the text in reference to the remedy by *those who*

The rule being thus established in the extreme case of legal actions alleging a joint liability upon contract, it is of course equally true in all other legal actions based upon a liability which at the common law was several, and in which the misjoinder of some defendants would have been no defence as to those properly sued, — as, for example, in actions for torts. *A fortiori* does the same doctrine apply in all equitable actions. Under the former system, the improper uniting of co-defendants was never a sufficient ground for preventing a decree against those who were properly made parties if the suit was in equity.[1]

§ 192. * 291. **How Question of Misjoinder may be raised by Defendants improperly joined. Demurrer Interposed by Whom. Waiver herein.** The situation of those parties improperly joined as co-defendants is, of course, very different from that just described. The very statement of the case assumes that the action is wrongly brought as against them; that, either as disclosed by the allegations of the plaintiff's pleading, or as discovered by the evidence on the trial, no cause of action exists against them, notwithstanding the one which exists against their co-defendants. If, therefore, in such a case, it appears on the face of the complaint or petition that one or more persons have been improperly made defendants, such persons may present the objection by a demurrer, not on the ground of a "defect" of parties, but on the ground that the plaintiff's pleading does not state facts sufficient to constitute a cause of action against them.[2] This demurrer must be interposed only by those defendants who are wrongly sued, *and not by all the defendants jointly*, since, if two or more demur jointly, and as to a portion of them there is

are improperly joined. See also Territory *v.* Hildebrand, 2 Mont. 426; White Oak Dist. Tp. *v.* Oskaloosa Dist. Tp., 44 Iowa, 512; Littell *v.* Sayre, 7 Hun, 485; Stafford *v.* Nutt, 51 Ind. 535; Murray *v.* Ebright, 50 id. 362; Erwin *v.* Scotten, 40 id. 389; Carmien *v.* Whitaker, 36 id. 509; Graham *v.* Henderson, 35 id. 195; Crews *v.* Lackland, 67 Mo. 619; Ryan *v.* State Bank, 10 Neb. 524; Hubbard *v.* Gurney, 64 N. Y. 457; Blackburn *v.* Sweet, 38 Wis. 578; Pierson *v.* Fuhrmann (Colo. App 1891), 27 Pac. 1015; Emry *v.* Parker, 111 N. C. 261. But see Curry *v.* Roundtree, 51 Cal. 181.

[1] See N. Y. & N. H. R. Co. *v.* Schuyler, 17 N. Y. 592.

[2] [See Gardner *v.* Samuels (1897), 116 Cal. 84, 47 Pac. 935, where a demurrer for misjoinder was held proper, under the statute. But it was said that a demurrer couched in the words of the statute would not be sufficient; "but a demurring party by designating the defendants who were improperly joined with him, sufficiently calls the plaintiffs' attention to his objection to the complaint." But see also Plankinton *v.* Hildebrand (1895), 89 Wis. 209, 61 N. W. 839.]

no cause for the demurrer, it must fail as to all.[1] The safer practice is, therefore, for each defendant who claims that he is improperly joined, to demur separately and individually from the others. This particular ground of objection is not waived by a neglect to demur, as it is expressly provided in all the codes that the defendant may at the trial interpose the same objection to the plaintiff's recovery, even though he has failed to allege it on the record.[2] If the absence of a cause of action does not appear on the face of the plaintiff's pleading, the defence may be set up in the *separate* answer or answers of the parties who rely upon it. Finally, whatever be the completeness or defect of the allegations made by the plaintiff and of the issues raised in the answers of the defendants, if on the trial the evidence fails to establish a cause of action against some portion of the defendants, and it thus appears that they had been wrongfully proceeded against in the action, the plaintiff will be nonsuited, or his complaint or petition dismissed as to them, and his recovery will be limited to the others against whom a cause of action is made out. The foregoing rules are sustained by the cases with almost absolute unanimity.[3] These are the more regular and formal modes

[1] Lowry *v.* Jackson, 27 S. C. 318.

[2] [But see Boland *v.* Ross (1893), 120 Mo. 208, 25 S. W. 524, where it was held that although the petition for an accounting stated no grounds for equitable relief against the defendant M, yet inasmuch as he failed to avail himself of that fact and did not demur on the ground of misjoinder, but answered to the merits after other defendants had answered and filed their cross-bills against him, the court did not lose jurisdiction over him under the cross-bills by dismissing the complaint as to him. He was deemed to have waived by his pleadings all questions as to jurisdiction and to have voluntarily submitted his rights to the court.]

[3] [Dobbs *v.* Purington (1902), 136 Cal. 70, 68 Pac. 323; Bunce *v.* Pratt (1893), 56 Minn. 8, 57 N. W. 160; Sutherland *v.* Holliday (1902), — Neb. —, 90 N. W. 937; Ruffatti *v.* Lexington Mining Co (1894), 10 Utah, 386, 37 Pac. 591; Hassler *v.* Hefele (1898), 151 Ind. 391, 50 N. E. 361; Curran *v.* Stein (1901), — Ky. —, 60 S. W. 839; Lull *v.* Anamosa Nat. Bank (1900), 110 Ia. 537, 81 N. W. 784; Bailey Loan Co. *v.* Hall (1895), 110 Cal. 490, 42 Pac. 962]; Young *v.* N. Y., etc. Steamship Co., 10 Abb. Pr. 229; Mitchell *v.* Bank of St. Paul, 7 Minn. 252, 256; Nichols *v.* Randall, 5 Minn. 304; Seager *v.* Burns, 4 Minn. 141; Lewis *v.* Williams, 3 Minn. 151; Makepeace *v.* Davis, 27 Ind. 352, 355; McGonigal *v.* Colter, 32 Wis. 614; Webster *v.* Tibbitts, 19 Wis. 438; Truesdell *v.* Rhodes, 26 Wis. 215, 219, 220; Willard *v.* Reas, 26 Wis. 540, 544; Rutenberg *v.* Main, 47 Cal. 213, 221. See also Gruhn *v.* Stanley, 92 Cal. 86. See, however, *per contra*, Wood *v.* Olney, 7 Nev. 109, which holds that, when a joint demurrer by defendants is good as to some and bad as to the others, it will not be overruled as to all; it will be sustained as to those who had a good cause of demurrer, and overruled only as to the others. In Missouri, where a *misjoinder* is made a cause of demurrer, it is held the objection must be set up by *those who are thus improperly joined*, and not by the others. If the others unite in the demurrer, it will be overruled as to them. Brown *v.* Woods, 48 Mo. 330; Alnutt *v.* Leper, 48 Mo. 315.

of raising the questions as to misjoinder by those defendants who are thus wrongfully made parties to a suit; but there undoubtedly may be cases in which the court will proceed in a more summary manner, and will strike off the name of a party on his mere motion. Such cases must of necessity be somewhat exceptional, for, as a general rule, the rights and liabilities of the parties to the record will not be determined on motion or by any other means except a formal trial of the issues.

§ 193. * 292. **Recapitulation of Code Reforms respecting Misjoinder of Defendants. Criticism.** If we sum up the results of the preceding discussion, the following conclusion may be regarded as established beyond any doubt. In ascertaining the effects of a misjoinder of parties, the courts, with great unanimity, have accepted and carried out in practice the spirit and true intent of the reform legislation; namely, that the familiar doctrines of equity should be made controlling in all kinds of actions legal and equitable. They have in this instance entirely abandoned the technical common-law rules, and have assimilated all actions in this respect to a suit in equity. Even in the case where the common-law doctrine of joint liability was the most rigid, they have with perfect ease abandoned it, have treated it as though abrogated by the general expressions of the reform legislation, and have thus demonstrated that the judicial reasoning by which that ancient dogma had been supported was in fact nothing but a formula of words without any real force and meaning. They have shown that in a legal action upon contract, no matter what may be the allegations as to the *joint* nature of the liability, it is possible to sever the judgment and to permit a recovery against some defendants and for the others, and thus to bring all cases legal and equitable within the operation of the familiar principles of equity. I dwell upon this special instance of liberal construction because it well illustrates the position which I have *theoretically* maintained as to the general mode of interpreting the codes. The courts of the dif-

See also, as to the effect of misjoinder, Nave *v.* Hadley, 74 Ind. 155; Mendenhall *v.* Wilson, 54 Iowa, 589; Cogswell *v.* Murphy, 46 id. 44; White Oak Dist. Tp. *v.* Oskaloosa Dist. Tp., 44 id. 512. On the general doctrine as to the proper joinder of defendants, see Buie *v.* Mech. Ass'n, 74 N. C. 117; State *v.* J. P. & M. R. Co., 15 Fla. 201; Mahoney *v.* McLean, 26 Minn. 415. In Barnes *v.* Blake, 59 Hun, 371, it was held that a misjoinder of defendants was not a cause for a demurrer for want of sufficient facts by the party improperly joined.

ferent States have found no difficulty in adopting and applying the complete doctrine of equity in this case; there is no greater difficulty in adopting and applying the same to all the provisions of the codes relative to parties, and to the amalgamation of equitable and legal principles in the one civil action created by the new procedure. If the rules which control equitable tribunals can be and ought to be introduced into the civil action in respect to the single feature of a misjoinder of defendants, for the same reason they can and ought to be introduced in respect to all the parties and in respect to every other external feature of the judicial proceeding. If the courts had been consistent in this matter, and had not halted in their work of liberal construction, a complete, harmonious, and symmetrical system would long since have been constructed, and the confusion and conflict in principle which now exists would have been avoided. Until this course is freely and systematically adopted, until the courts shall follow out to its legitimate results in all parts and elements of the action the equitable notion which is made everywhere so prominent in the statute, we can never expect to obtain all the simplicity and clearness, and subordination of external form to substantial facts, promised by the new system of procedure.

§ **194.** * 293. **Same respecting Nonjoinder. Less Liberal Interpretation here. Case of Nonjoinder and Misjoinder Compared. Criticism and Recommendation.** Even in determining the effects of a *nonjoinder* of proper defendants, the courts have failed to interpret the provisions of the codes with the same freedom which they used in that of *misjoinder;* they have hesitated and stopped, when it would have been easy to have gone forward, and to have given the clauses their full force and effect. Undoubtedly the two cases stand upon a somewhat different footing. When a person is himself properly sued, it does not substantially affect his rights or liabilities that another person is also improperly sued with him; that fact does not essentially make his own liability greater or less. But when a person is sued, he has, in many instances, — certainly in all those legal actions where the liability is joint, and in some equitable suits where the rights and liabilities are complex, — a right that all the others who are also liable with him, or against whom the cause of action exists, or who are necessary parties to a complete determination of the controversy, should be united with him as

co-defendants, and a neglect to join them is an error against which he should be permitted to object, and from which he should be suffered to obtain a relief. The former equitable procedure, as well as the common-law practice, recognized this right of the defendant. But it is a very different thing to say that such an error, when established, should in any class of cases *absolutely defeat the action.* The error is not *essentially fatal.* This is shown by the practice itself of the courts, which treats the objection as dilatory, and requires it to be presented in a certain technical manner, or else regards it as waived. There is then no reason in the nature of the proceeding why the equity doctrine should not have been applied under these circumstances to all legal actions, so that, when an improper *nonjoinder* is finally established by the decision of the court, the action should never be defeated thereby, but should be retained by the court in order that the plaintiff might add the necessary defendants, and then the cause proceed to judgment on the merits. It is certainly as practicable and as easy to pursue this course with all legal actions, as it is with those that are equitable; and the codes expressly permit, if not require it, in language which in terms embraces every species of suit.

I shall now proceed to consider the particular cases which have arisen, and the various specific rules as to parties defendant which have been established by judicial decision. This examination will show how the general principles of interpretation have been applied by the courts, and will exhibit the system as a whole which has been constructed in respect to the selection and joinder of defendants. The discussion will be separated into three general divisions: namely, legal actions generally; actions against husband and wife, or either of them, as affected by the marriage relation; equitable actions generally.

FIRST: LEGAL ACTIONS.

§ 195. * 294. **I. Actions against Owners or Occupants of Land. Limitation herein. Distinguished from Common-Law Action of Ejectment.** This division does not include actions for trespass or other torts to the land or its possession, which will be considered under a subsequent subdivision relating to torts. The actions here intended must be brought against joint owners, owners in common, or occupants. The action to recover possession of

land, and to try the title thereto, is generally called by lawyers and judges the action of ejectment. Yet wherever the new procedure is adopted, it far more nearly resembles in all of its essential features the ancient *real actions* which were displaced in use by "ejectment," — in its *essential* features, I say, for of course it has none of the technical peculiarities which marked those old common-law forms of proceeding. One fact is certainly true, namely, that it does not bear the slightest resemblance to the action of "ejectment" as that was contrived by the old judges and lawyers, and only confusion and misconception result from applying to it that name. Undoubtedly the courts have continued to connect with it some of the special rules and doctrines which belong to the action of ejectment; but many of them, I am sure, could never have been retained if the courts had fully appreciated the completeness of the change wrought by the reformed system of procedure in abolishing all the forms of legal actions, and had reflected that the technical rules resulting alone from the absurd fictions which characterized ejectment have no legitimate connection with the simple action to recover possession of and try the title to land which has been introduced by the codes in the place of the former modes. As in the "real actions," the real party in interest, and that is the owner of the estate entitling him to possession, — whatever be its nature, — must be the plaintiff, and if the object be to establish a title, the holder or claimant of the adverse title must be made the defendant, while in respect of the claim to possession the occupant must be made a defendant. These are the simple essentials of the action, and they clearly have nothing in them akin to "ejectment." The codes of some States contain express provisions in relation to parties defendant, and especially in relation to the union of the landlord and tenant as co-defendants,[1] but these are rather inserted from an excess of caution, and do not add anything to the force of the more general clauses.

§ 196. * 295. **Who should be joined. Illustrations.** In an action to recover possession of an entire tract or parcel of land, when the claim of the plaintiff to the whole rests upon and is

[1] Code of New York, § 118 (447, 1503, 1598); California, §§ 379, 380; South Carolina, § 141; North Carolina, § 61; [Utah, Rev. St., 1898, § 2914; North Dakota, Rev. Codes, 1899, § 5230; South Dakota, Ann. St., 1901, § 6078; Montana, § 581; Idaho, Code Civ. Pro., 1901, § 3167; Missouri, Rev. St., 1899, § 543.]

derived through a single title, he may, and unless their occupation is distinct, should join all the actual occupants or tenants of the tract, even though they may be in possession of separate and distinct portions thereof, and may hold, possess, and claim under separate and distinct titles.[1] In addition to these he may join the landlord or person holding the fee, or any person claiming the ownership and right of possession, and *must* join such person if he desires to establish in that action his own ultimate ownership against that claimant.[2] If the entire tract is in the possession of two or more persons who possess the same, not in separate portions, but jointly or in common in undivided shares, they should all be made defendants. If the plaintiff, however, claims separate portions of an entire tract under distinct titles, and each of these portions is possessed or occupied by a different person holding under a separate right or title from the others, he cannot join all these occupants in a single action; a suit must be brought

[1] [Lewis *v.* Hinson (1902), 64 S. C. 571, 43 S. E. 15, quoting the text. Andrews *v.* Carlile (1894), 20 Colo. 370, 38 Pac. 465: Where several defendants are sued jointly in ejectment, and each files a separate answer, a joint judgment may be rendered against them unless they demand separate trials and judgments within a proper time.

In Klinker *v.* Schmidt (1898), 106 Ia. 70, 75 N. W. 672, plaintiff alleged that defendant was in wrongful possession of a strip of land fourteen feet wide along the westerly side of his lot. This, if true, indicated that each lot owner in that tier of lots was fourteen feet on his neighbor's land to the east. *Held*, that this did not show an interest in the suit which would warrant the other lot owners being made parties defendant, on defendant's motion. There was merely a possibility of controversies arising between the other lot owners, and, besides, their defences might not be the same.] See, however, Sutton *v.* Casseleggi, 77 Mo. 397.

[2] State *v.* Orwig, 34 Iowa, 112, 115. As to proper defendants in actions to recover possession of land, and to try the title thereto, see also Jackson *v.* Allen, 30 Ark. 110; Rollins *v.* Rollins, 76 N. C. 264; Colgrove *v.* Koonce, 76 id. 363; Lytle *v.* Burgin, 83 id. 301; Young *v.* Greenlee, 82 id. 346; Cagger *v.* Lansing, 64 N. Y. 417; in Wisconsin, see Gray *v.* Tyler, 40 Wis. 579; Pier *v.* Fond du Lac, 38 id. 470 (the Wisconsin statute provides for an action of ejectment against a person not in possession; this person must be one exercising some acts of ownership over the land, "or claiming title thereto or some interest therein;" and the complaint must allege that the defendant "unlawfully withholds the possession from the plaintiff;" *held*, that in such an action the title claimed by the defendant must be one which, if valid, would give him a *possessory* right to the premises; and ejectment will not lie against one not in possession who only claims a lien); Wilson *v.* Henry, 40 id. 594; Platt *v.* Jante, 35 id. 629; Barclay *v.* Yeomans, 27 id. 682; Burchard *v.* Roberts, 70 Wis. 111. Under the Missouri statute, requiring the action to be brought against the person in possession, Shaw *v.* Tracy, 95 Mo. 531 (possession of the tenant is not such possession of the landlord as to enable the plaintiff to recover against the landlord as sole defendant); Phillips *v.* Phillips, 107 Mo. 360 (occupancy of or residence upon the property is not a necessary element of possession); Bensieck *v.* Cook (Mo. 1892), 19 S. W. 642; Callahan *v.* Davis, 90 Mo. 78; Charter Oak L. Ins. Co. *v.* Cummings, 90 Mo. 267.

to recover each portion against the occupant thereof; the mere fact of propinquity would not produce any community of interest. The foregoing propositions are sustained and illustrated in the following instances. In an action brought by a widow to recover dower (which had not been assigned) in a city lot of land and block of stores, the occupant, holding under a lease for one year, of a single floor of one store standing on a small portion of the entire tract was held to be properly joined as a co-defendant.[1] A similar action being brought to recover dower in a tract which the husband had conveyed during his marriage to a single grantee by one deed in which his wife did not join, and which land had by subsequent deeds been conveyed, one-half to one separate owner, and one-half to another, it was held that the widow, being entitled to dower in the whole tract, might join both these owners of the fee, who were also the occupants, as defendants in the same action.[2] The rule is not confined to proceedings for the recovery of dower. Where it was alleged that one defendant claimed to be owner in fee of the whole premises, and that the three other defendants were his tenants, and that they all "unjustly withheld from the plaintiff the possession of the said premises," and it appeared on the trial that each of these four defendants actually occupied a separate portion, it was held that all these persons were properly united as co-defendants in the action.[3] When the land is in the actual possession of a tenant, the landlord may be joined with him as a co-defendant, independently of any express provision of the code authorizing such a course, if the landlord has in any manner interfered to resist the plaintiff's claim, or has aided and abetted the tenant in *his* resistance, or has asserted the right of ownership to be in himself as against the plaintiff.[4]

[1] Ellicott *v.* Mosier, 7 N. Y. 201. This was so held under the 2 R. S. of New York, p. 303, §§ 2 and 4, and p. 304, §§ 10 and 13, which provide that ejectment must be brought against the person actually in occupation; citing Sherwood *v.* Vandenburgh, 2 Hill, 303. The defendant had contended that the action, being for dower, must be against the owner of the freehold, as in the common law action of dower. In Missouri, when an action is brought to recover lands claimed to be owned in fee by a wife, her husband is the only proper party to be made defendant, since he is entitled to the possession. Bledsoe *v.* Simms, 53 Mo. 305. See also Wilson *v.* Garaghty, 70 Mo. 517; Rust *v.* Goff, 94 Mo. 511.

[2] Galbreath *v.* Gray, 20 Ind. 290. It was held that the respective liabilities of the two defendants could be arranged and determined in the judgment.

[3] Fosgate *v.* Herkimer Man. Co., 12 N. Y. 580. See Fisher *v.* Hepburn, 48 N. Y. 41, 55, per Earl J.

[4] Abeel *v.* Van Gelder, 36 N. Y. 513; Fosgate *v.* Herkimer Man. Co., *supra*; Pearce *v.* Ferris's Ex., 10 N. Y. 280;

§ 197. * 296. **Who should not be joined. Illustrations.** Persons, however, whose rights cannot be at all affected by a recovery against the party in actual possession, whose interest is entirely distinct from his, and under or from whom he does not derive any title, are neither necessary nor proper co-defendants with him in an action brought to recover the possession as against his special title; as, for example, the remainder-man in fee after a life estate, when the action is merely for the purpose of recovering possession during the continuance of such life interest. Thus, in an action against a husband, tenant by the curtesy in actual possession, brought, not to establish an absolute title in fee, but to recover the possession during the husband's life, the heirs of the deceased wife — who are the reversioners in fee — are neither necessary nor proper parties defendant.[1] On the same principle, an action by the grantee in a sheriff's deed of lands given on an execution sale, the judgment debtor having died, should be against the latter's heirs alone, and not against them and his widow; her dower right could not be affected by the recovery, and being as yet unassigned, it did not entitle her to possession as against the plaintiff.[2] Lands having been given to a tenant for life, with remainder in fee to another, the former leased the premises for a term of years, with a covenant of quiet enjoyment. The life tenant died before the expiration of the term, and the remainder-man thereupon entered and took possession. The lessee brought an action upon the broken covenant against both the executors of the life tenant and the remainder-

Fosgate *v.* Herkimer Man. Co., 12 Barb. 352. See also Finnegan *v.* Carraher, 47 N. Y. 493, which was very similar to Abeel *v.* Van Gelder, *supra*, in all the facts. The landlord alone was sued. Court held the tenant was also a proper and perhaps a necessary party, but objection to his nonjoinder had been waived by not demurring or answering. See, further, Clason *v.* Baldwin, 129 N. Y. 183; City of Napa *v.* Howland, 87 Cal. 84. In Iowa, it is held that, when the defendant is only a tenant, the landlord *may* be substituted; but this is not necessary. If substituted or notified, he is bound by the judgment; otherwise he is not. State *v.* Orwig, 34 Iowa, 112, 115.

[Where an owner of land brings an action to recover possession against a railroad company which had acquired it by condemnation proceedings, the lessee of such land is a necessary party: Roby *v.* N. Y. C. & H. R. R. R. Co. (1894), 142 N. Y. 176, 36 N. E. 1053.

The tenant in possession is the only necessary party to an action of ejectment, even though he may set up that there are tenants in common with him: Raymond *v.* Morrison (1894), 9 Wash. 156, 37 Pac. 318. See also Danihee *v.* Hyatt (1897), 151 N. Y. 493; 45 N. E. 939.

All the occupants of land need not be joined; one is sufficient: Hennessey *v.* Paulsen (1895), 147 N. Y. 255, 41 N. E. 516.]

[1] Allen *v.* Ranson, 44 Mo. 263.

[2] Cavender *v.* Smith, 8 Iowa, 360.

man. The action in this form was plainly without any foundation; the remainder-man was improperly joined, as he was in no manner liable on the covenant.[1]

§ 198. * 297. **II. Actions against Owners or Possessors of Chattels. In Actions to recover Possession of Chattels. Common-Law Rule not Changed.** The actions which fall under this subdivision, and which have any distinctive features, are very few in number. Those brought to recover damages for a tortious act, trespass, or negligence, committed by means of a chattel, and those brought to recover damages for the conversion of a chattel, properly belong to the subdivision which treats of actions for torts in general. The common-law rules as to parties defendant in an action to recover possession of chattels have not been in any manner affected by the new procedure. Such action must be brought against the party or parties in actual possession of the chattel demanded by the plaintiff.[2] If this actual possession is in one, he must be the sole defendant; if in two or more jointly, — as, for example, in a partnership, — they must all be made defendants.[3] There is a particular case in which the action may be maintained against one in *constructive* possession, as well as against the party in actual possession.[4] If the original taking of the goods was wrongful, and the wrong-doer has subsequently parted with the possession by assignment, the action will still lie against him, or it may be prosecuted against both himself and the assignee whose possession is actual.[5] Possession by the party, however, and not the claim of ultimate ownership, is in general

[1] Coakley *v.* Chamberlain, 8 Abb. Pr. N. S. 37. The complaint was dismissed as to the remainder-man, and judgment was rendered against the executors. The action was in every respect remarkable. Where a lessor assigns his term, the lessor may join the lessee and the assignee in a suit for the rent. Tabue *v.* McAdams, 8 Bush, 74.

[2] ["One having custody of property in dispute is a proper defendant in replevin": Engel *v.* Dado (1902), — Neb. —, 92 N. W. 629. Replevin should be brought against the party in possession, and where such action is brought against an officer acting under an execution, he may be sued either as an individual or as an officer: Irwin *v.* Walling (1896), 4 Okla. 128, 44 Pac. 219.]

[3] 1 Ch. Pl. pp. 122, 123 (Springfield ed. 1840); Gassner *v.* Marquardt, 76 Wis. 579; Washington *v.* Love, 34 Ark. 93; Harkey *v.* Tillman, 40 Ark. 551; and Helman *v.* Withers (Ind. App. 1892), 30 N. E. 5, citing numerous cases; Scott *v.* McGraw, 3 Wash. 675; Willis *v.* De Witt (S. Dak. 1892), 52 N. W. 1090, and cases cited.

[4] Nichols *v.* Michaels, 23 N. Y. 264, 270, 271. See Haughton *v.* Newberry, 69 N. C. 456.

[5] Nichols *v.* Michaels, 23 N. Y. 264, 268, 270, 271, per James and Selden JJ. See, however, Davis *v.* Van de Mark, 45 Kan. 130; Feder *v.* Abrahams, 28 Mo. App. 454.

the ground for making him a defendant. If the possessor is sued, and a third person also sets up a claim of title, the conflicting demands may be determined by means of an interpleader between the plaintiff and this claimant, ordered by the court at the instance of the defendant, if he in fact admits that he himself has no right in and to the goods.[1]

§ 199. * 298. **Ship-Owners.** The liability of ship-owners for supplies furnished or repairs made, or upon other contracts, express or implied, in respect to the vessel itself, gives rise to rules which properly fall under this subdivision. I do not now stop to inquire when, how, or by whom the owners may be bound, nor what are the powers of the master or other agent in managing the vessel. It is assumed that the power exists and has been properly exercised, and that a liability has arisen for the supplies, repairs, or other aid to the ship; and the single question is, What is the extent of the liability, upon whom does it rest, and against whom should it be enforced? When a liability has been created by the master or other agent for supplies furnished to the vessel, the part-owners are responsible *in solido*, and should all be joined as defendants; the *nonjoinder* of some is a defence by those sued;[2] and the same is true in the case of repairs and of all other expenses properly incurred in sailing her.[3] An action to recover compensation in the nature of salvage for services rendered in saving and securing a disabled steamboat under circumstances entitling the plaintiff to such compensation, was held to be properly brought against all the persons and corporations who owned interests in the boat, even though their interests were distinct and unequal, and even though some of them were separate

[1] See code of New York, § 122 (452, 820); California, § 386; Nebraska, § 48; North Carolina, § 65; Nevada, § 17; [Arizona, Rev. St., 1901, § 1308; Arkansas, Sand. & Hill's St., §§ 5635–5637; Colorado, § 18; Connecticut, Gen. St., 1902, § 1019; Georgia, Code, 1895, § 4896; Idaho, Code Civ. Pro., 1901, § 3176; Indiana, Burns' St., § 274; Iowa, Code, 1897, § 3487; Kansas, Gen. St., 1901, § 4474; Kentucky, § 30; Missouri, Rev. St., 1899, § 417; Montana, § 588; North Dakota, Rev. Codes, 1899, § 5240; Ohio, Bates' St., § 5016; Oklahoma, St., 1893, § 3915; Oregon, Hills' Laws, § 40; South Carolina, § 143; South Dakota, Ann. St., 1901, § 6085; Utah, Rev. St., 1898, § 2924; Washington, Bal. Code, § 4842; Wisconsin, St., 1898, § 2610; Wyoming, Rev. St., 1899, § 3490.]

[2] Sager *v.* Nichols, 1 Daly, 1.

[3] Bassett *v.* Crowell, 3 Robt. 72. Liability *in solido* means a joint liability, where all must be proceeded against, and the judgment is recovered against all, but may be fully enforced against either, and he left to his right of contribution, if any, against his fellows. In reference to the general doctrine stated in the text, consult Smith's Mercantile Law, pp. 237, 238 (Am. ed.), and Abbott on Shipping, pp. 116–118 (marg. pag.).

insurers of her by different policies, to whom an abandonment had been made on account of a total loss. Although their interests and their liabilities were unequal, they might all be sued in a single action, and a separate judgment could be rendered against each in proportion to his or its liability.[1]

§ 200. * 299. **III. Actions upon Contract; Joint Liability. Common-Law Rules Unchanged in Legal Actions. Exceptions.** Notwithstanding the general intent of the codes — which, I think, is very plain — to substitute the equitable in place of the legal doctrines upon the subject of joint liability and of the necessary defendants in actions brought thereon, this intent has not guided the courts in the decision of the particular cases as they have arisen. The overwhelming weight of authority, in passing upon the subordinate and practical questions, has determined that no such change has actually been made, and that the common-law rules are left controlling in all legal actions.[2] The only modification — and it is rather formal than real — seems to be in the manner of raising the questions. In an action against joint debtors, or to enforce a joint liability arising out of contract, all of the joint debtors or joint contractors that are living must be united as co-defendants;[3] and a neglect to make such union of parties, if properly taken advantage of, will be fatal to the action.[4] In other words, the codes, in the absence of such ex-

[1] Cloon *v.* City Ins. Co., 1 Handy, 32, per Gholson J., Superior Court of Cincinnati.

[2] This general statement does not, of course, apply in those States whose codes expressly change the common-law rules in respect to joint debtors and joint liability upon contract, and expressly permit any number to be sued, and also the personal representatives of deceased joint debtors to be united with the survivors, etc. See *supra*, § * 118.

[3] [But where all have not been served with process, the action may proceed against those served: Gyger *v.* Courtney (1900), 59 Neb. 555, 81 N. W. 437; Perkins County *v.* Miller (1898), 55 Neb. 141, 75 N. W. 577; Clark *v.* Commercial Nat. Bank (1903), — Neb. —, 94 N. W. 958.

In Greer *v.* Waxelbaum (1902), 115 Ga. 866, 42 S. E. 266, the court said: "A petition in an action brought against a partnership described as the firm of A. & B., and alleged to be composed of the individuals A. & B. is not amendable so as to make the action one against a partnership described as the firm of C. & B., and composed of the individuals C. & B."

All partners must be joined: Jones *v.* Langhorne (1893), 19 Colo. 206, 34 Pac. 997; Cox *v.* Gille Hardware Co. (1899), 8 Okla. 483, 58 Pac. 645. Where a joint liability but not a partnership is alleged, proof of the partnership is admissible to show the joint liability: First Nat. Bank *v.* Hattenbach (1900), 13 S. D. 365, 83 N. W. 421.]

[4] [Montana, by statute, allows suit against two or more persons transacting business under a common name, to be brought against them in such common name, the summons to be served on one or more of the associates, § 590. Similar statute in Colorado, § 14; California,

press provisions as are found in those of some States,[1] have not changed the nature of joint liability on contract, nor assimilated it to a several or joint and several one.[2] While this doctrine is

§ 388; Minnesota, St., 1894, § 5177; Wyoming, Rev. St., 1899, § 3485; Utah, Rev. St., 1898, § 2927; Connecticut, Gen. St., 1902, § 588; Ohio, R. S., 1900, § 5011.]

[1] [In Arkansas and Kentucky the statute is as follows: "Where two or more persons are jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option." Arkansas, Sand. & Hill's Dig. § 5634; Kentucky, Code, 1895, § 27.

In Kansas and Missouri the statute is as follows: "In all cases of joint obligations and joint assumptions of co-partners or others, suits may be brought and prosecuted against any one or more of those who are so liable." Kansas, Gen. St., 1901, § 1193; Missouri, Rev. St., 1899, § 892.

The Iowa statute is somewhat more comprehensive: "Where two or more persons are bound by contract or by judgment, decree or statute, whether jointly only, or jointly and severally, or severally only, including the parties to negotiable paper, common orders and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them." Code 1897, § 3465.

The North Carolina statute is as follows: "In all cases of joint contracts of co-partners in trade or others, suit may be brought and prosecuted on the same against all, or any number of the persons making such contracts." Code, 1883, § 187.

In 1897 Minnesota adopted a similar statute, Laws 1897, chap. 303, reading as follows: "A joint or separate or several action may be brought against any one or more or all of the parties liable upon such joint obligation, and a joint or several judgment may be entered against any one or more or all of the parties liable upon such joint obligation; *provided*, *however*, the court may, upon application by any interested party, or upon its own motion, require the plaintiff to bring in as parties defendant all of the parties jointly liable on any such obligation."]

[2] Bridge *v.* Payson, 5 Sandf. 210; Wooster *v.* Chamberlain, 28 Barb. 602; Tinkum *v.* O'Neale, 5 Nev. 93; Keller *v.* Blasdel, 1 Nev. 491; Jenks *v.* Opp, 43 Ind. 108, 110; Kamm *v.* Harker, 3 Ore. 208; Aylesworth *v.* Brown, 31 Ind. 270; Bledsoe *v.* Irvin, 35 Ind. 293; Hardy *v.* Blazer, 29 Ind. 226; 92 Am. Dec. 347; Braxton *v.* State, 25 Ind. 82; Shafer *v.* Moriarty, 46 Ind. 9, 13. See Lane *v.* Salter, 51 N. Y. 1. In Bledsoe *v.* Irvin, the court said that the decision there made did not conflict with the doctrine of Goodnight *v.* Goar, 30 Ind. 418, which was that "the code seems to have re-enacted the rules which prevailed in equity as to who must join as plaintiffs and may be joined as defendants," because, even in equity, such parties (joint debtors) must all be made defendants, and thus brought before the court; citing, in support of this equity rule, 1 Dan. Ch. Prac. 329; Perry *v.* Turner, 55 Mo. 418. If one of two or more joint debtors has been discharged in bankruptcy, he is still a necessary defendant, since his defence is personal, and must be specially pleaded. Jenks *v.* Opp, 43 Ind. 108, 110, 111. See also, retaining the common-law rule, People *v.* Sloper, 1 Idaho, 158; Ryan *v.* State Bk., 10 Neb. 524; Rider Life Raft Co. *v.* Roach, 97 N. Y. 378.

[Kansas and Missouri have the following statute: "All contracts which, by the common law, are joint only, shall be construed to be joint and several." Kansas, Gen. St., 1901, § 1190; Missouri, Rev. St., 1899, § 889. Colorado has a statute almost identical, Mills' St., § 2528, quoted in note to § *303. And a recent Minnesota statute, Laws 1897, chap. 303, provides that "Parties to a joint obligation shall be jointly and severally liable thereon for the full amount thereof."

In Outcalt *v.* Collier (1899), 8 Okla. 473, 58 Pac. 642, the court held that under the various sections of the Oklahoma statutes, contracts which appear to be joint must be construed to be joint and several. See § *276, note.

Held, in Davison *v.* Harmon (1896),

generally accepted in the States which have adopted the reform system of procedure, in a few of them, as has been said, the language of the statute is much more specific, and this language, it is held by the courts, substantially abolishes all joint debts and contract liabilities, and reduces them to joint and several liabilities; or, rather, it produces a still greater effect, for, as judicially interpreted, it permits the creditor to sue one, all, or any number he pleases, of the debtors or persons liable on the contract.[1]

§ 201. * 300. **One of two or more Joint Contractors Incapacitated. Retired Partners.** If one of two or more joint contractors is incapable of entering into a valid agreement, but all are sued jointly in one action, judgment may be recovered against those alone who are capable of contracting and of binding themselves thereby; as, for example, where a note had been given in a firm name, and the partners, who were husband and wife, were both

65 Minn. 402, 67 N. W. 1015, that where a plaintiff brings an action upon a joint contract, and, upon default of one of the joint debtors, takes a judgment by default against him, such judgment is a bar to a subsequent action against the others. But it was held in Pfefferkorn *v.* Haywood (1896), 65 Minn. 429, 68 N. W. 68, that if the debt is in fact joint and several, though alleged to be joint, and judgment by default is so entered, the court may thereafter allow an amendment of the complaint to conform it to the facts.]

[1] This is the necessary effect of the provision in the code of each State referred to in the text, and named in note last preceding; namely, Kansas, Rose *v.* Williams, 5 Kan. 483; Jefferson County Com'rs *v.* Swain, 5 Kan. 376; Crane *v.* Ring, 48 Kan. 58; Whittenhall *v.* Korber, 12 Kan. 618; Alvey *v.* Wilson, 9 Kan. 401, 405; Silver *v.* Foster, 9 Kan. 56, 59. Iowa, Ryerson *v.* Hendrie, 22 Iowa, 480, an action sustained against one of the partners upon a firm note; the opinion of Cole J. is a very full discussion of the doctrine and of the changes made by the new system, — an exceedingly instructive opinion, but too long for quotation. Kentucky, Gossom *v.* Badgett, 6 Bush, 97; Nichols *v.* Burton, 5 Bush, 320. This last case holds that a judgment against one partner on a firm debt extinguishes the demand, and is a bar to any subsequent action thereon against the other partners. This result is expressly guarded against by the codes of certain other States. Bradford *v.* Toney, 30 Ark. 763; Williams *v.* Rogers, 14 Bush, 776 (a judgment in the suit against one or more is *not* a bar to an action against the others, overruling Nichols *v.* Burton); Lingenfelser *v.* Simon, 49 Ind. 82 (*per contra*, it *is* a bar; but the execution of a note by one joint debtor is not a satisfaction of the joint liability, unless taken under an express agreement that it should be so). It is held in Missouri that a judgment is not a contract within the meaning of the statute, and that therefore in a suit upon a joint judgment all the judgment debtors must be made defendants; Sheehan & L. Transp. Co. *v.* Sims, 28 Mo. App. 64; *contra*, interpreting the same statute, Belleville Sav. Bk. *v.* Winslow, 30 Fed. Rep. 488. It is held in Colorado that the language of the statute in that State (Gen. Stat. § 1834), "All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants," does not embrace or apply to oral contracts. Exchange Bank *v.* Ford, 7 Colo. 314; [Kellogg *v.* Window (1897), 100 Ia. 552, 69 N. W. 875; Council Bluffs Bank *v.* Griswold (1897), 50 Neb. 753, 70 N. W. 376, construing the Iowa statute; Hanstein *v.* Johnson (1893), 112 N. C. 253, 17 S. E. 155.]

sued, judgment would be given against the husband alone.[1] When a contract is made by a firm, all the persons who were then members of the partnership continue liable upon it, even though some of them may have retired from the firm before the contract was broken. No arrangement among the partners themselves can change their liability to their common creditor, unless he is a party thereto, and in some manner discharges an outgoing member from his responsibility. A suit, therefore, where there has been no such discharge, should be brought against all the persons who were partners at the time when the agreement was entered into or the indebtedness was incurred.[2]

§ 202. * 301. **Case of Implied Contracts. Illustrations.** The rule which requires that all joint debtors must be made defendants applies to the cases where the contract is implied, as well as to those in which it is express. Thus, when two or more administrators, or an administrator and an administratrix, have been appointed over an estate, and upon their retainer services are rendered by a person for their benefit, — as, for example, by a lawyer retained to conduct legal proceedings affecting the estate, — they are jointly liable to him for his compensation, and should be sued jointly in an action to recover it; their different and even hostile interests in the final distribution do not alter the nature of their liability upon the contract, express or implied, made with the person thus employed.[3] The case of persons liable to repay money which had been paid by mistake is another familiar example of liability arising from implied contract; all the parties upon whom such duty rests should be joined in the suit to recover the money.[4] The members of a joint-stock association, not being a corporation, are jointly liable as partners for the debts and contracts of such association.[5]

[1] Bramskill *v.* James, 11 N. Y. 294. See Groat *v.* Phillips, 6 N. Y. Sup. Ct. 42, where a wife who had joined in a contract was omitted in the action.

[2] Briggs *v.* Briggs & Vose, 15 N. Y. 471. See also Bowen *v.* Crow, 16 Neb. 556 (an action to recover taxes levied upon property owned by a partnership, which had been dissolved at the time the action was brought: all the members of the late firm must be joined).

[3] Mygatt *v.* Wilcox, 1 Lans. 55.

[4] Duncan *v.* Berlin, 5 Robt. 457. In Kentucky, by statute, a surety who has paid the debt or a part thereof may sue the principal debtor and the co-surety in one action, and recover from the former the whole amount, and from the latter his contributory share. Robinson *v.* Jennings, 7 Bush, 630; 2 R. S. 398, ch. 97, § 7.

[5] [So, in Thurmond *v.* Cedar Spring Baptist Church (1900), 110 Ga. 816, 36 S. E. 221, it was held that the members of an unincorporated religious society are liable as joint promisors on its contracts. If such society has duly appointed trustees

Although the statute permits a creditor to sue the president or other managing officer, the judgment thus obtained can only be enforced out of the common property. If he desires to enforce his claim against the members individually, he must unite all of them as defendants, no matter how numerous, as in an action against an ordinary firm.[1] The apparent exception, which existed at the common law, to the general rule requiring all joint debtors to be sued, remains in full force under the new system, so that a dormant partner need not necessarily be included as a defendant in an action against the firm, although of course he *may* be so joined, if the plaintiff elect.[2]

§ 203. *302. **Survivorship. In States containing no Special Statutory Provisions respecting Joint Liability, Common-Law Rule Unchanged. Practical Result herein.** I am finally brought to the case where one or more of several joint debtors dies. The common-law rule had been settled from the earliest period that only the survivors could be sued. Equity had modified this legal doctrine, and permitted an action against the personal representatives of the deceased debtor or contractor. Has any change in this respect been introduced by the new procedure? It is now established by a great preponderance of authority, in those States whose codes do not contain the special provisions concerning joint liability already referred to,[3] that these rules, as they existed immediately prior to the reform legislation, have not been in any manner modified, but remain in active operation as a part of the present system. The practical result is, upon the death of one or more joint debtors, obligors, or promisors, a legal action can be maintained against the survivors alone, and in such action the personal representatives of the deceased cannot be made defendants for any purpose. An equitable action, however, can be maintained against the administrators or executors of the

to hold and manage its property, the trustees are the only necessary parties in an action for money furnished to the use of the church: Josey *v.* Union Loan & Trust Co. (1898), 106 Ga. 608, 32 S. E. 628.]

[1] Kingsland *v.* Braisted, 2 Lans. 17.

[2] North *v.* Bloss, 30 N. Y. 374; Cookingham *v.* Lasher, 2 Keyes, 454; Hurlbut *v.* Post, 1 Bosw. 28; Brown *v.* Birdsall, 29 Barb. 549; Arnold *v.* Morris, 7 Daly, 498; Farwell *v.* Davis, 66 Barb. 73; Leslie *v.* Wiley, 47 N. Y. 648. Compare Marvin *v.* Wilber, 52 N. Y. 270. Even when the dormant partner is the husband of the ostensible one. Scott *v.* Conway, 58 N. Y. 619; Woodhouse *v.* Duncan, 106 N. Y. 527.

[3] See these provisions in the codes of Missouri, Kentucky, Iowa, Kansas, North Carolina, [Minnesota and Arkansas, *ante*, p. 289, note 1.]

deceased when, and only when, either the legal remedy against the survivors has been exhausted, or such remedy would be absolutely useless. In such equitable action, therefore, the plaintiff must either aver and prove the recovery of a judgment and the issue and the return of an execution thereon unsatisfied, against the survivors, or else that the survivors are utterly insolvent.[1] This rule differs from that prevailing in England in a single particular.[2] The English Court of Chancery permits

[1] [Dishneau *v.* Newton (1895), 91 Wis. 199, 64 N. W. 879.] Voorhis *v.* Child's Ex., 17 N. Y. 354; Richter *v.* Poppenhausen, 42 N. Y. 373; Pope *v.* Cole, 55 N. Y. 124; Lane *v.* Doty, 4 Barb. 534; Voorhis *v.* Baxter, 1 Abb. Pr. 43; Moorehouse *v.* Ballou, 16 Barb. 289; Bentz *v.* Thurber, 1 N. Y. Sup. Ct. 645; Maples *v.* Geller, 1 Nev. 233, 237, 239; Fowler *v.* Houston, 1 Nev. 469, 472; Kimball *v.* Whitney, 15 Ind. 280, 283; Barlow *v.* Scott's Adm., 12 Iowa, 63; Pecker *v.* Cannon, 11 Iowa, 20; Marsh *v.* Goodrell, 11 Iowa, 474; Williams *v.* Scott's Adm., 11 Iowa, 475. The last four cases were all on joint and several notes, and it was held that the rule applied to them as well as to obligations purely joint. It should be observed that all these Iowa cases were decided prior to the "revision" of the statutes made in 1860. County of Wapello *v.* Bigham, 10 Iowa, 39; Childs *v.* Hyde, 10 Iowa, 294; People *v.* Jenkins, 17 Cal. 500; Humphreys *v.* Crane, 5 Cal. 173; May *v.* Hanson, 6 Cal. 642. But in Bank of Stockton *v.* Howland, 42 Cal. 129, an action against the survivors and the administrator of a deceased joint debtor was held to be properly brought; the judgment, however, should be severed, and against the survivors should be *de bonis propriis*, and against the administrator *de bonis testatoris*. See also Bostwick *v.* McEvoy, 62 Cal. 496; Lawrence *v.* Doolan, 68 Cal. 309. It was decided in Parker *v.* Jackson, 16 Barb. 33, per Gridley J., that an action could be maintained against the survivor and the personal representative of a deceased maker of a *joint and several* note, without alleging or proving the insolvency of the survivor. For the proceedings when the cause of action is for a tort, and survives upon the death of one of the wrongdoers, see Bond *v.* Smith, 6 N. Y. Sup. Ct. 239; and when the promise is joint and several, see Speyers *v.* Fisk, 6 N. Y. Sup. Ct. 197, and cases cited. When an execution against the survivors of joint debtors has been returned unsatisfied, the action against the personal representatives of the deceased debtor will lie, although it may turn out that the survivors were not insolvent. Pope *v.* Cole, 55 N. Y. 124, and see Yates *v.* Hoffman, 5 Hun, 113. See also Livermore *v.* Bushnell, 5 Hun, 285 (in an action against defendants jointly liable on a contract, if one or more die the action does not abate; the death should be suggested on the record, and the action proceed against the survivors; the personal representatives of the deceased cannot be joined); Cairnes *v.* O'Bleness, 40 Wis. 469 (same); Jones *v.* Keep, 23 Wis. 45; Masten *v.* Blackwell, 8 Hun, 313; Lanier *v.* Irvine, 24 Minn. 116, pending an action on a joint and several bond, if one of the defendants dies it may be continued against the survivors, without joining the representatives of the deceased defendant; Scholey *v.* Halsey, 72 N. Y. 578; Mattison *v.* Childs, 5 Colo. 78 (following the common-law rule): Seaman *v.* Slater, 18 Fed. R. 485. When the joint debtor who dies is a *mere* surety, his estate is absolutely discharged from all liability at law or in equity, — that is, liability to the creditor. Wood *v.* Fiske, 63 N. Y. 245; Getty *v.* Binsse, 49 id. 385, and cases cited; Davis *v.* Van Buren, 72 id. 587, 588, 589, and cases cited; Pickersgill *v.* Lahens, 15 Wall. 140.

[2] [The very recent case of Potts *v.* Dounce (1903), 173 N. Y. 335, 66 N. E. 4, affirming Potts *v.* Baldwin, 67 App. Div. 434, states a different rule in that State from the rule given in the text. It was an action upon a promissory note,

a suit against the personal representatives of the deceased at once, without attempting, much less exhausting, any remedy at law against the survivor. In other words, the creditor has his option at all times to sue the survivors at law, or the representatives of the deceased in equity, whether the survivors are solvent or not; and this doctrine has been adopted in several American States.[1]

§ 204. * 303. **States whose Codes contain Provisions Changing Common-Law Rule. Result.** These doctrines and modes of procedure in reference to the enforcing a joint demand when one debtor dies, have not, however, been accepted in all the States which have adopted the new system. In Indiana it is declared to be the true meaning and intent of the provisions of the code abolishing the distinctions between legal and equitable actions, and introducing the equitable principles concerning parties, and providing for a severance in the judgment, that upon the death of one or more joint, or joint and several debtors or obligors, an action will lie at once against the survivors and the administrators or executors of the deceased.[2] In certain States, special pro-

brought against three surviving joint promisors and the executor of the fourth. The question presented to the court was whether the executor of the deceased maker was properly joined. Section 758 of the Code of Civil Procedure, as amended in 1877, provides that in case of the death of one of two or more plaintiffs, or defendants, if the entire cause of action survives to, or against, the others, the action may proceed in favor of, or against, the survivors; "but the estate of a person or party, jointly liable upon contract with others, shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do for the proper disposition of the matter." The court, by Gray J., says: "While this section, by its place in the code, is applicable to the case of the death of a party pending the action, it must, nevertheless, be regarded as making a material alteration in the law and as imposing a liability where none existed before. . . . At common law, her death would have terminated her liability; but, while no action at law could have been brought against her estate, as she was a joint debtor, equity, if an inability to collect from the survivors were shown, would have allowed a recovery against the estate. Section 758 of the code, now, by continuing the liability of the estate of the deceased, enables that liability to be enforced in an action at law. It effects, directly, what, formerly, equity intervened to accomplish. But, while the legal rule of liability has been changed, the rule of procedure is not, and when the personal representatives of the deceased joint debtor are directly proceeded against at law, the plaintiff should, still, allege the insolvency, or inability to pay, of the survivors."]

[1] Wilkinson *v.* Henderson, 1 My. & K. 582; Braithwaite *v.* Britain, 1 Keen, 219; Brown *v.* Weatherby, 12 Sim. 6, 11. The survivors, however, should be made co-defendants.

[2] Braxton *v.* The State, 25 Ind. 82; Eaton *v.* Burns, 31 Ind. 390. The former of these cases is an able and instructive decision; the opinion presents the equitable theory of interpreting the code in a clear and convincing manner. Voorhis *v.* Child's Ex., *supra*, was expressly disapproved. In Klussman *v.* Copeland, 18 Ind. 306, the uniting the administrator

visions of the codes, or of other statutes, expressly authorize an action to be brought in the first instance against the survivors and the personal representatives of the deceased joint debtor, or even against some, any, or one of them, at the option of the plaintiff.[1]

of a deceased joint debtor as a co-defendant with the survivor was declared not to be *necessary*. When a bond had been executed by a guardian and his surety, and the surety had died, the action on the bond may be brought in Indiana against the surviving principal and the *heirs* of the deceased obligor, the latter being liable of course to the extent of the lands descended to them. Voris *v.* State, *ex rel.* Davis, 47 Ind. 345, 349, 350; and an action may be maintained on an administrator's bond against the surviving principal — the administrator — and the executor of a deceased surety. The bond was assumed to be joint, and the judgment was against both defendants *in solido* for the full amount. Myers *v.* State, *ex rel.* McCray, 47 Ind. 293, 297; citing and following Braxton *v.* State, *supra*, and Owen *v.* State, 25 Ind. 107. See also Hays *v.* Crutcher, 54 Ind. 260. The courts of South Carolina have put the same interpretation upon the code provisions. See Trimmier *v.* Thomson, 10 Rich. L. 164; Susong *v.* Vaiden, 10 Rich. L. 247; Wiesenfeld *v.* Byrd, 17 S. C. 106. [The Indiana doctrine was approved by the Supreme Court of Wyoming in the case of Chadwick *v.* Hopkins (1893), 4 Wyo. 379, 34 Pac. 899. In the course of the opinion the court says: "The one sufficient reason for the rule of the common law, that the surviving joint obligor and the representatives of the estate of the deceased could not be joined as defendants in an action at law, was the inability of a court of law to render separate and different judgments in a single action — against the survivor to be satisfied *de bonis propriis*, and against the administrators of the estate of the deceased to be satisfied from such estate in due course of administration. From the same reason it followed that the survivor alone was liable in an action at law, and that if he were solvent and the action thus available for the collection of the debt the plaintiff need go no further, and he was not permitted to do so. In the code States this, the only reason for the rules of the common law upon the subject, has entirely disappeared. . . . With all due respect for the opinions of some eminent courts which seem to hold differently, we are of the opinion that codes such as ours, doing away with the reason of the common-law rule under consideration as to joinder of parties defendant, also furnish, in terms sufficiently clear, a new rule to be followed in its stead." Citing the text, and cases from Ohio, South Carolina, and Indiana.]

[1] [The statutes upon this subject are as follows:

Ohio: "Where two or more persons shall be indebted in any joint contract, or upon a judgment founded upon any such contract, and either of them shall die, his estate shall be liable therefor, as if the contract had been joint and several, or as if the judgment had been against himself alone." Bates St., § 6102.

Iowa: "When any of those so bound [jointly] are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all such representatives." Code, 1897, § 3465.

Kentucky: "If any of the persons so bound [jointly] be dead, the action may be brought against any or all of the survivors with the representatives of all or any of the decedents, or against the latter or any of them." Code, 1895, § 27.

Missouri: "In case of the death of one or more of the joint obligors or promisors, the joint debt or contract shall and may survive against the heirs, executors, and administrators of the deceased obligor or promisor, as well as against the survivors." Rev. St., 1899, § 890.

Kansas: Same as Missouri. Gen. St., 1901, § 1191.

Indiana: "When two or more persons shall be jointly liable on a contract or

§ 205. * 304. Criticism of General Rule. Although the interpretation put upon the codes in reference to this particular sub-

judgment, and either of them shall die, his estate, executors, and administrators shall be liable for the failure to perform the contract and for the payment of the judgment, to the same extent and in the same manner as if such contract or judgment were joint and several." Burns St., 1901, § 636.

Arkansas: "Where any of the persons so bound [jointly] are dead, the action may be brought against any or all of the survivors, with the representatives of all or any of the decedents." Sand. & Hills' Dig., § 5634.

Minnesota: "When two or more persons are indebted on any joint contract, or upon a judgment founded on a joint contract, and either of them die, his estate is liable therefor, and the amount thereof may be allowed by the probate court, as if the contract had been joint and several, or as if the judgment had been against him alone." St., 1894, § 4521.

Wisconsin: "When two or more persons shall be indebted on any joint contract or upon a judgment founded upon a contract, and either of them shall die, his estate shall be liable therefor, and the claim may be allowed by the court as if the contract had been joint and several or as if the judgment had been against him alone, and the other parties to such joint contract may be compelled to contribute or to pay the same if they would have been liable to do so upon payment thereof by the deceased." St., 1898, § 3848.

Colorado: "All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants." Mills St., § 2528.

New York: "The estate of a person or party, jointly liable upon contract with others, shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do for the proper disposition of the matter." Code Civ. Pro. § 758. See Potts *v.* Dounce (1903), 173 N. Y. 335, 66 N. E. 4, quoted at length in note to § * 302, for a judicial interpretation of this statute.

South Dakota: "Where one of two or more plaintiffs, or one of two or more defendants, in an action, dies, and only part of the cause of action, or of several distinct causes of action, survives to or against the others, the action may proceed without bringing in the person who has succeeded to the rights of the deceased party; and the judgment shall not affect him, or his interest in the subject of the action. But the court may order such successor of a deceased party, or any person who claims to be such successor, to be brought in as a party, either plaintiff or defendant, whenever it appears proper to do so, upon his own application or upon the application of any party to the action, and, if necessary, that supplemental pleadings be put in." Ann. St., 1901, § 6084.]

Burgoyne *v.* Ohio L. Ins. & T. Co., 5 Ohio St. 586, 587. This was an action against the surviving makers and the administrator of a deceased maker of a promissory note. Ranney C. J., after stating the original common-law rule, and quoting a statute of Ohio (Swann's R. S. p. 378) as follows, — "When two or more persons shall be indebted on a joint contract or upon a judgment founded upon any such contract, and either of them shall die, his estate shall be liable therefor as if the contract had been joint and several, or as if the judgment had been against him alone," — proceeds (p. 587): "This statute effected an entire abrogation of the common-law principle to which allusion has been made, and left the estate of the joint debtor liable to every legal remedy as fully as though the contract had been joint and several. Until the passage of the act to establish a code of civil procedure, it is true his personal representatives and the survivors could not be sued in the same action. But by the 38th section of that act it is provided that 'persons severally liable on the same obligation or instrument may all or any of them be included in the same action at the option of the plaintiff.' And the 371st section allows a several judgment to be given against any one of the defendants as the nature of the case may re-

ject by the courts of New York and of many other States is clearly established by an overwhelming weight of authority, I do not hesitate to say that it is as plainly opposed to the obvious intent, and even to the very letter, of the reform legislation. When the statute has in express terms abolished all distinctions between actions at law and suits in equity, has declared that in all cases any person may be made a defendant, who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination and settlement of the questions involved, and has finally authorized a several judgment to be rendered in any action, it is simply a palpable violation of these positive provisions to say that a creditor shall not maintain a legal action against the personal representatives of a deceased joint debtor, but shall be driven to an equitable suit, and that only in a certain contingency; it is a useless sacrifice to the merest form. I would not be understood by this criticism as denying the existence of the rule, for it is too well settled to be doubted. If, however, the courts shall at any time accept the intent of the legislatures, as it is plainly shown in their statutory work, and shall adopt a general equitable theory of interpretation, which shall be applied in all cases to all actions without reservation or exception, so that there shall result one single and uniform system of procedure, then without doubt the rule that I am criticising will be abandoned, and the conclusions reached by the Indiana courts will be accepted in all the States.

§ 206. * 305. IV. Actions upon Contract; Joint and Several Liability. No Change by General Language in most Codes. Illustrations. The former doctrine of the common law concerning joint and several contracts and suits thereon has not been affected by the new procedure, except in those few States, already referred to,[1] whose codes or statutes permit the creditor in all cases to sue all, or any, or one of the debtors or co-contractors. The general language found in most of the codes has wrought no change in the practical

quire. In the opinion of the court, these sections permit the joinder of the survivor or survivors and the personal representatives of the deceased obligor in the same action, whether the contract is *in terms* joint and several, or is made so by the 90th section of the administration statute upon the death of the joint obligor, and authorize a separate judgment against each according to the nature of their respective liabilities." The construction here put upon the Ohio statute is certainly far more equitable, and in accordance with their intent, than that put upon the code of New York. See also Sellon *v.* Braden, 13 Iowa, 365.

[1] *Ante*, p. 289, note.

rules.[1] This proposition is sustained by many of the cases in reference to joint liability, cited under the foregoing paragraphs; it is also recognized or distinctly affirmed in many particular instances, among which I mention a few.[2] Two insurance companies had insured a building by separate policies, each of which contained the usual rebuilding clause. Upon the occurrence of a fire, they united in a joint notice of their election to rebuild, and partly completed the work under such notice. Default being made by them, the owner brought an action against one of them to recover damages for the non-performance of the contract to rebuild. It was held that by the election the companies had turned their policies into building contracts, and were liable according to the terms thereof, and that the owner might sue both in a joint action, or either in a separate action; in other words, that their liability was joint and several.[3] Premises were leased with covenants against under-letting, and against using the building for certain purposes. The lessee sub-let portions to different under-tenants, who violated the covenants by using them in the prohibited manner. An action against all, — the lessee and the sub-tenants, — to recover damages for the breach of the covenants, was held proper, although it was said the plaintiff must have a separate judgment against each defendant for the special injury and wrong done by him. A separate action might also have been brought against the original lessee and each of the under-tenants.[4] When an express joint and several note is made by a firm, and is signed by the firm name, it retains its joint and several character; an action may be brought either against all the partners, or against each or one of them.[5] In certain States, as has already been mentioned,[6] the express language of the codes permits an action

[1] [Certain statutory presumptions exist in some States. See notes to §§ *275, *276, where the statutes of California, Montana, Oklahoma, and North and South Dakota are set out.]

[2] [State *v.* McDonald (1895), Idaho, 40 Pac. 312; Council Bluffs Savings Bank *v.* Griswold (1897), 50 Neb. 753, 70 N. W. 376.]

[3] Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429.

[4] Gillilan *v.* Norton, 6 Robt. 546. The ruling of the court in respect to a separate judgment was based upon § 274 (1205, 1206, 821, 822) of the New York code. The entire decision is in closer harmony with the plain intent of the code than many others which have been cited. See Trabue *v.* McAdams, 8 Bush, 74.

[5] Snow *v.* Howard, 35 Barb. 55. See O'Gorman *v.* Lindeke, 26 Minn. 93 (a joint and several bond). A covenant to indemnify persons against liability on a bond wherein they are jointly and severally bound, is also joint and several. Hughes *v.* Oreg. Ry. & Nav. Co., 11 Ore. 437.

[6] *Ante*, p. 289, note.

against any number of joint and several debtors at the plaintiff's option, as well as against any number of joint debtors.[1] If several defendants are sued jointly upon an alleged joint and several contract, the plaintiff may sever in the recovery, and take judgment against a portion only, if the evidence shows such a liability;[2] and when one of two or more persons jointly and severally liable dies, the creditor may at once sue the personal representatives of the deceased in a separate action, or may sue the survivors.[3]

§ 207. * 306. **V. Actions upon Contract; Several Liability. No Change in Common-Law Doctrines — Except.** No change has been made in the common-law doctrines and rules concerning several liability arising from contract, except that produced by the provision found in all the codes in substance as follows. Persons severally liable on the same obligation or instrument, including the parties to bills of exchange, promissory notes, and negotiable bonds, — and in some States sureties, — may all, or any of them, be included in the same action at the option of the plaintiff. This clause certainly effects a very important change in the ancient rule, in all cases where the liability flows from an instrument or contract in writing, in that it permits a creditor to sue *all* the several promisors, or any number of them, instead of restricting him to a separate action against each.[4] The effect of this clause, and the extent of the change wrought by it will be discussed at large in Section VIII. of the present chapter. With this exception, the common-law doctrine is unaltered. In many States it is settled by a decided preponderance of authority, that a principal debtor and a guarantor thereof cannot be joined as co-defendants in the same action. Even when the principal debt is evidenced by a written instrument, and the guaranty is in-

[1] Rose *v.* Williams, 5 Kan. 483; Jefferson County Com'rs *v.* Swain, 5 Kan. 376; Kupfer *v.* Sponhorst, 1 Kan. 75; Rose *v.* Madden, 1 Kan. 445; Sellon *v.* Braden, 13 Iowa, 365; Ryerson *v.* Hendrie, 22 Iowa, 480; Clapp *v.* Preston, 15 Wis. 543. This last case arose under a provision identical with § 120 (454) of the New York code as to parties severally liable on the same instrument; and see Powell *v.* Powell, 48 Cal. 234. In Kansas a personal money judgment against two or more is a joint and several obligation. Read *v.* Jeffries, 16 Kan. 534.

[2] [Black Hills Bank *v.* Kellogg (1893), 4 S. D. 312, 56 N. W. 1071.]

[3] Speyers *v.* Fisk, 6 N. Y. Sup. Ct. 197; Parker *v.* Jackson, 16 Barb. 33; McIntosh *v.* Ensign, 28 N. Y. 169; Harrington *v.* Higham, 15 Barb. 524.

[4] See Powell *v.* Powell, 48 Cal. 234. Persons severally liable for different items of a general demand cannot be joined as defendants in one action. Miller *v.* Curry, 53 Cal. 665.

dorsed upon the same paper, the parties are not "severally liable on the same obligation or instrument," and do not fall within the provision last above quoted. A separate action must be brought against the principal debtor and against the individual guarantor.[1] This doctrine does not prevail in all the States. It is held in some, by very able courts, that where the payee or owner of a promissory note transfers the same, and writes a guaranty upon it, he may be sued as a guarantor, together with the maker thereof, in one action; and the same doctrine has been applied to a similar transfer and guaranty of a contract to pay money not negotiable in form.[2] In an ordinary action to recover upon a debt due by an insolvent corporation, over which a receiver has been appointed, he is not a necessary, nor even proper co-defendant when no cause of action is stated, and no relief is prayed against him.[3]

§ 208. * 307. **VI. Liability in Actions for Tort. Common-Law Doctrines Unchanged. General Rule as to Parties Defendant herein. Illustrations.** The common-law doctrines concerning the liability of tort-feasors, and as to the joinder or separation of them in actions brought to recover damages for the wrong, are entirely unchanged by the new system of procedure. It is unnecessary to repeat these ancient rules; that they are still in operation with their full force and effect is sufficiently shown by the following particular instances. In general, those who have united in the commission of a tort to the person or to property, whether the injury be done by force or be the result of negligence or want of skill, or of fraud and deceit, are liable to the injured party without any restriction or limit upon his choice of defendants against whom he may proceed. He may, at his option, sue all the wrong-

[1] [Sims *v.* Clark (1892), 91 Ga. 302, 18 S. E. 158.] Le Roy *v.* Shaw, 2 Duer, 626; De Ridder *v.* Schermerhorn, 10 Barb. 638; Allen *v.* Fosgate, 11 How. Pr. 218; Phalen *v.* Dingee, 4 E. D. Smith, 379; Bonduront *v.* Bladen, 19 Ind. 160; Virden *v.* Ellsworth, 15 Ind. 144. See Stout *v.* Noteman, 30 Iowa, 414, 415; Tucker *v.* Shiner, 24 Iowa, 334. Also Graham *v.* Ringo, 67 Mo. 324; Barton *v.* Speis, 5 Hun, 60.

[2] Marvin *v.* Adamson, 11 Iowa, 371; Mix *v.* Fairchild, 12 Iowa, 351; Tucker *v.* Shiner, 24 Iowa, 334; Peddicord *v.* Whittam, 9 Iowa, 471. It is to be noticed that in each one of these cases the guarantor was the original payee or promisee, and also the assignor; but it must be said that the court does not lay any stress upon this fact as a ground for its decision.

[3] Arnold *v.* Suffolk Bank, 27 Barb. 424. In an action against two or more as for money had and received, a complaint is demurrable which shows that the money was received otherwise than jointly; although the joinder might have been proper if the action had sounded in tort: Simmons *v.* Spencer, 9 Fed. R. 581; 3 McCrary, 48. [Loustalot *v.* Calkins (1898), 120 Cal. 688, 53 Pac. 258.]

doers in a single action, or may sue any one, or may sue each in a separate action, or may sue any number he pleases less than all; the fullest liberty is given him in this respect.[1] The only exceptions are those few instances in which the tort from its very nature must be a separate act impossible to be committed by two or more jointly.[2] A sheriff and his deputy may be sued jointly for the trespasses and other wrongful acts done by the

[1] [But where a joint issue is presented on the pleadings against a number of tort-feasors, plaintiff has no right to any other than a joint recovery, unless the action has failed as to all but one of the defendants, or unless the joint issue has been modified by a severance in the answers: Ashkraft *v.* Knoblock (1896), 146 Ind. 169, 45 N. E. 69. But see Hassler *v.* Hefele (1898), 151 Ind. 391, 50 N. E. 361, where the court says, quoting from an earlier case: "It was held in terms that this provision of the code (Burns' R. S., § 579) applies to all actions indiscriminately, whether founded upon contract or upon tort; that it is immaterial whether the complaint alleges a joint or a joint and several liability; that the right of recovery is, in this respect, to be regulated by the proof and not by the allegations of the complaint; that, in other words, every complaint is, in the respect stated, to be treated as both joint and several where there are two or more defendants."]

[2] Creed *v.* Hartman, 29 N. Y. 591, 592, 597; Roberts *v.* Johnson, 58 N. Y. 613, 616, an action against one partner only where the entire firm had been guilty of negligence; Chester *v.* Dickerson, 52 Barb. 349, 358; Phelps *v.* Wait, 30 N. Y. 78, an action against principal and agent for negligence of the agent; Kasson *v.* People, 44 Barb. 347; Wood *v.* Luscomb, 23 Wis. 287, an action against one partner for negligence by the firm; Fay *v.* Davidson, 13 Minn. 523; Mandlebaum *v.* Russell, 4 Nev. 551; McReady *v.* Rogers, 1 Neb. 124; Murphy *v.* Wilson, 44 Mo. 313; Allred *v.* Bray, 41 Mo. 484; Brady *v.* Ball, 14 Ind. 317, action for injury done by trespassing animals which belonged to several persons jointly; Turner *v.* Hitchcock, 20 Iowa, 310, a very elaborate and instructive judgment; Buckles *v.* Lambert, 4 Metc. (Ky.) 330; Hubbell *v.* Meigs, 50 N. Y. 480, 489; McIntosh *v.* Ensign, 28 N. Y. 169; Bullis *v.* Montgomery, 50 N. Y. 352. Where a right of action for tort exists against several, and is of such a character that it survives upon the death of the wrong-doer, if one of the persons liable dies, the action may be brought or continued against his personal representatives; but it is the settled rule in New York that the action in such case must be divided, and one suit be brought or continued against the survivors, and one against the representatives of the deceased. Bond *v.* Smith, 6 N. Y. Sup. Ct. 239; 4 Hun, 48; Heinmuller *v.* Gray, 13 Abb. Pr. N.S. 299; Union Bank *v.* Mott, 27 N. Y. 633; Gardner *v.* Walker, 22 How. Pr. 405; McVean *v.* Scott, 46 Barb. 379. As further illustrations; — negligence: Vary *v.* B. C. R. & M. R. Co., 42 Iowa, 246 (joint employers); Van Wagenen *v.* Kemp, 7 Hun, 328, a joint action allowed against the owner of a lot for a negligent excavation of the sidewalk, and the city for negligently suffering the same; cf. *infra*, § *308 note; Mitchell *v.* Allen, 25 id. 543 (a release of one of the persons jointly negligent releases all); Gudger *v.* Western N. C. R. Co., 21 Fed. R. 81; trespass: Wehle *v.* Butler, 61 N. Y. 245; Fleming *v.* McDonald, 50 Ind. 278; fraud: Bond *v.* Smith, 4 Hun, 48 (one of the defendants dies); Hun *v.* Cary, 82 N. Y. 65 (trustees guilty of a tortious breach of trust, a portion of them may be sued — all need not be joined); nuisance: Cobb *v.* Smith, 38 Wis. 21, a mill-dam caused plaintiff's lands to be overflowed; *held*, the persons who had acquired title to the land on which the dam stands, and by whose authority it has been maintained, are proper co-defendants; Greene *v.* Nunnemacher, 36 Wis. 50; Lohmiller *v.* Indian Water Co., 51 id. 683; Hillman *v.* Newington, 57 Cal. 56.

latter in his official capacity; the deputy, because he actually commits the tort, and the sheriff because he is the principal.[1] A passenger in the cars of one company was injured by a collision with a train of another company which used the same track. The servants of both companies were in fault, and as the wrong was caused by the negligence of each corporation, an action brought against them jointly was sustained.[2]

[1] Waterbury *v.* Westervelt, 9 N. Y. 598; King *v.* Orser, 4 Duer, 431; *contra*, Moulton *v.* Norton, 5 Barb. 286, 296, per Pratt J. This dictum is clearly erroneous. So, too, an execution or an attachment creditor, under whose direction property is tortiously taken by the sheriff, is properly joined with the sheriff in an action for the trespass: Elder *v.* Frevert, 18 Nev. 446; Marsh *v.* Backus, 16 Barb. 483.

[2] Colegrove *v.* N. Y. & N. H. R. Co., 20 N. Y. 492; Mooney *v.* Hudson River R. Co., 5 Robt. 548.

[A railroad company and its receiver may be joined in an action for tort to recover damages caused by flooding plaintiff's land: St. Louis, etc. R. R. Co. *v.* Trigg (1897), 63 Ark. 536, 40 S. W. 579. An engineer and fireman through whose negligence plaintiff's intestate was killed, may be sued jointly with the master, the railroad corporation: Winston's Adm'r *v.* Ill. Cent. R. R. Co. (1901), Ky., 65 S. W. 13. A master and servant, generally, may be jointly sued for the servant's negligence: Central of Georgia Ry. Co. *v.* Brown (1901), 113 Ga. 414, 38 S. E. 989; Greenberg *v.* Whitcomb Lumber Co. (1895), 90 Wis. 225, 63 N. W. 93. A fireman injured in a collision properly joined as defendants the railroad company, the division superintendent, and the train despatcher: Howe *v.* Northern Pac. Ry. Co. (1902), 30 Wash. 569, 70 Pac. 1100.

Where a tort is committed by the separate but concurrent negligence of a town marshal and a board of town trustees, suit may be brought against them jointly, together with the bondsmen on the marshal's bond: Doeg *v.* Cook (1899), 126 Cal. 213, 58 Pac. 707. All who participate in a fraud are jointly liable therefor: Spaulding *v.* North Milwaukee Town Site Co. (1900), 106 Wis. 481, 81 N. W. 1064; Austin *v.* Murdock (1900), 127 N. C. 454, 37 S. E. 478; — including those whose gains or losses are attributable to the fraud: Stevens *v.* South Ogden Land Co. (1896), 14 Utah, 232, 47 Pac. 81.

It was held in Page *v.* Citizens Banking Co. (1900), 111 Ga. 73, 36 S. E. 418, that an action for malicious prosecution may be brought jointly against a partnership, the individual members thereof, and a person not a member, if such prosecution was begun and carried on as a result of a conspiracy among them.

The plaintiff may sue any one or more of joint tort-feasors as he may elect: Coddington *v.* Canaday (1901), 157 Ind. 243, 61 N. E. 567; Pugh *v.* Chesapeake & Ohio Ry. Co. (1897), 101 Ky. 77, 39 S. W. 695; Douglass *v.* Railway Co. (1894), 91 Ia. 94, 58 N. W. 1070; Brown *v.* City of Webster City (1902), 115 Ia. 511, 88 N. W. 1070; Cumberland Tel. Co. *v.* Ware's Adm'r (1903), — Ky. —, 74 S. W. 289; Chapin *v.* Babcock (1896), 67 Conn. 255, 34 Atl. 1039.

One joint wrong-doer cannot complain that others equally guilty are not joined with him: Berkson *v.* Kansas City Ry. Co. (1898), 144 Mo. 211, 45 S. W. 1119; Whitman McNamara Tobacco Co. *v.* Wurm (1902), Ky., 66 S. W. 609; Scott *v.* Flowers (1900), 60 Neb. 675, 84 N. W. 81.

The plaintiff may dismiss as to some at any stage of the proceedings, without affecting the merits as to the others: Berkson *v.* Kansas City Ry. Co. (1898), 144 Mo. 211, 45 S. W. 1119; Melson *v.* Thornton (1901), 113 Ga. 99, 38 S. E. 342.

It is held in Connecticut, Nichols *v.* Peck (1898), 70 Conn. 439, 39 Atl. 803, that the persons jointly guilty of a trespass *quare clausum fregit* should be sued jointly, and if several actions are instituted without due cause such actions should be consolidated.]

§ 209. * 308. **Joint Liability must rest upon Community in Wrong-doing.** In order, however, that the general rule thus stated should apply, and a union of wrong-doers in one action should be possible, there must be some *community* in the wrong-doing among the parties who are to be united as co-defendants; the injury must in some sense be their *joint* work.[1] It is not enough that the injured party has on certain grounds a cause of action against one, for the physical tort done to himself or his property, and has, on entirely different grounds, a cause of action against another for the same physical tort; there must be something more than the existence of two separate causes of action for the same act or default, to enable him to join the two parties liable in the single action. This principle is of universal application.[2]

[1] [But in the case of a joint assault, malice on the part of one will be attributed to all, and each will be held liable for all the damages, both actual and exemplary: Reizenstein *v.* Clark (1897), 104 Ia. 287, 73 N. W. 588. So a master and servant are both liable for the servant's wilful tort, if within the scope of his employment: Gardner *v.* Southern Ry. Co. (1903), 65 S. C. 341, 43 S. E. 816.

[2] Trowbridge *v.* Forepaugh, 14 Minn. 133. F., owning a lot in St. Paul abutting on a street, dug and left open a dangerous hole in the street, into which the plaintiff fell. He sues the city and F. jointly, basing his claim upon the above acts of F., and upon the general duty of the city in respect of its streets. The court held that such a joint action could not be maintained. "The liability of the city depends on a state of facts not affecting its co-defendant, and the converse is equally true. Neither is, in fact nor in law, chargeable with, nor liable for, the matter set up as a cause of action against the other. They did not *jointly* conduce to the injury." *Contra*, in Van Wagenen *v.* Kemp, 7 Hun, 328, a similar case, the joinder was allowed. See also Long *v.* Swindell, 77 N. C. 176; Cogswell *v.* Murphy, 46 Iowa, 44; Keyes *v.* Little York Gold, etc. Co., 53 Cal. 724; Mitchell *v.* Allen, 25 Hun, 543 (a release of one of several joint tort-feasors releases all; Cooper *v.* Blair, 14 Oreg. 255; Dahms *v.* Sears, 13 Oreg. 47; [M. K. & T. Ry. Co. *v.* Haber (1896), 56 Kan. 694, 44 Pac. 632.]

[Where parents wrongfully cause husband and wife to separate, they are jointly liable, though each does not participate in all the acts of the other: Price *v.* Price (1894), 91 Ia. 693, 60 N. W. 202. And in an action by a wife for damages resulting from a particular intoxication of her husband, all the parties who contributed to the particular intoxication may be joined, although they were conducting separate places of business when the liquor was sold to the husband and did not act in concert: Faivre *v.* Mandirschied (1902), 117 Ia. 724, 90 N. W. 76.

It was held in City of Kansas City *v.* File (1899), 60 Kan. 157, 55 Pac. 877, that a city and an electric light company are jointly liable for injuries sustained by plaintiff by reason of a broken wire which remained in the street for three weeks, constituting a dangerous obstruction to travel. A dissenting opinion was rendered citing the text, and the case of Trowbridge *v.* Forepaugh (*infra*). See, also, Street Ry. Co. *v.* Stone (1894), 54 Kan. 83, 37 Pac. 1012, where a city and a street railway were held jointly liable for a dangerously constructed track.

In Smith *v.* Day (1901), 39 Ore. 531, 65 Pac. 1055, the court said: "Two or more tort-feasors may be sued jointly when they have all concurred by joint design or common act or negligence to produce the injury complained of; but where the parties have acted separately and independently of each other, without concert, or by common purpose, although

§ 210. * 309. **Case of Joint Conversion of Chattels.** The general doctrine under examination embraces as well the case of a joint conversion of chattels, as any other instance of joint tort to property or person. When two or more have united in the act which amounts to a conversion, or have so interfered with the chattel as to constitute a conversion within the legal meaning of the term, the owner or person having the special property may sue all, or one, or any, as in the case of any other tort.[1] But there must be a community in the wrong-doing; the wrongful act must constitute a conversion *on the part of all*, and in that act all must have engaged. When such is the case, the law does not apportion the responsibility, but holds each liable for the whole amount.[2] If there is no such community, a joint action for the conversion will not lie, and *a fortiori*, it will not lie when the defendants have not each been guilty of an act which *is* a wrongful conversion.[3]

§ 211. * 310. **Case of Replevin and Detinue.** The same general doctrine, under the same limitations, controls the action of replevin, or detinue, — or to recover possession of chattels, which at the common law was regarded as a personal action based upon the tortious act of the defendant, in his wrongful detention or taking of the goods. If, therefore, there is a joint wrongful taking or detention of the goods, the action will lie against the wrong-doers jointly, although one of them may have parted with his actual possession. Thus, where goods had been sold and delivered to a fraudulent vendee, so that the vendor might rescind and retake the chattels, and this vendee had afterwards assigned them to an assignee in trust for creditors, and the

the injury may be a common result to which the acts of each contributed, their liability is not joint, and a joint recovery cannot be had."

Stuart *v.* Bank of Staplehurst (1899), 57 Neb. 569, 78 N. W. 298: "The petition charged joint actions of the defendants, and the acts were such as might be done in combination; hence it was not open to attack by demurrer for an improper joinder of parties."

Miller *v.* Beck (1899), 108 Ia. 575, 79 N. W. 344: Where two creditors with separate claims put them in the hands of the same attorney, and attachments were sued out on each, this does not make them joint tort-feasors and jointly liable for the wrongful attachments.]

[1] See Simmons *v.* Spencer, 9 Fed. R. 581; 3 McCrary, 48.

[2] [Ess *v.* Griffith (1894), 128 Mo. 50, 30 S. W. 343: "The purchaser, with knowledge of the conversion, is jointly liable with the wrongful seller. . . . It does not matter that the parties acted in good faith and believed they had a right to take and dispose of the property."]

[3] Manning *v.* Monaghan, 23 N. Y. 539. See s. c. 28 N. Y. 585. Further instances of joint conversion: Hearty *v.* Klinkhammer, 39 Minn. 488. All the wrongdoers need not be joined: Carroll *v.* Fethers, 82 Wis. 67.

possession had actually been transferred to such trustee, an action by the vendor to recover the possession of the goods was held to be properly brought against both jointly, the assignee not being a purchaser for value.[1]

§ 212. * 311. **Common Carriers.** The common-law doctrines relating to suits against common carriers are unaltered. Although an action may be brought upon their contract express or implied to carry the goods safely, yet the ultimate ground of their liability is their general duty, the violation of which is a tort. The usual form of the action under the old system was Case, and not Assumpsit. The owner of goods that have been lost or damaged in the carriage may therefore treat the default as a tort, and sue all or any of the parties at his election.[2]

§ 213. * 312. **Lessor and Lessee. Principal and Agent.** A joint liability for an injury may arise from the ownership and occupancy of real property.[3] As an example, where the owner of a house had constructed a coal-hole in the sidewalk in such a manner and position as to be dangerous to passers, and had leased the premises to a tenant who used the coal-hole, and a person passing on the sidewalk had fallen into it and been injured, both the owner and the tenant were held liable, and a joint action against them was sustained.[4] In general, the principal and his agent may be sued

[1] Nichols *v.* Michaels, 23 N. Y. 264. See, especially, the opinions of James J., p. 268 *et seq.*, and of Selden J., pp. 270, 271, where the nature of the action before and since the code is discussed at length. See also *ante*, § * 297.

[2] McIntosh *v.* Ensign, 28 N. Y. 169.

[3] [Where the sole ground of liability for a negligent injury is the ownership of certain land, the persons who are joint owners should be joined: Printup *v.* Patton (1893), 91 Ga. 422, 18 S. E. 311. But in an action by mandamus against a lessee of a railroad to compel the restoration of a highway, the lessor is not a necessary party: People *ex rel. v.* Railway Co. (1900), 164 N. Y. 289, 58 N. E. 138.]

[4] Irvin *v.* Wood, 4 Robt. 138, 5 Robt. 482; s. c. on appeal, 51 N. Y. 224, 230; 10 Am. Rep. 603. But see Trowbridge *v.* Forepaugh, 14 Minn. 133, *supra*, § * 308 (n.); and compare Van Wagener *v.* Kemp, 7 Hun, 328, there cited. Farther illustrations: nuisance: Cobb *v.* Smith, 38 Wis. 21; *supra*, § * 307 (n.); Greene *v.* Nunnemacher, 36 Wis. 50; Lohmiller *v.* Indian Water Co., 51 id. 683.

[Waterhouse *v.* Schlitz Brewing Co. (1900), 12 S. D. 397, 81 N. W. 725: A tenant is not a necessary party in an action against the owner of a building for injuries caused by its collapse, where the complaint alleges that the collapse occurred because of negligent construction, but did not allege decay or want of repairs.

It was held in Atcheson, Topeka, etc. Ry. Co. *v.* Anderson (1902), 65 Kan. 202, 69 Pac. 158, that the lessee could not be sued without the lessor. The court said, in the syllabus: "In an action against a railroad company for damages in laying a track in a public street and obstructing the ingress and egress of a lot owner to and from his property, it appeared that the company sued was not the owner of the track when it was built, nor at the time the action was commenced,

jointly for any trespass or other wrongful act done by the agent while acting within the scope of his employment. The agent is personally responsible, because his employment will not shield him from the consequences of his torts, and the principal is liable upon the familiar doctrine of agency. The injured party may of course sue either separately.[1]

§ 214. *313. **Cases where Joint Liability is Impossible.** It has already been said that the general doctrine of the joint and several nature of the liability springing from torts does not obtain in those cases where the injury is essentially a several one, or where, in other words, from its intrinsic character, it can only be committed by one person. The most important of this class of torts is slander. No joint action for slander is possible; but such an action can be maintained for the publication of a libel, as in the very familiar and frequent instance of a newspaper, which contains defamatory matter, being owned and published by a partnership.[2] In the same manner a joint action to recover damages for a malicious prosecution, which is an injury to character, may beyond doubt be brought against two or more persons who united in promoting the judicial proceeding complained of.

§ 215. *314. **Joint Tort may give Rise to many Actions, but only one Satisfaction.** Although in cases of joint torts the law gives the injured party a wide choice to sue all the wrong-doers, or any number, in a single action, or to sue each of them separately, thus bringing as many actions as there are persons, yet it does not permit him thereby to multiply his damages. He can have but one

but was a lessee only. *Held*, that the lessor company, which laid the track, and caused the obstruction, was a necessary party."]

[1] Phelps *v.* Wait, 30 N. Y. 78; Wright *v.* Wilcox, 19 Wend. 343; 32 Am. Dec. 507; Montfort *v.* Hughes, 3 E. D. Smith, 591, 594; Suydam *v.* Moore, 8 Barb. 358; Hewett *v.* Swift, 3 Allen, 420; Shearer *v.* Evans, 89 Ind. 400. An execution or attachment creditor under whose direction a levy is unlawfully made, held to be properly joined with the sheriff in an action for the trespass; Elder *v.* Frevert, 18 Nev. 446; Marsh *v.* Backus, 16 Barb. 483; and in an action of false imprisonment the sheriff who made the arrest and the judge who issued the process were properly joined. Zeller *v.* Martin (Wis. 1893), 54 N. W. 330. When damage is caused by the negligence of a servant of a firm, all or any number of the partners may be sued. Roberts *v.* Johnson, 58 N. Y. 613, 616.

[2] Forsyth *v.* Edmiston, 2 Abb. Pr. 430. A *quære* is suggested, whether an action for slander may not be maintained against several persons if the defamatory words are uttered in pursuance and as the result of a conspiracy among them. This, perhaps, may be possible.

[Monson *v.* Lathrop (1897), 96 Wis. 386, 71 N. W. 596: Where a libellous telegram is sent, the sender and the telegraph company may be jointly liable.]

satisfaction.[1] In short, he can collect but one amount of damages out of the many that may have been awarded him in separate actions, although he is entitled to the costs in each suit.[2] If he has prosecuted two or more jointly, and the jury has assessed a different sum as damages against each defendant, the plaintiff may enter the judgment against all for either of these amounts which he elects, and of course he would naturally choose the largest. This rule is based upon the notion that the injury is a unit, that one award of damages is a compensation for that injury, and that the defendants are equally responsible as among themselves. A satisfaction of one is therefore operative as to all. Imprisonment under a body execution is regarded by the law as *pro tanto* a satisfaction;[3] and if one such judgment debtor, being in imprisonment, is voluntarily discharged therefrom by the creditor, the judgment or judgments against all the others are *ipso facto* satisfied, even though rendered in separate actions, as fully as though the discharge had been by payment.[4]

[1] [Butler *v.* Ashworth (1895), 110 Cal. 614, 43 Pac. 386; Hollingsworth *v.* Howard (1901), 113 Ga. 1099, 39 S. E. 465; Ashcraft *v.* Knoblock (1896), 146 Ind. 169, 45 N. E. 69. Satisfaction as to one joint tort-feasor is a bar to an action as to the others: Dulaney *v.* Buffum (1903), 173 Mo. 1, 73 S. W. 125.]

[2] This doctrine is not confined to cases of tort; it applies in all instances where there have been separate suits or recoveries against persons who are jointly and severally liable on the same obligation; satisfaction of one is satisfaction of all, except as to costs; and if some of the actions are pending, payment of one may be pleaded in bar of such pending suits. First Nat. Bk. of Indianapolis *v.* Indianapolis Piano Man. Co., 45 Ind. 5. See also Lord *v.* Tiffany, 98 N. Y. 412. In an action for assault and battery committed by the defendant and one P. G., the answer set up that plaintiff had recovered judgment against P. G. for the same tort, and issued execution thereon, which had been levied on the property of P. G. *Held*, a good defence. The injured party may sue each or any of several joint trespassers separately, and prosecute each action to final judgment, but must then elect against which one he will have execution. A final judgment *and* execution or an order for execution, against one is a discharge of all the others. Fleming *v.* McDonald, 50 Ind. 278. The English rule is that final judgment alone without any execution is a discharge of all the others. Brinsmead *v.* Harrison, L. R. 7 C. P. 547.

[3] Koenig *v.* Steckel, 58 N. Y. 475.

[4] Kasson *v.* The People, 44 Barb. 347. The plaintiff had obtained a judgment against G. and one against R. in a separate action against each for a joint trespass. G. was taken on body execution, and, while in custody, was voluntarily set at liberty by the judgment creditor. The plaintiff afterwards took the other defendant, R., on a body execution in *his* action. R. applied to a judge by *habeas corpus*, and was discharged. The General Term, on appeal, held this discharge regular, and laid down the doctrines stated in the text. See also McReady *v.* Rogors, 1 Neb. 124; Turner *v.* Hitchcock, 20 Iowa, 310. The latter case was very extraordinary. The action was for a trespass, and was against six women and their husbands; and one Johnson was a defendant. The petition alleged that a party of women, of whom the female defendants were a portion, made a raid upon

§ 216. *315. **VII. Statutory Actions in the Settlement of Decedents' Estates.** In many, if not all States, actions are authorized by statute, in the matter of settling the estates of deceased persons, which were unknown at the common law, as, for example, an action by a legatee to recover his legacy. It is not within my purpose to inquire when such actions may be brought, but simply to ascertain what special rules, if any, have been laid down in reference to the proper parties therein.[1] A statute of New York requires the heirs of an intestate who have inherited lands under certain specified circumstances, to be sued jointly and not separately for a debt due from the deceased, the land in their hands being regarded as a fund upon which the debt is chargeable and out of which it is to be paid. It has been held that this statute does not make the heirs jointly liable as *joint debtors*, but that it merely prescribes a mode of enforcing the demand out of assets which have descended to them.[2] In an action by a residuary legatee against the executor to recover the amount claimed to have been given by the will, all persons interested in the residue

the plaintiff's saloon, destroying property therein. The defendants, except Johnson, answered, among other defences, that since the action was brought the plaintiff had released the defendant Johnson; also that one Almira C. was one of the joint trespassers; and, before the action was brought, the plaintiff and she had intermarried, and were then husband and wife. On the trial, it was proved that plaintiff had released Johnson, but that she had taken no part in the trespasses, and was not liable therefor. The other defence was proved exactly as alleged. Upon these facts, the court held that the release of Johnson did not discharge the other defendants, because she was not in fact a joint trespasser. On the second defence, Dillon J., after stating the common-law rules concerning joint trespassers, reached the following conclusions: That the code had not changed these former rules; that separate actions may be brought, separate verdicts given, and judgments rendered, but only one satisfaction, that the release of one joint wrong-doer discharges all; and, finally, that the marriage of one with the plaintiff operated as a release and discharge. On this last point the court were equally divided; but they were agreed upon all the other propositions of Judge Dillon's opinion. The case, as a whole, is very instructive, and contains a full discussion of the doctrines concerning joint torts, and a review of all the leading authorities. See also Mitchell *v.* Allen, 25 Hun, 543 (a discharge by the plaintiff of one of the persons jointly liable releases all the others).

[1] [In a proceeding to establish a lost will, the legatees, devisees and heirs at law are all necessary parties: *In re* Valentine's Will (1896), 93 Wis. 45, 67 N. W. 12. In a contest of a will it is not necessary to bring in all persons interested in the estate, if all the devisees are properly brought in: Kischman *v.* Scott (1901), 166 Mo. 214, 65 S. W. 1031. In a suit to set aside a will, a judgment will be reversed if devisees are named which are not made parties: Wells *v.* Wells (1898), 144 Mo. 198, 45 S. W. 1095; — and the executor is a necessary party, and as such has a right to defend the will: *In re* Estate of Whetton (1893), 98 Cal. 203, 32 Pac. 970.]

[2] New York Laws of 1837, p. 537, § 73; Kellogg *v.* Olmsted, 6 How. Pr. 487. Also Selover *v.* Coe, 63 N. Y. 438.

must be joined as co-defendants with the executor, and if a legacy is charged upon lands, the devisees must also be made parties.[1] When a creditor seeks to recover his demand against the estate, his suit should be prosecuted against the executor or administrator alone; the widow, heirs, legatees, next of kin, and creditors, are neither necessary nor proper parties defendant. This was the universal rule under the former system; and although the code has enacted the equitable doctrines concerning parties, and has made no exception in their application to different actions, it has not changed the procedure in this particular. The administrator or executor represents the estate; is a trustee for all the parties who are interested in its distribution; and his defence is their defence. He is bound to interpose all necessary and available answers to demands made upon the estate, and the law presumes that he will faithfully perform this duty. The general language of the codes certainly does not require a greater latitude in the admission of parties defendant who are interested in the event of the suit than was demanded by the practice of the equity courts. It has not therefore been so construed as to make the widow, heirs, legatees, and others necessary or proper defendants, although they may seem to be interested in the result of the controversy.[2] The same is true even when the testator has bequeathed all his property, real and personal, to a single legatee; the creditor must pursue his claim against the executor, and not against the legatee.[3] Although, in general, an action to recover a debt or demand due to the estate must be brought by the administrator or executor alone, yet in some exceptional

[1] Tonnelle *v.* Hall, 3 Abb. Pr. 205. Such an action, although it may be authorized by statute, is in all its features equitable; and the equity rules as to parties must control it. See Towner *v.* Tooley, 38 Barb. 598, as to the necessary defendants in an action upon an administration bond by legatees whose legacies are charged upon the lands of the deceased. [Harrell *v.* Warren (1898), 105 Ga. 476, 30 S. E. 426, the court said: "When a legatee under a will cites an administrator *de bonis non cum testamento annexo* to a settlement, the defendant is not, as a matter of right, entitled to have another, who is the sole remaining legatee, made a party to the proceeding. Such other legatee would be a proper, but is not an essential, party."]

[2] Nelson *v.* Hart, 8 Ind. 293, 295. See also Stanford *v.* Stanford, 42 Ind. 485, 488, 489. In an action against the sureties on an administrator's bond, he himself being dead, *his* administrator is not a necessary defendant, and the next of kin of the original decedent are not proper defendants. Flack *v.* Dawson, 69 N. C. 42. If one of two executors dies, and an action is brought against *his* personal representative to recover a demand against the original estate, the surviving executor must be made a co-defendant. McDowell *v.* Clark, 68 N. C. 118, 120.

[3] Perry *v.* Seitz, 2 Duv. (Ky.) 122.

instances such suit may be instituted and prosecuted by a legatee or distributee, when the administrator or executor is incapacitated from suing.[1]

§ 217. *316. **VIII. Some Special Actions.** In New York, an action against a county should be brought against "The Board of Supervisors" of the specified county, and not against the supervisors individually or by name.[2] A suit may be maintained between two firms having a common partner, he being made a defendant, and suitable averments being inserted in the complaint or petition.[3] Where a particular religious society or individual church is incorporated, an action to recover a debt or damages for the breach of a contract due from it must be brought against this corporation, and not against the bishop or priest, whatever may be the ecclesiastical powers and authority of such clerical officers.[4] In certain States the assignor of a non-negotiable thing in action, or where the assignment is not expressly authorized by statute, is a necessary defendant in an action brought by the assignee.[5]

[1] See Fisher *v.* Hubbell, 1 N. Y. Sup. Ct. 97; s. c. 65 Barb. 74; 7 Lans. 481; Lancaster *v.* Gould, 46 Ind. 397; Shove *v.* Shove, 69 Wis. 425. [But see Sheppard *v.* Green (1896), 48 S. C. 165, 26 S. E. 224, where it was held that the personal representatives of the deceased, the voluntary grantees and persons holding liens executed by them are all necessary parties in an action to establish creditors' claims on the assets of a decedent's estate, and to set aside certain conveyances as fraudulent.]

[2] Hill *v.* Livingston Cy. Sup., 12 N. Y. 52. See also Sims *v.* McClure, 52 Ind. 267 (against common-school trustees); Hawley *v.* Fayetteville, 82 N. C. 22 (against towns); Hamilton *v.* Fond du Lac, 40 Wis. 47 (against municipal corporations for intentional trespasses); White *v.* Miller, 7 Hun, 427 (against the "Shakers"); La France *v.* Krayer, 42 Iowa, 143 (in actions under the "civil damage act").

[3] Cole *v.* Reynolds, 18 N. Y. 74; Englis *v.* Furniss, 4 E. D. Smith, 587. See also Ford *v.* Ind. Dist. of Stuart, 46 Iowa, 294; Crosby *v.* Timolat (Minn. 1892), 52 N. W. 526. The balance of account between the two firms may be struck, and assigned to a third person to sue upon the same; Beacannon *v.* Liebe, 11 Ore. 443. As to actions between two of several partners without joining the others, see Wells *v.* Simmonds, 8 Hun, 189, 209; Neudecker *v.* Kohlberg, 81 N. Y. 296.

[4] Charboneau *v.* Henni, 24 Wis. 250. A peculiar case. The action was against a Roman Catholic bishop, to recover the cost of building a church edifice belonging to a religious society.

[5] Harvey *v.* Wilson, 44 Ind. 231, 234; Allen *v.* Jerauld, 31 Ind. 372; Indiana & Illinois Cent. R. Co. *v.* McKernan, 24 Ind. 62; Holdridge *v.* Sweet, 23 Ind. 118; French *v.* Turner, 15 Ind. 59; Gower *v.* Howe, 20 Ind. 396; Breeding *v.* Tobin (Ky. 1892), 18 S. W. 773; Hood *v.* Cal. Wine Co., 4 Wash. 88; St. Louis, I. M. & S. Ry. *v.* Camden Bk., 47 Ark. 541; Sykes *v.* First Nat. Bk. of Canton (S. Dak. 1891), 49 N. W. 1058; Keller *v.* Williams, 49 Ind. 504; Clough *v.* Thomas, 53 Ind. 24; Reed *v.* Garr, 59 Ind. 299; Reed *v.* Finton, 63 Ind. 288; Leedy *v.* Nash, 67 Ind. 311; Gordon *v.* Carter, 79 Ind. 386; compare Riley *v.* Schawacker, 50 Ind. 592; Watson *v.* Conwell (Ind. App., 1892), 30 N. E. 5; Bondurant *v.* Bladen, 19 Ind. 160; Nelson *v.* Johnson, 18 Ind. 329; Hubbell *v.* Skiles, 16 Ind. 138; Hopkins

§ 218. * 317. **Joinder in Case of Substituted Debtor.** In the case of a substitution of one party for another as a debtor, — that is, when, a debt being due from one person, another for a valuable consideration assumes such indebtedness and promises to pay the same, — it has been decided in Indiana that the creditor may maintain an action against the substituted debtor, but must join with him the original debtor as a co-defendant, under the general provision of the code requiring or permitting all persons to be made defendants who are necessary parties to a complete determination and settlement of the questions involved.[1] In this decision the court has accepted to its full extent the equitable theory of parties, and has applied it unreservedly to a purely legal action; for since the creditor had surrendered all claim upon the original debtor, he could recover no judgment in the action against such debtor, and the latter's presence could only be necessary for his own protection and that of the other defendant. It is probable that this ruling would not be followed by those courts which have partially or wholly confined the operation of the statutory provisions in question to equitable actions. When the stockholders of a corporation are by statute made personally responsible for an amount equal to the amount of stock held by them, the liability is not joint, and each must be sued separately.[2]

SECOND. ACTIONS AGAINST HUSBAND AND WIFE OR EITHER OF THEM: PARTIES DEFENDANT AS AFFECTED BY THE MARRIAGE RELATION.

§ 219. * 318. **General Extent of Statutory Modification of Common-Law Rules. No Change in Suits against Wife for her Torts, Frauds, and other Wrongful Acts.** The provisions of the codes, and of other statutes, in relation to actions in which married women are parties, were quoted in full in the last preceding section, and need not be repeated here.[3] There is a marked

v. Organ, 15 Ind. 188; Perry *v.* Seitz, 2 Duv. (Ky.) 122; Lytle *v.* Lytle, 2 Metc. (Ky.) 127; Gill *v.* Johnson's Adm., 1 Metc. (Ky.) 649. See Shane *v.* Lowry, 48 Ind. 205, 206; Strong *v.* Downing, 34 Ind. 300; Durham *v.* Bischof, 47 Ind. 211; S. P. Hardy *v.* Blazer, 29 Ind. 226.

[1] Hardy *v.* Blazer, 29 Ind. 226; Davis *v.* Hardy, 76 Ind. 272; McGill *v.* Gunn, 43 Ind. 315.

[2] Perry *v.* Turner, 55 Mo. 418. But see *ante*, § * 299, note; *post*, § * 417.

[3] See *supra*, § 152, where the statutory provisions embracing the cases of plaintiffs and of defendants will be found in full.

difference in the extent of the alterations made in the former law by the legislation of the various States. The changes in New York are complete and radical, the wife being in almost every respect assimilated to the unmarried woman. The example of New York is followed by many States. In many others, however, the modifications do not go to any such extent, and are confined to the cases in which married women are sued or sue in respect of their separate property, and those in which the action is directly between the husband and wife, leaving all others to be controlled by the prior law. We saw in the preceding section that in this group of States where a right of action exists on account of a tort committed to the person of a married woman, the common-law rules are unchanged, and the action must be either in the name of the husband alone, or of the husband and wife jointly; while in New York, and in the States which have copied its legislation, the wife is permitted to sue in her own name in respect of any cause of action accruing to herself. There is even less modification of the ancient doctrines which regulate the form of suits *against* the wife for her torts, frauds, and other wrongful acts.[1]

§ 220. *319. **Result.** The result is that, in actions which concern her separate property, the wife *may* or *must* be sued alone. In those States which permit her to enter into contracts having reference to her separate property, or connected with a business or trade which she may carry on, suits upon such contracts may or must be brought against her individually;[2] while

[1] [In Taylor *v.* Pullen (1899), 152 Mo. 434, 53 S. W. 1086, the court said: "While it is true that one of the supposed reasons for the rule which required a husband to be joined with his wife in an action for her torts has ceased because he no longer acquires her property by virtue of the marriage in this state, all lawyers must admit that so far no writer or court has as yet furnished satisfactorily all the reasons which may have influenced the adoption of the rule at common law, and until they are produced, certainly the courts cannot declare that all the reasons have ceased and thus abolish the rule by judicial decision." See also Nichols *v.* Nichols (1898), 147 Mo. 407, 48 S. W. 947.]

[2] [In Hollister *v.* Bell (1900), 107 Wis. 198, 83 N. W. 297, the court said: "A married woman has not capacity to bind herself at law by contract, except as regards her separate property or business. It follows, as has often been decided by this court, that a married woman's note, given solely for the purpose of securing or paying the debt of a third person, is void at law and not enforceable in equity against her separate property in the absence of some equitable considerations rendering such enforcement under the circumstances just." The signing of a promissory note by a married woman raises no presumption that she intended to charge her separate estate: State Nat. Bank *v.* Smith (1898), 55 Neb. 54, 75 N. W. 51. See also

actions to recover damages for personal torts committed by her must be instituted against her and her husband jointly, or, in certain exceptional cases, solely against the husband. These propositions, which are the general summing up of the statutory provisions, and of the judicial interpretation thereof, I shall now illustrate by particular instances which will embrace all the important questions that arise.

§ 221. * 320. **The Settled Rule. Tort Committed in Presence or by Compulsion of Husband.** It is the settled rule in the States which have adopted the second form of statute,[1] that, in actions to recover damages for all torts whether with or without violence, negligences, frauds, deceits, and other such wrongs done by the wife personally, and not done merely by, or by the use of, her separate property, the common-law principle is unaltered, and the husband and wife must be joined as co-defendants.[2] The principle thus stated assumes that the wife acted voluntarily. If, however, the tort is committed by the wife in the presence and under the compulsion or direction of her husband, he alone is liable, and should be sued without making her a co-defendant. In applying the latter rule, it is settled that if the tort is done by the wife *in the presence of her husband*, a *prima facie* presumption is raised that it was done by his direction and under his compulsion. This presumption may be overcome, and if it be shown that she acted voluntarily, although in his presence, she must be

Gallagher *v.* Mjelde (1898), 98 Wis. 509, 74 N. W. 340, holding that a married woman without property and not in business cannot make a binding contract to repay money loaned to enable herself and husband to go into business]

[1] [That form which requires a joinder except in actions concerning the wife's separate property and in actions between husband and wife. See § 152, *ante*.]

[2] [Henley *v.* Wilson (1902), 137 Cal. 273, 70 Pac. 21, citing the text;] Anderson *v.* Hill, 53 Barb. 238, assault and battery by the wife; Peak *v.* Lemon, 1 Lans. 295, conversion; Tait *v.* Culbertson, 57 Barb. 9, libel by the wife; Kowing *v.* Manly, 57 Barb. 479, 483; s. c. 49 N. Y. 192, 198, fraud and forgery by the wife; Brazil *v.* Moran, 8 Minn 236, assault and battery by the wife; Ball *v.* Bennett, 21 Ind. 427, action for setting fire to plaintiff's mill by the wife; Turner *v.* Hitchcock, 20 Iowa, 310, trespass on plaintiff's premises and destroying personal property thereon; Musselman *v.* Galligher, 32 Iowa, 383; McElfresh *v.* Kirkendall, 36 Iowa, 224; Luse *v.* Oaks, 36 Iowa, 562, slander by the wife; Curd *v.* Dodds, 6 Bush, 681, action for fraud of wife in selling certain property of hers. *Held*, that she was not liable for a fraud in entering into a contract, the law of Kentucky not permitting her to make a binding contract; the doctrine of the text is fully recognized in the opinion. Coolidge *v.* Parris, 8 Ohio St. 594, assault and battery by the wife. In Kowing *v.* Manly, 49 N. Y., Rapallo J. discusses the subject [of the joinder of the husband and wife under the common-law rule, as it existed in New York prior to the recent legislation. The opinion is a learned and exhaustive one.] See also

made a defendant. These common-law rules have not been in any respect changed by the codes.[1]

§ 222. * 321. **Where Tort is committed by Wife in the Use or by Means of her Separate Property.** If, however, the tort is not committed by the wife personally, but is done by means of her separate property, or in the use thereof, or under color or claim of ownership of her separate property, the action should be brought against her individually, without joining the husband as co-defendant, in all those States whose statutes permit a married woman to be sued alone in respect of all matters which concern her separate estate.[2] In other words, actions which concern or have relation to her separate property are not confined to those upon contract or those involving the ownership of the property, but extend to suits based upon torts and wrongs done by means or in the use of or claim to the property.

Clark *v.* Boyer, 32 Ohio St. 299; Sunman *v.* Brewin, 52 Ind. 140 (if the husband dies after verdict, the wife is liable to have judgment entered against herself alone). Fitzgerald *v.* Quann, 109 N. Y. 441; 33 Hun, 652 (slander by wife); Austin *v.* Bacon, 49 Hun, 386 (same); Quilty *v.* Battie, 61 Hun, 164 (harboring a vicious dog); Wirt *v.* Dinan, 44 Mo. App. 583 (for deceit of wife). [But see, also, Thomas *v.* Cooksey (1902), 130 N. C. 148, 41 S. E. 2, where a suit for possession of personal property was held properly brought against the wife alone. The court said that if the fact that she had a husband living would protect her, "all that a married woman would have to do would be to get possession of some one else's property, and the owner would be without remedy and helpless. Heath *v.* Morgan, 117 N. C. 504." Also, Pender *v.* Mallett (1898), 123 N. C. 57, 31 S. E. 351, where suit was brought by a receiver against a wife to whom her husband had conveyed property in fraud of creditors, the husband being joined as a defendant.]

[1] Brazil *v.* Moran, 8 Minn. 236; Ball *v.* Bennett, 21 Ind. 427; Curd *v.* Dodds, 6 Bush, 681, 685; Cassin *v.* Delaney, 38 N. Y. 178, per Hunt C. J.: "An offence by his direction, but not in his presence, does not exempt her from liability; nor does his presence, if unaccompanied by his direction. The presence furnishes evidence and affords a presumption of his direction, but it is not conclusive, and the truth may be established by competent evidence." Flanagan *v.* Tinen, 53 Barb. 587. The rule is settled in Missouri, that if husband and wife both unite in committing a tort, as, for example, an assault and battery, a joint action against them will not lie, but the husband alone must be sued. Dailey *v.* Houston, 58 Mo. 361, 366, 367; Meegan *v.* Gunsollis, 19 Mo. 417; see, however, Flesh *v.* Lindsay (Mo. Sup. 1893), 21 S. W. 907. But in an action against husband and wife for their joint fraud, it was held in New York that she would not be liable unless she actively participated in the wrong. Vanneman *v.* Powers, 56 N. Y. 39, 41.

[2] Peak *v.* Lemon, 1 Lans. 295; Eagle *v.* Swayze, 2 Daly, 140; Rowe *v.* Smith, 38 How. Pr. 37, s. c. on appeal, 45 N. Y. 230; Baum *v.* Mullen, 47 N. Y. 577. Action against a married woman alone to recover damages for fraud in the sale of land which she owned, the husband acting as her agent in the sale and making the fraudulent representations. The fact that her husband acted as her agent in the sale did not affect her liability, for he may be her agent the same as any other person. She is liable for frauds committed by her husband as her agent in carrying on a business for her. Warner *v.* Warren, 46 N. Y. 228. See also Quilty *v.* Battie, 135 N. Y. 201. [See Pender *v.* Mallett (1898), 123 N. C. 57, 31 S. E. 351.]

§ 223. *322. **Under New York Statutes.** Under the statutes of New York, a married woman may be sued alone upon any contract which she has made in a trade or business carried on by herself, or in her name by her agent, and the complaint should be in the ordinary form as though the action was brought against an unmarried woman.[1] She must also be sued in the same manner upon any contract made in relation to, or upon any liability growing out of her separate property. Finally, if she enters into any contract and therein charges the payment thereof upon her separate property, she is in like manner personally liable, and must be sued without making her husband a co-defendant. The charge thus made does not create an equitable lien upon any particular property, nor even a general lien to be enforced by an equitable action. It simply creates a personal liability upon herself, to be enforced in an ordinary legal action, and by the recovery of any ordinary judgment for debt or damages. Such charge may even be verbal, and when made creates a personal liability which may be enforced against any property which she may have at the time, or any which she may afterwards acquire. In all these cases it is not necessary to allege in the complaint the special facts from which such liability arises; the complaint should be in the ordinary form, and all the special facts relating to her coverture should be averred in the answer.[2]

[1] Hier *v.* Staples, 51 N. Y. 136. She has not the full power to contract; the contract must either be made in some trade or business which she carries on, or be for her personal services, or have a connection with her separate property. See the following cases: Manchester *v.* Sahler, 47 Barb. 155; Smith *v.* Allen, 1 Lans. 101; Hart *v.* Young, 1 Lans. 417; Lennox *v.* Eldred, 1 N. Y. Sup. Ct. 140; Shorter *v.* Nelson, 4 Lans. 114; Hallock *v.* De Munn, 2 N. Y. Sup. Ct. 350; Bodine *v.* Killeen, 53 N. Y. 93; Adams *v.* Honness, 62 Barb. 326.

[2] These propositions are the final results at which the New York courts have arrived through a long and progressive series of decisions. Maxon *v.* Scott, 55 N. Y. 247; Hier *v.* Staples, 51 N. Y. 136; Hinckley *v.* Smith, 51 N. Y. 21; Frecking *v.* Rolland, 53 N. Y. 422, 426; Smith *v.* Dunning, 61 N. Y. 249; Foster *v.* Conger, 61 Barb. 145, 147; Ainsley *v.* Mead, 3 Lans. 116; Perkins *v.* Perkins, 62 Barb. 531; Baken *v.* Harder, 6 N. Y. Sup. Ct. 440; Weir *v.* Groat, 6 N. Y. Sup. Ct. 444; Blanke *v.* Bryant, 55 N. Y. 649; Loomis *v.* Ruck, 56 N. Y. 462; Corn Exch. Ins. Co. *v.* Babcock, 42 N. Y. 613; Yale *v.* Dederer, 18 N. Y. 265, 22 N. Y. 450, which is superseded by subsequent decisions; Owen *v.* Cawley, 36 N. Y. 600; Carpenter *v.* O'Dougherty, 50 N. Y. 660; Garretson *v.* Seaman, 54 N. Y. 652; Newell *v.* Roberts, 54 N. Y. 677; Fowler *v.* Seaman, 40 N. Y. 592; Quassaic Nat. Bk. *v.* Waddell, 3 N. Y. Sup. Ct. 680; Miller *v.* Hunt, 3 N. Y. Sup. Ct. 762; Kelty *v.* Long, 4 N. Y. Sup. Ct. 183; Bogert *v.* Gulick, 65 Barb. 322; Warner *v.* Warren, 46 N. Y. 228; Manhattan Brass & M. Co. *v.* Thompson, 58 N. Y. 80. — Contracts between the wife and husband; see also *ante*, § *240, and notes. She may become his creditor, and maintain an action to recover the debt: Woodworth *v.* Sweet, 44 Barb. 268, 51

§ 224. *325. **Wife as Party in Actions concerning the Homestead.** Under the statutes of many States respecting homesteads, it is the established rule that the wife has such a vested interest in the homestead that she is always a proper, and generally a necessary, party defendant with her husband in all actions which may affect the title thereto, or the right to the possession thereof. At all events, her interest will not be cut off unless she is made a party. Even when the husband himself brings an action in order to enjoin a sale of the homestead, or seeking in any other way to protect his right, the defendants, for their own security, may, and perhaps should, require the wife to be brought in as a co-plaintiff.[1]

§ 225. *328. **Defence by Wife when both are sued together.** The codes of several States contain a provision that, "if the husband and wife be sued together, she may defend for her own right, and if the husband neglect to defend, she may defend for

N. Y. 8; McCartney *v.* Welch, 44 Barb. 271; Savage *v.* O'Neil, 44 N. Y. 298; Jaycox *v.* Caldwell, 51 N. Y. 395. If the husband *gives* a note to his wife during the marriage, no action can be maintained on it by her against him or his representatives after his death, simply because there is no consideration: Whitaker *v.* Whitaker, 52 N. Y. 368; but if there is a consideration for the note, or if it is given by him in contemplation of marriage, she can enforce it by suit: Wright *v.* Wright, 54 N. Y. 437; Banfield *v.* Rumsey, 4 N. Y. Sup. Ct. 322. The following are the most important among the recent N. Y. decisions: Williamson *v.* Dodge, 5 Hun, 479; Covert *v.* Hughes, 8 id. 305 (a married woman is liable for the price of goods bought by her as agent of her husband which were necessary for and were used for the support of herself and her children, Laws of 1860, ch. 90, § 1); Gossman *v.* Cruger, 7 id. 60; Hill *v.* Rosselle, 6 id. 631; McVey *v.* Cantrell, 6 id. 528; 70 N. Y. 295; Conlin *v.* Cantrell, 64 N. Y. 217 (the liability of a married woman who has a separate estate, and her intention to charge such estate, may be inferred from the circumstances of the contract; it is not necessary that there should be a specific agreement to charge her separate estate); Smith *v.* Dunning, 61 id. 249; Cushman *v.* Henry, 75 id. 103; Tiemeyer *v.* Turnginst, 85 id. 516 (very important case; she is liable on any contract of purchase although she had no separate property at the time she entered into the contract); Woolsey *v.* Brown, 74 id. 82 (liable as a surety); Nash *v.* Mitchell, 71 id. 199. In California, under the Civil Code, the liability of a married woman on her contracts is substantially the same as in New York and Iowa, except that her husband must be joined as a co-defendant in suits upon them. See Wood *v.* Orford, 52 Cal. 412; Parry *v.* Kelly, 52 id. 334; Marlow *v.* Barlew, 53 id. 456; Tobin *v.* Galvin, 49 id. 34.

[The present New York statute reads as follows: "A husband who acquires property of his wife by ante-nuptial contract or otherwise, is liable for her debts contracted before marriage, but only to the extent of the property so acquired." Gen. Laws, Ch. 48, § 24.]

[1] Chase *v.* Abbott, 20 Iowa, 154, 160. See also Burnap *v.* Cook, 16 Iowa, 149, 153, 158, per Dillon J.; Larson *v.* Reynolds, 13 Iowa, 579; Revalk *v.* Kraemer, 8 Cal. 66, 72; Marks *v.* Marsh, 9 Cal. 96; Moss *v.* Warner, 10 Cal. 296; Sargent *v.* Wilson, 5 Cal. 504; De Uprey *v.* De Uprey, 27 Cal. 329, 332; Watts *v.* Gallagher (Cal., Dec. 13, 1892), 31 Pac. 626.

his right also." The former clause of this section at least applies only to equitable suits in which separate rights of the wife are involved, as, for example, those relating to her separate property; it has no application to ordinary legal actions in which both are sued jointly, and over which the husband has still, as under the former practice, the entire control.[1] It was a settled rule of the equity procedure that, in an action against husband and wife, not affecting her separate estate and seeking no relief against her property, service of process upon the husband was a good and sufficient service upon the wife, and he could appear on her behalf, so that she would be bound by the decree made upon such service and appearance. This rule, it is said in some cases, still subsists under like circumstances. Of course, if the wife's separate property is involved, or if any relief is demanded against her directly, she must be personally served, and has a right to appear independently of her husband. This right, although expressly secured by statute in some States, exists independently of any such statutory permission.[2]

THIRD: EQUITABLE ACTIONS.

§ 226. *329. I. General Principles. Distinction between Necessary and Proper Parties. In all equitable actions, a broad and most important distinction must be made between two classes of parties defendant; namely, (1) those who are "necessary," and (2) those who are "proper." Necessary parties, when the term is accurately used, are those without whom no decree at all can be effectively made determining the principal issues in the cause.

[1] Coolidge *v.* Parris, 8 Ohio St. 594; Wolf *v.* Banning, 3 Minn. 202. See also Holliday *v.* Brown, 33 Neb. 657 (rehearing denied, March 16, 1892, 51 N. W. 839). Such legal actions as those for torts done by the wife, or debts due by her *dum sola*, and others, in which the law still requires both spouses to be made defendants, are not affected by the statutory provision.

[2] Foote *v.* Lathrop, 53 Barb. 183; Lathrop *v.* Heacock, 4 Lans. 1. This was a foreclosure suit, the mortgage being upon lands of the husband, so that the wife's only possible interest was to protect her inchoate right of dower. Wolf *v.* Banning, 3 Minn. 202, 204. *Contra*, McArthur *v.* Franklin, 15 Ohio St. 485; s. c. 16 Ohio St. 193. This case was similar in all its features to Foote *v.* Lathrop, *supra*. Both were parties, but service was made on the husband alone. Held, that the wife was not concluded, and her dower right was not cut off. The cases are diametrically opposed to each other.

[*As to Community Property:* The wife is a proper party defendant in an action against the husband on a note executed by himself alone, in order to determine whether the judgment can be executed as one for a community debt: Clark *v.* Eltinge (1902), 29 Wash. 215, 69 Pac. 736; McDonough *v.* Craig (1894), 10 Wash. 239, 38 Pac. 1034.]

Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject-matter of the litigation.[1] Confusion has frequently arisen from a neglect by text-writers, and even judges, to observe this plain distinction. Parties are sometimes spoken of as necessary when they are merely proper. Thus, because a decree cannot be rendered which shall determine the rights of certain classes of individuals without making them defendants in the action, they are not unfrequently called necessary parties; or, in other words, because they must be joined as defendants in a particular suit, in order that the judgment therein may bind *them*, they are denominated "necessary" parties absolutely. Such persons are "necessary" *sub modo* — that is, they must be brought in if it is expected to conclude them by the decree; but to call them "necessary" absolutely is to ignore the familiar and fundamental distinction between the two classes of parties which has just been mentioned. This inaccurate use of language would make every person a necessary party who should actually be joined as a co-defendant in an equitable action.

§ 227. * 330. **Distinction between Necessary and Proper Parties Illustrated. Practical Test.** I will illustrate these positions by a familiar example. In an action to foreclose a mortgage, the owner of the land covered by it is a necessary defendant, because without his presence no decree can be made for the sale of the land; in other words, no effective decree at all, and the suit would be an empty show of litigation. The holders of subsequent mortgages, judgments, and other liens upon the same land are not necessary parties in order to the rendition of an effective judgment, because the land can be sold without their presence and without cutting off their liens. If, however, the plaintiff desires to settle all the questions involved in one controversy, and to determine the rights of all the persons who have any interest in the land, he must bring in all these holders of subsequent liens, so that a judgment may be given which shall fore-

[1] [Reiser *v.* Gigrich (1894), 59 Minn. 368, 61 N. W. 30, quoting the text; Rudd *v.* Fosseen (1900), 82 Minn. 41, 84 N. W. 496; Kircher *v.* Pederson (1903), 117 Wis. —, 93 N. W. 813, quoting California *v.* Southern Pac. Ry. Co., 157 U. S. 229; Steinbach *v.* Prudential Ins. Co. (1902), 172 N. Y. 471, 65 N. E. 281.]

close their rights. To accomplish this end, these persons must be made defendants; and in that respect they are necessary parties — that is, necessary in order to attain the particular result desired. They are not, however, necessary to the decision of the main issues involved in the suit and to the granting of a decree. If we use language accurately, we shall call them proper parties, and shall thus distinguish them from the other class, without whom the judicial machinery cannot be put in motion. Every person who is rightly joined as a defendant in an equitable action, is, in a certain broad sense, a *necessary* party, because his presence is necessary to accomplish some particular end, and to make the judgment more complete than it otherwise would have been; but to use the term in this broad sense is to lose all the benefits of an accurate classification and of practical rules depending on such classification. To sum up: Necessary parties defendant are those without whom no decree at all can be rendered; proper parties defendant are those whose presence renders the decree more effectual; and *all* the proper parties are those by whose presence the decree becomes a complete determination of all the questions which can arise, and of all the rights which are connected with the subject-matter of the controversy. A practical test will at once fix the class into which any given persons interested in an equitable litigation must fall. If the person is a necessary defendant, a demurrer for defect of parties on account of his nonjoinder will be sustained; and conversely, if the demurrer will be sustained, the person is a *necessary* party. If the given person is merely a *proper* party, such a demurrer will not be sustained on account of his nonjoinder, although the court may undoubtedly, in the exercise of its discretion, order him to be brought in.

§ 228. * 331. **Equity Doctrine herein. Statutory Provision.** The principal provision quoted at the commencement of the present section, and which is the same in all the codes of procedure, is a general and concise statement of the doctrine which had long prevailed in courts of equity in relation to the joinder of defendants. As the language of this provision is permissive — any person *may* be made a defendant, not *must* be — it was evidently intended to embrace "proper" as well as "necessary" parties within its requirement. The doctrine of equity, expressed in its most general form, is, that all persons materially

interested, either legally or beneficially, in the subject-matter of the suit, should be made parties to it, either as plaintiffs or as defendants, so that there may be a complete decree which shall bind them all.[1] Those whose interests are adverse to the claims set up by the plaintiff, and who would therefore naturally resist such claims, should be brought into the action as defendants. On the other hand, those whose interests are concurrent with the interests of the principal plaintiff who actually institutes and prosecutes the suit, should primarily be joined with him as co-plaintiffs. But, as has already been shown in the preceding section, equity procedure is not strenuous in respect to this accurate division, and often permits individuals of the latter class to be made defendants, being satisfied if they are before the court so as to be bound by the decree. The persons who are interested in resisting the demands of the actual plaintiff, and who must therefore be defendants in the action, are separated, according to the nature of their interests and of their relations with each other, into two classes, — those immediately interested, and those consequentially interested. When an individual is in the enjoyment of the subject-matter, or has a right, interest, or estate in it, either in possession or in expectancy,

[1] See Story, Eq. Pl. §§ 72, 76 *a*. It has been suggested that this general doctrine should be stated as follows: All persons materially interested in the *object* of the suit should be made parties. See Calvert on Parties, pp. 1–11; Story, Eq. Pl. §§ 76 *b*, 76 *c*.

[Paine *v.* Foster (1900), 9 Okla. 213, 53 Pac. 109: The syllabus by the court reads, "Courts of equity 'delight to do justice, and not by halves;' and it is a general rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are required to be made parties, either plaintiff or defendant, however numerous they may be, so that there may be a complete decree, which should bind them all."

In Abbott *v.* Gaches (1899), 20 Wash. 517, 56 Pac. 28, the court quoted as follows from High on Injunctions: "The true test, however, in all cases would seem to be to make such parties defendant as are necessary to a proper solution of the questions at issue."

The following are illustrations of defendants properly joined: Miles *v.* Du Bey (1894), 15 Mont. 340, 39 Pac. 313 (all persons diverting water from a water course); Brown *v.* Canal & Reservoir Co. (1899), 26 Colo. 66, 56 Pac. 183 (ditch company and persons claiming right to pro-rate water, in an action to restrain pro-rating); West Point Irrigation Co. *v.* Ditch Co. (1900), 21 Utah, 229, 61 Pac. 16 (all persons obstructing flow of water in ditch); United Coal Co. *v.* Canon City Coal Co. (1897), 24 Colo. 116, 48 Pac. 1045 (a mining company and its agent where one or the other or both were taking coal from plaintiff's mines); Siever *v.* Union Pac. R. R. Co. (1903), — Neb. —, 93 N. W. 743 (employer and creditor of employee in suit by employee to restrain vexatious attempts to garnishee exempt wages); State *ex rel.* *v.* Metschan (1896), 32 Ore. 372, 46 Pac. 791 (the holder of a county warrant in a suit to enjoin its payment).]

which is liable to be defeated or diminished by the plaintiff's success, he has an immediate and direct interest in resisting the plaintiff's demand, and is, in general, a necessary defendant. The interest here spoken of need not be personal and beneficial; it includes any estate or right in the subject-matter, legal or equitable, whether beneficial to the holder thereof or not.[1] Numerous illustrations of this fundamental doctrine are given in the succeeding portions of this section.

§ 229. * 332. **Persons consequentially Interested.** If a person not thus immediately interested is, nevertheless, so related to the subject-matter and to the principal defendant that, upon the plaintiff's success, he will be liable to be proceeded against by such defendant, and to be compelled to make compensation, in whole or in part, for the loss, he is consequentially interested in the subject of the action, and is also, in general, a necessary, or at least a proper, co-defendant. Equity requires this class of persons to be joined as defendants, not because they will be directly affected by the decree when rendered, but because, if the plaintiff succeeds against the principal defendant, the latter will then have the right to call upon them to reimburse him, wholly or partially, or to do some other act which shall, according to the nature of the case, restore or tend to restore him to his former position before the recovery against him. To avoid a multiplicity of actions, such persons should, in general, be brought into the suit in the first instance, so that their secondary or consequential liabilities may be determined and adjusted together with the main issues in the one decree.[2] I shall now apply these very general statements of doctrine to the classes of cases which most frequently arise in actual practice.

§ 230. * 333. **II. Actions to foreclose Mortgages. Introductory. Statutory Distribution of Parties.** The first class or group of equitable actions which I shall take up, both because it is the most

[1] 1 Dan. Ch. Pl. (4th Am. ed.) p. 246. On the general doctrine concerning defendants in equity, and necessary and proper parties, see Douglas Cy. Sup. *v.* Walbridge, 38 Wis. 179, citing Williams *v.* Bankhead, 19 Wall. 563; Janes *v.* Williams, 31 Ark. 175; Hamill *v.* Thompson, 3 Col. 518, 523; State *v.* Jacksonville, P. & M. R. Co., 15 Fla. 201; Satterthwaite *v.* Beaufort Cy. Com'rs, 76 N. C. 153.

[2] 1 Dan. Ch. Pl. (4th Am. ed.) p. 282. See also Story Eq. Pl. §§ 159, 162, 169, 169 *a*, 172, 173, 176; Greenwood *v.* Atkinson, 5 Sim. 419; Wilkinson *v.* Fowkes, 9 Hare, 193; Knight *v.* Knight, 3 P. Wms. 333; Crosby's Heirs *v.* Wickliffe, 7 B. Mon. 120; Wiser *v.* Blachly, 1 Johns. Ch. 437; New Eng. Com'l Bk. *v.* Newport Steam Factory, 6 R. I. 154.

familiar and because it illustrates very clearly the general doctrine, is that of suits to foreclose mortgages. The statute distributes the persons who may be proper or necessary parties defendant into two divisions, those "who have or claim an interest in the controversy adverse to the plaintiff," and those "who are necessary parties to a complete determination or settlement of the questions involved therein." It is plain that the latter division is the more comprehensive, and in fact includes the former. Every person "who has or claims an interest in the controversy adverse to the plaintiff" is evidently "a necessary party to a complete determination of the questions involved therein;" but, on the other hand, it is equally evident that there may be persons "who are necessary parties to a complete determination of the questions involved, but who do not have nor claim any interest in the controversy adverse to the plaintiff." A single example will illustrate this position. The codes of several States require the assignor of a thing in action to be made a co-defendant "to answer to the assignment" in a suit brought by the assignee. Of the two defendants, when this is done, the debtor alone has an interest in the controversy adverse to the plaintiff. The assignor has no such interest; he is not liable for the debt; his interest in the result is rather in accord with than in opposition to the plaintiff. He is, however, a necessary party to a complete determination and settlement of the questions involved in the suit. One of these questions is, whether the cause of action was in fact assigned to the plaintiff; and it is important to the rights of the debtor that this question be for ever settled in the single action. In the absence of any positive requirement of the statute, the assignor would not be a *necessary* defendant, because a judgment could be rendered against the debtor without the presence of the assignor. This example well illustrates my statement above, that one may be a party necessary to the settlement of all the questions involved in the suit, and at the same time neither have nor claim any interest adverse to the plaintiff. This evident distinction will aid us in discriminating between the necessary and the proper parties defendant in any given equitable action, for, as a general proposition, all those persons who have or claim an interest in the controversy adverse to the plaintiff are "*necessary*" defendants, if by "interest adverse" is intended an *interest opposed to a*

recovery of judgment by the plaintiff; while those who, in contradistinction to the former, are merely "necessary parties to a complete determination of the questions involved," are, in the main, "*proper*" defendants.

§ 231. * 334. **Object of the Judgment in Foreclosure. Necessary and Proper Parties herein.** These principles may now be applied to the class of actions under immediate discussion, — those brought to foreclose mortgages. Those persons who own or have an estate in the land to be sold under the decree, and those who, in the original creation of the debt, or by any subsequent assumption of it, are debtors to the mortgagee, and therefore liable to a personal judgment for a deficiency, have an interest in the controversy adverse to the plaintiff, and are beyond doubt necessary parties, if the plaintiff desires to obtain all the relief which the law affords him, namely, of sale and personal judgment for deficiency. If, however, the plaintiff will be satisfied with a partial relief, and simply asks a decree for a sale without any personal judgment for a deficiency, the debtor, unless he is also owner of the land in whole or in part, is not a necessary defendant. The decree and sale must of course divest all ownership and titles to the land or any part thereof, or else there would be no sale but simply the show of one. But in order that the land may produce its full value, the decree and sale must go further than this, and must cut off all subsequent liens and incumbrances, and inchoate interests which are not titles but merely the seeds of titles. There is thus a threefold object of the judgment: (1) To divest the title of the present owner, and transfer the ownership to the purchaser. This is essential, and all persons who have any such title are necessary parties, for without them the whole action would be a nullity.[1] (2) To cut off all liens and inchoate interests, so that the land can be sold at a greater advantage. This is of course not absolutely essential, for a sale can be effected without it. The holders of such liens and inchoate interests are *proper* parties. (3) To obtain a decree for any deficiency which may arise after the sale, against those persons who are liable for the mortgage debt. All such debtors are necessary parties if the plaintiff seeks to obtain this particular relief; but

[1] ["Any one who has the right to pay the debt and redeem is a necessary party to the foreclosure proceedings, and a decree in his absence is nugatory:" Brown *v.* Hotel Ass'n of Omaha (1901), 63 Neb. 181, 88 N. W. 175, citing Denney *v.* Cole, 22 Wash. 372, 61 Pac. 38.]

he may waive this relief and content himself with the sale and the proceeds thereof, in which case these mere debtors would not be necessary defendants. The foregoing principles have been adopted by all the courts. The doctrine is universally established that in the equitable action to foreclose a mortgage by a sale of the mortgaged premises, all persons who own the land or any part thereof, all who have any interest therein vested or contingent, perfected or inchoate, subsequent to the giving of the mortgage, all who are owners or holders of any subsequent liens or incumbrances thereon, and finally all who are personally liable for the debt secured by the mortgage, may generally be united as defendants; and must be made defendants if the plaintiff seeks to obtain a decree affording him all the relief which the court can grant. As titles, interests, and liens prior and paramount to the mortgage are in no way affected by it or by the decree of foreclosure and the sale thereunder, the owners and holders thereof are neither necessary nor proper parties.[1]

§ 232. * 335. **Variations in Practical Rules Due to Differences in Local Law as to Nature of Interests in Land.** While this general statement of the doctrine is universally accepted, there are some points of difference in its practical application. These differences will be found, upon careful examination, to arise, not from any doubt as to the general principle itself, but from a certain want of uniformity in the local law of the various States in respect to the nature of liens and incumbrances upon the land, and in respect to the nature of inchoate or contingent interests in the land. Thus, if in one State a judgment, when docketed, becomes a lien upon the lands of the debtor, and in another such a judgment is not a lien, a judgment creditor of the owner of the mortgaged premises would plainly be a proper party defendant in the first-named State, and as plainly not a proper party in the second. The most important difference in the local law defining and regulating the nature of interests in the land, relates to the inchoate dower of the wives of mortgagors and of other subsequent owners, and especially where the mortgage is given for purchase-money so as to take precedence of the dower right of the mortgagor's wife. In some States where dower is carefully protected, the wives of the mortgagors and of other subsequent

[1] [But see note to § * 342.]

owners of the land are in all cases regarded as having a positive interest in the equity of redemption, even though they joined in the execution of the mortgage, or even though the lien of the mortgage be prior to their dower right; and they are therefore, under all possible circumstances, necessary defendants if the plaintiff wishes to cut off their rights of redemption. In other States, the wives, under some circumstances at least, are not regarded as having any real interest in the land, nor any right of redemption, and they need not therefore be made defendants for any purpose. This example is a sufficient illustration, and shows that any difference in the practical rules laid down by various courts arises from a variation in the law defining the nature of interests in the land; what constitutes an interest in one State may not do so in another.

§ 233. * 336. **Mortgagor and his Grantee as Parties.** I pass from this broad statement of the general principle to a more careful discussion of the rules, with an analysis of some leading cases. The doctrine which I have thus stated is approved and applied under various circumstances, and to different classes of persons having different interests and liens in the cases cited in the foot-note.[1] When the mortgagor remains owner of the

[1] [The author's original note has been classified and condensed as follows: Owner of land: Lenox *v.* Reed, 12 Kan. 223; Green *v.* Dixon, 9 Wis. 532 (containing a full discussion of subject of parties); Sumner *v.* Coleman, 20 Ind. 486 (holding that owner of land subject to mortgage is proper but not necessary party); Semple *v.* Lee, 13 Ia. 304 (same doctrine); Davenport *v.* Turpin, 43 Cal. 597. Grantee of part of mortgaged premises: Douglass *v.* Bishop, 27 Ia. 214. Judgment creditor of mortgagor: Union Bank of Masillon *v.* Bell, 14 O. St. 200; Gaines *v.* Walker, 16 Ind. 361; Morris *v.* Wheeler, 45 N. Y. 708: "This is certainly a most extraordinary decision; it is in direct conflict with other decisions made by the same court, and is an utter confounding of all distinctions between necessary and proper parties. The decision is so clearly erroneous that it can only be regarded as an inadvertence." Verdin *v.* Slocum, 71 N. Y. 345. Obligor on mortgage debt other than mortgagor: Nichols *v.* Randall, 5 Minn. 240. Husband, where husband and wife join in mortgage on wife's property: Wolf *v.* Banning, 3 Minn. 133. Trustee and beneficiary: Mavrich *v.* Grier, 3 Nev. 52. Wife of grantee of mortgaged premises: Watt *v.* Alvord, 25 Ind. 533; Kay *v.* Whittaker, 44 N. Y. 565. Third party interested in mortgage debt: Johnson *v.* Britton, 23 Ind. 105. Assignor of instrument secured by mortgage: Holdridge *v.* Sweet, 23 Ind. 118; Gower *v.* Howe, 20 Ind. 396. These cases fell within a special provision of the Indiana code. Rankin *v.* Major, 9 Ia. 297; Sands *v.* Wood, 1 Ia. 263. Prior mortgagee: Standish *v.* Dow, 21 Ia. 363. Occupant of mortgaged premises: Suiter *v.* Turner, 10 Ia. 517. Heirs of deceased mortgagor: Muir *v.* Gibson, 8 Ind. 187; Leggett *v.* Mutual Life Ins. Co., 64 Barb. 23. Person claiming title adverse to mortgagor: Brundage *v.* Domestic, etc. Soc., 60 Barb. 204. Wife, where husband and wife join in mortgage (not necessary): Thornton *v.* Pigg, 24 Mo. 249; Powell *v.* Ross, 4 Cal. 197 (necessary): Chombers *v.* Nicholson, 30 Ind. 349; McArthur *v.* Franklin, 15 O. St. 485, s. c.

premises, he is of course, on every account, a necessary defendant.[1] If, however, he has conveyed away the entire land by an absolute deed of conveyance, the grantee, who is the owner at the time of commencing the suit, is a necessary party defendant, even though his deed has not been put upon record, because without his presence the decree for a sale, which is the essential primary remedy granted by the action, cannot be made.[2] In a few cases, however, such parties have been spoken of as *proper*

16 id. 193. Wife, where she did not join with her husband in mortgage: Fletcher *v.* Holmes, 32 Ind. 497; Mooney *v.* Maas, 22 Ia. 380; Merchants' Bank *v.* Thompson, 55 N. Y. 7. Personal representative of deceased mortgagor: Miles *v.* Smith, 22 Mo. 502; Darlington *v.* Effey, 13 Ia. 177; Belloc *v.* Rogers, 9 Cal. 123; Schadt *v.* Heppe, 45 Cal. 433; Huston *v.* Stringham, 21 Ia. 36. Mortgagor after conveyance of equity of redemption: Burkham *v.* Beaver, 17 Ind. 367; Johnson *v.* Monell, 13 Ia. 300; Murray *v.* Catlett, 4 Greene (Ia.) 108; Stevens *v.* Campbell, 21 Ind. 471; Daly *v.* Burchell, 13 Abb. Pr. N. S. 264; Williams *v.* Meeker, 29 Ia. 292. Junior mortgagee: Procter *v.* Baker, 15 Ind. 178; Newcomb *v.* Dewey, 27 Ia. 381; Anson *v.* Anson, 20 Ia. 55; Knowles *v.* Rablin, 20 Ia. 101; Chase *v.* Abbott, 20 Ia. 154; Street *v.* Beal, 16 Ia. 683; Heinstreet *v.* Winnie, 10 Ia. 430; Crow *v.* Vance, 4 Ia. 434; Veach *v.* Schaup, 3 Ia. 194; Hayward *v.* Stearns, 39 Cal. 58. Assignee of mortgage as collateral security: Simson *v.* Satterlee, 64 N. Y. 657. Joint obligors with mortgagor: Fond du Lac Harrow Co. *v.* Haskins, 51 Wis. 135. Citing also, Hall *v.* Nelson, 23 Barb. 88, 14 How. Pr. 32; Peto *v.* Hammond, 29 Beav. 91; Maule *v.* Duke of Beaufort, 1 Russ. 349; Drury *v.* Clark, 16 How. Pr. 424; Denton *v.* Nanny, 8 Barb. 624; Mills *v.* Van Voorhies, 20 N. Y. 415; Delaplaine *v.* Lewis, 19 Wis. 476; Bigelow *v.* Bush, 6 Paige, 343; Shaw *v.* Hoadley, 8 Blackf. 165; Van Nest *v.* Latson, 19 Barb. 604; Cord *v.* Hirsch, 17 Wis. 403; Riddick *v.* Walsh, 15 Mo. 538; Martin *v.* Noble, 29 Ind. 216; French *v.* Turner, 15 Ind. 59; Ten Eyck *v.* Casad, 15 Ia. 524; Parrott *v.* Hughes, 10 Ia. 459; Bates *v.* Ruddick, 2 Ia. 423; Harwood *v.* Marye, 8 Cal. 580; Carpenter *v.* Williamson, 25 Cal. 161; Paton *v.* Murray, 6 Paige, 474; Church *v.* Smith, 39 Wis. 492; De Forest *v.* Holum, 38 Wis. 516.]

[1] [Where mortgaged premises are subsequently subjected to an easement by the public, and damages therefor are awarded to the owners of such premises, the owners are proper if not necessary parties to an action by the mortgagees to have the liens of their mortgages adjudged to be liens upon the money awarded as damages: Lumbermen's Ins. Co. *v.* City of St. Paul (1899), 77 Minn. 410, 80 N. W. 357.

Carey-Lombard Lumber Co. *v.* Bierbauer (1899), 76 Minn. 434, 79 N. W. 541: Where a person has an equitable interest in a building subject to lien, such interest may be proceeded against and the lien enforced without joining the legal owner of the land on which the building stands.]

[2] Hall *v.* Nelson, 23 Barb. 88; 14 How. Pr. 32; Cord *v.* Hirsch, 17 Wis. 403; Johnston *v.* Donvan, 106 N. Y. 269. See, however, Shippen *v.* Kimball, 47 Kan. 173, to the effect that a grantee whose deed has not been put on record is not a necessary party to the foreclosure, so as to render the proceedings ineffectual to convey a title.

[Goodwin *v.* Tyrrell (1903), Ariz., 71 Pac. 906; Armstrong *v.* Hufty (1901), 156 Ind. 606, 55 N. E. 443; Hopkins *v.* Warner (1895), 109 Cal. 133, 41 Pac. 868; Osborn *v.* Logus (1895), 28 Ore. 306, 42 Pac. 997; Brown *v.* Hotel Ass'n of Omaha (1901), 63 Neb. 181, 88 N. W. 175.

But it is not necessary to join the trustees in a deed of trust, in a suit to foreclose the same: Sidney Stevens Implement Co. *v.* Improvement Co. (1899), 20 Utah, 267, 58 Pac. 843.]

defendants merely.[1] This latter view is, in my opinion, clearly incorrect, since it leads to the inevitable conclusion that there may be an action without any necessary defendant. If, however, the mortgagor has conveyed away only a portion of the premises and remains owner of the residue, the grantee of the part so conveyed is not a necessary defendant. The suit against the mortgagor alone is not a nullity; there is a title in him for the decree of sale to act upon; but the rights of the grantee would be unaffected.[2] It follows as an evident corollary from the proposition just stated, that the mortgagor who has conveyed away the whole of the mortgaged premises is no longer a *necessary* party defendant in a foreclosure action, that is, he is not indispensable to the rendition of a simple judgment of sale, if no decree for a deficiency is asked.[3] He is, however, an eminently proper party; and if the plaintiff wishes a personal judgment for any deficiency which may arise upon the sale, he, or his personal representative if he is dead, is a necessary party, and may defend the action, and defeat the same by any competent defence which he may establish.[4] The decisions do not make any distinction between the case in which the mortgagor has simply conveyed the land incumbered by the mortgage, and that in which the grantee has assumed to pay the mortgage debt, and in fact there is and can be no such distinction. Whatever arrangement the mortgagor may make with his grantee, he cannot by his own act free himself from his liability to the holder of the mortgage; he

[1] Sumner *v.* Coleman, 20 Ind. 486; Semple *v.* Lee, 13 Iowa, 304. In the last case, the mortgagor and the owner to whom the land had been conveyed were both joined, and the court said the owner was a *proper* party, and the mortgagor was not a *necessary* one. [The same doctrine was announced in Talbot *v.* Roe (1903), 171 Mo. 421, 71 S. W. 682, the court saying that the only result of not joining the grantee was to leave her right to redeem still open.]

[2] Douglass *v.* Bishop, 27 Iowa, 214, 216. There is certainly a plain distinction between this case and the one where the entire premises are conveyed by the mortgagor. Watts *v.* Julian, 122 Ind. 124.

[3] Drury *v.* Clark, 16 How. Pr. 424; Delaplaine *v.* Lewis, 19 Wis 476, and cases cited; Stevens *v.* Campbell, 21 Ind. 471; Burkham *v.* Beaver, 17 Ind. 367; Huston *v.* Stringham, 21 Iowa, 36; Johnson *v.* Monell, 13 Iowa, 300; Semple *v.* Lee, 13 Iowa, 304; Murray *v.* Catlett, 4 Greene (Ia.), 108; Belloc *v.* Rogers, 9 Cal. 123; Williams *v.* Meeker, 29 Iowa, 292, 294; Story, Eq. Pl. § 197. See also Ayres *v.* Wiswall, 112 U. S. 187; Daugherty *v.* Deardorf, 107 Ind. 527; Bennett *v.* Mattingly (Ind. 1887), 10 N. E. 299; Keister *v.* Myers, 115 Ind. 312; West *v.* Miller, 125 Ind. 70; Johnson *v.* Foster, 68 Iowa, 140; Watts *v.* Creighton (Iowa, 1892), 52 N. W. 12; Miner *v.* Smith, 53 Vt. 551; Tutwiler *v.* Dunlap, 71 Ala. 126; Butler *v.* Williams, 27 S. C. 221; [Hopkins *v.* Warner (1895), 109 Cal. 133, 41 Pac. 868; Weir *v.* Rathbun (1895), 12 Wash. 84, 40 Pac. 625.]

[4] See cases cited in last note.

will therefore remain liable, either as principal debtor or as surety for the grantee who has assumed the payment, and will continue subject to a judgment for a deficiency.[1]

§ 234. *337. **Successive Grantees of Mortgaged Premises as Parties. Administrator and Heirs of Mortgagor.** The same principle is of universal application, and embraces all successive grantees of the premises who have made themselves personally liable for the mortgage debt. Thus, if the mortgagor conveys the premises to A., who takes them simply burdened by the lien, but does not assume and agree to pay the debt, and A. afterwards conveys in the same manner to B., who again conveys to C. who is the owner when the foreclosure is commenced, A. and B. are plainly neither necessary nor proper parties; they have retained no interest in the land, and were never personally responsible for the debt. If, on the other hand, in this series of conveyances, A., B., and C. had each in turn assumed and agreed to pay the mortgage debt, C. would be the *necessary* defendant in any action to foreclose, because he is the owner of the land. The mortgagor, A., and B. would be proper defendants, because they are personally liable for the debt. The mortgagor's liability was created by the original instrument, bond, note, or otherwise, and he did not become freed therefrom because others also assumed it. A.'s and B.'s liability was created by their voluntary assumption, and having been once incurred, it could not be thrown off without the consent of the creditor. If the plaintiff therefore demands a judgment for deficiency, and desires to make his security as complete as possible, he may join the mortgagor and A. and B. as co-defendants in the suit to foreclose.[2] If the mortgagor has conveyed his entire interest and

[1] See same cases last cited. [In Plankinton *v.* Hildebrand (1895), 89 Wis. 209, 61 N. W. 839, the court said: "In the absence of some statute extending their power, courts of equity, in foreclosure cases, have invariably left the complainant to his remedy at law for the part of the mortgage debt not satisfied by the foreclosure and sale. Statutory provisions of the character referred to were adopted in Wisconsin during its territorial existence, and continued in force until, by the adoption of the code, they were repealed. The result was that it was held by this court, in several cases, after the repeal of the statute, that the legal cause of action on the note or bond could not properly be joined with the equitable one to foreclose the mortgage, unless both causes of action affected all the parties to the action."]

[2] See same cases last cited. See also Logan *v.* Smith, 70 Ind. 597; Scarry *v.* Eldridge, 63 id. 44. [Johns *v.* Wilson (1898), Ariz. 53 Pac. 583; Hopkins *v.* Warner (1895), 109 Cal. 133, 41 Pac. 868. One who becomes liable by endorsement on note of mortgagor may also be joined

afterwards dies, his administrator or executor must be joined as a defendant if a judgment for deficiency is prayed, and may be admitted to contest the validity of the mortgage and of the debt it is given to secure.[1] It is even said by some courts that the personal representative of the deceased mortgagor is a necessary party defendant with the heirs and widow.[2] When the mortgagor dies intestate owning the land, or when any subsequent owner thus dies, his heirs are indispensable parties; and if the objection to their nonjoinder has not been taken, the court will of its own motion order them to be brought in as defendants. No effectual decree of sale can be made without them.[3]

in foreclosure suit: Meehan *v.* Bank (1895), 44 Neb. 213, 62 N. W. 490. As to the grantee being subject to an action at law while a separate suit in equity is prosecuted to foreclose the mortgage, see Garneau *v.* Kendall (1901), 61 Neb. 396, 85 N. W. 291; Meehan *v.* Bank (1895), 44 Neb. 213, 62 N. W. 490.]

[1] Huston *v.* Stringham, 21 Iowa, 36; Darlington *v.* Effey, 13 Iowa, 177.

[2] [Kelsey *v.* Welch (1896), 8 S. D. 255, 66 N. W. 390; Simon *v.* Sabb (1899), 56 S. C. 38, 33 S. E. 799, where it is held that under the act of 1894, making it necessary to recover judgment for a specific sum against the mortgagor's estate before the mortgaged property can be sold, the personal representative of a deceased mortgagor is a necessary party.] Miles *v.* Smith, 22 Mo. 502. If the plaintiff seeks a personal judgment for a deficiency, the personal representative of a deceased mortgagor is of course a necessary defendant; but if the plaintiff demands no such judgment, and is contented with the security of the land alone, it seems, the personal representative is not a necessary party. Story's Eq. Pl. §§ 196, 200; Duncombe *v.* Hansley, 3 P. Wms. 333 (*n.*); Fell *v.* Brown, 2 Bro. C. C. 276; Bradshaw *v.* Outram, 13 Ves. 234. See also Stanley *v.* Mather, 31 Fed. Rep. 860; Van Schaack *v.* Saunders, 32 Hun, 515; Munn *v.* Marsh, 38 N. J. Eq. 410; Fraser *v.* Bean, 96 N. C. 327; Lovering *v.* King, 97 Ind. 130; Hodgdon *v.* Heidman, 66 Iowa, 645; Hill *v.* Townley, 45 Minn. 167; Renshaw *v.* Taylor, 7 Ore. 315. But even if the complaint prays for judgment for a deficiency, the personal representatives are not necessary in the sense that their omission will render the complaint demurrable; for the prayer is not part of the complaint: so held in Butler *v.* Williams, 27 S. C. 221. [A devisee and those claiming under him are necessary parties, as well as the heirs: Chadbourn *v.* Johnston (1896), 119 N. C. 282, 25 S. E. 705.]

[3] Muir *v.* Gibson, 8 Ind. 187; Story's Eq. Pl. § 196. In North Carolina, when the mortgagee dies, his heirs are, in general, necessary parties plaintiff or defendant; but there are exceptions, as where the mortgagee had assigned, and died insolvent, leaving non-resident heirs. Etheridge *v.* Vernoy, 71 N. C. 184, 186, 187. See also Renshaw *v.* Taylor, 7 Ore. 315 (heirs necessary with the administrator); Zoger *v.* Ruster, 51 Wis. 32 (heirs necessary); Hill *v.* Townley, 45 Minn. 167 (same); Pillow *v.* Sentelle, 39 Ark. 61 (same); De Forest *v.* Holum, 38 Wis. 516 (devisee of deceased vendee in foreclosure of the vendor's lien); Hibernia Sav. & Loan Soc. *v.* Herbert, 53 Cal. 375 (mortgagor conveyed to a grantee and died, no judgment for a deficiency being asked, his administrator is not a necessary defendant). In Harsh *v.* Griffin, 72 Iowa, 608, it was held that the failure to join the heirs does not render the foreclosure sale wholly void; their only right is to redeem. Under the statutes of Missouri and of California the personal representative is the only necessary defendant; Tierney *v.* Spiva, 97 Mo. 98; Hall *v.* Klepzig, 99 Mo. 83; Bayly *v.* Muehe, 65 Cal. 345. [It is not necessary to join the heirs of a deceased mortgagor: Dickey *v.* Gibson (1898), 121 Cal. 276, 53 Pac. 704.

§ 235. *338. **Personal Representative of Owner of Mortgaged Premises Necessary Party in California. Judgment Creditors of Mortgagor. Assignor of Secured Debt.** In California, the personal representative of a deceased person succeeds at once to all lands as well as personal property; the title vests in him for purposes of administration; and if an owner of mortgaged land dies, his executor or administrator is therefore an indispensable party defendant.[1] A mortgagor having conveyed the land to assignees in trust for the benefit of creditors, judgment creditors whose judgments were recovered subsequent to such assignment, and which were therefore not direct liens on the land, were held to be proper parties defendant in an action brought to foreclose the mortgage against the mortgagor and the trustees. These trustees having suffered a default, the judgment creditors were permitted to intervene and to contest the validity of the mortgage and of the debt which it secured by setting up usury.[2] The general proposition was announced by the court, that the *cestuis que trustent* are proper defendants as well as the trustees. When a mortgage was given to secure a note payable to the order of the mortgagee, and the latter indorsed and transferred the note and assigned the mortgage, the assignee cannot maintain an action against the mortgagor and maker of the note, and the indorser of the note (the mortgagee), to foreclose the mortgage and to obtain judgment against both for either the whole amount of the note or for the deficiency. A legal action may be brought against both on the note, but a foreclosure must be against the mortgagor alone.[3] This last rule is exactly otherwise in Minnesota by virtue of an express statute. If the mortgage debt is secured by the obligation of any person other than the mortgagor, he may be joined as a defendant in the foreclosure suit, and a judgment for deficiency may be rendered against him alone, or jointly with the mortgagor, as the case may be.[4]

The heirs and devisees of a deceased mortgagor are necessary parties: Wall *v.* McMillan (1895), 44 S. C. 402, 22 S. E. 424.]

[1] Harwood *v.* Marye, 8 Cal. 580. It is held that the heirs of the deceased mortgagor are not necessary parties. Bayly *v.* Muehe, 65 Cal. 345. [See Kelsey *v.* Welch (1896), 8 S. D. 255, 66 N. W. 390, where the heirs were held proper parties, and the administrator, where the judgment will result prejudicially to the estate, a necessary party.]

[2] Union Bank of Masillon *v.* Bell, 14 Ohio St. 200. [But see Sidney Stevens Implement Co. *v.* Improvement Co. (1899), 20 Utah 267, 58 Pac. 843, where it was held that the trustees of a deed of trust were not necessary parties in an action to foreclose the same.]

[3] Sands *v.* Wood, 1 Iowa, 263.

[4] Nichols *v.* Randall, 5 Minn. 304, 308.

§ 236. *339. **Special Statutes Making Assignor of a Thing in Action a Necessary Party.** The special provisions in the codes of some States requiring the assignor of a thing in action to be made a defendant under certain circumstances in a suit by the assignee, affects the general doctrine as to parties in foreclosure actions in those States. These provisions, it will be remembered, require the assignor to be made a party "when the thing in action is not assignable by indorsement," or when it is not a negotiable instrument, or when the assignment is not expressly authorized by statute so as to transfer the legal title to the assignee. It has been held in States where these provisions are in force, that if a mortgage is given to secure a negotiable note, and this note is transferred in the usual manner by indorsement, although there is no written assignment of the mortgage, the assignor need not be made a defendant. The transfer of the note by indorsement carries with it the title to the mortgage, and the assignee thus becomes legal owner of both by a form and mode of transfer which permits the action to be brought without the assignor as a party defendant.[1] On the other hand, if the mortgage alone is assigned by a written transfer, while the evidence of the debt, for example a bond, is merely transferred by delivery, the assignor, who might be the mortgagee, is a necessary defendant under the provision above referred to.[2] This decision would undoubtedly embrace all cases where the instrument which is the principal evidence of debt, whether bond or negotiable note, unless the latter be payable to bearer, is transferred by delivery merely. If a note secured by mortgage is payable to bearer, so that the legal title will pass by mere delivery, it would seem the assignor need not be made a defendant. Such a note being negotiable, the case falls directly within the language of the provision as it is found in several codes.

§ 237. *340. **Where Holder of less than all of a Series of Notes Secured by same Mortgage brings Foreclosure Suit.** When a mortgage is given to secure a series of notes made by the mortgagor,

[1] Gower *v.* Howe, 20 Ind. 396. Mortgagees who have assigned their entire interest are not necessary parties. Pullen *v.* Heron Min. Co., 71 N. C. 567; Smythe *v.* Brown, 25 S. C. 89. It is held in New York that where the mortgage has been assigned by the mortgagee as collateral security for his own debt, and is foreclosed by the assignee without making the assignor a party, the latter may redeem upon payment of his debt. *Re* Gilbert's Est., 104 N. Y. 200. [See Styers *v.* Alspaugh (1896), 118 N. C. 631, 24 S. E. 422.]

[2] Holdridge *v.* Sweet, 23 Ind. 118; French *v.* Turner, 15 Ind. 59. See Kittle *v.* Van Dyck, 1 Sandf. Ch. 76.

having different periods of time to run, as, for example, one, two and three years, the proceeds of the land when sold upon foreclosure are to be applied to the payment of these notes in the order in which they fall due; that is, the one which first falls due is to be paid in full, and the surplus, if any, goes to the payment of the second, and so on. If the mortgagee assigns one or more of such notes, and retains the others, or if the notes are separately assigned to different persons, the holders cannot unite as co-plaintiffs in an action to foreclose, because the debt has been severed and their interests are separate and distinct. Either holder, however, may bring an action to foreclose, and may make the other holder (or holders) defendant, and such defendant can set up his rights in his answer. The facts being thus presented, the decree can adjust the various interests and equities of the different holders, and apportion the proceeds according to the priorities. The foregoing rules are established in Iowa.[1]

§ 238. * 341. **Occupant of Premises as Party. Averments of Petition as to each Person Made Defendant.** An occupant of the land, that is, a person in possession without alleging the title to be in himself, is not a necessary party; his rights, however, whatever they may be, will not be affected by the decree in a suit to which he was not made a defendant.[2] The complaint or petition must allege, in respect of every person made a defendant, that he has or claims some interest adverse to the plaintiff, or that he is a

[1] Rankin *v.* Major, 9 Iowa, 297. It must be confessed this is a sacrifice of substance to form. If the assignee may have affirmative relief as a defendant, it is difficult to see any substantial reason why he should not be permitted to join as plaintiff in the first instance. For a statement of the varying rules on the subject of mortgages to secure several notes, see 3 Pom. Eq. Jur. §§ 1200–1203. See also Johnston *v.* McDuffee, 83 Cal. 30; Studebaker Bros. Man. Co. *v.* McCargur, 20 Neb. 500.

[It was held in the following Nebraska cases that the holders of the different notes secured by the mortgage might maintain separate actions of foreclosure: Todd *v.* Cremer (1893), 36 Neb. 430, 54 N. W. 674; Burnett *v.* Hoffman (1894), 40 Neb. 569, 58 N. W. 1134; Sloan *v.* Thomas (1899), 58 Neb. 713, 79 N. W. 728, but the question of the right to join was not raised. In the recent case, however, of Guthrie *v.* Treat (1902), — Neb. —, 92 N. W. 595, in an elaborate and well reasoned opinion in which the rule in Rankin *v.* Major (*supra*), and the similar case of Swenson *v.* Plow Co., 14 Kan. 387, is thoroughly discussed, the court holds that under the facts of this case a joinder is proper. The Iowa and Kansas rule is explained on the basis of the different methods of procedure in foreclosure in those States. But in Bacon *v.* O'Keefe (1896), 13 Wash. 655, 43 Pac. 886, that court held that a joinder was not only proper but necessary, and refused to sanction the rule in Burnett *v.* Hoffman (*supra*).]

[2] Suiter *v.* Turner, 10 Iowa, 517. See Richardson *v.* Hadsall, 106 Ill. 476. That he is a proper party, see Ruyter *v.* Reid, 121 N. Y. 498 (motion for rehearing denied, Oct. 14, 1890, 25 N. E. 377).

necessary party to a complete settlement of the questions involved in the controversy. A defendant concerning whom no such averment is made may demur for want of sufficient facts.[1] Parties remotely and contingently interested in the result, although having no estate in or lien on the land, may be proper defendants in order to protect their rights and to effect the settlement of the questions.[2]

§ 239. *342. **Subsequent and Prior Incumbrancers as Parties. Husband in Case of Mortgage on Wife's Land.** It is a rule universally established that all subsequent incumbrancers, who are holders of general or specific liens on the land, whether mortgagees, judgment creditors, or whatever be the nature of the lien if it can be enforced against the land, are not necessary parties in the sense that their presence is indispensable to the rendition of a decree of sale; but they are necessary parties defendant to the recovery of a judgment which shall give to the purchaser thereunder a title free from their liens and incumbrances. If they are not joined as defendants, their rights are unaffected; their liens remain undisturbed and continue upon the land while in the hands of the purchaser; and they retain the right of redemption from the holder of the mortgage before the sale, and from the purchaser after the sale.[3] It is not, in general, considered that

[1] Martin *v.* Noble, 29 Ind. 216. It is not necessary to allege any particular interest. A general averment, as stated in the text, is sufficient in respect to all the defendants, except those against whom a personal judgment is asked, and those who are owners of the land. See Anthony *v.* Nye, 30 Cal. 401; Sichler *v.* Look, 93 Cal. 600; Carpenter *v.* Ingalls (S. Dak. 1892), 51 N. W. 948. [McKibben *v.* Worthington's Ex'r (1898), 103 Ky. 356, 45 S. W. 233; Commonwealth *v.* Robinson (1895), 96 Ky. 553, 29 S. W. 306.]

[2] See, as illustrations, Johnson *v.* Britton, 23 Ind. 105; Parrott *v.* Hughes, 10 Iowa, 459. Such persons are not, however, necessary parties: United States Trust Co. of N. Y. *v.* Roche, 116 N. Y. 120, 130.

[3] Kay *v.* Whittaker, 44 N. Y. 565, 572; Bloomer *v.* Sturges, 58 N. Y. 168; Rathbone *v.* Hooney, 58 N. Y. 463; Gaines *v.* Walker, 16 Ind. 361; Proctor *v.* Baker, 15 Ind. 178; Wright *v.* Howell, 35 Iowa, 288, 293; Newcomb *v.* Dewey, 27 Iowa, 381; Anson *v.* Anson, 20 Iowa, 55; Ten Eyck *v.* Casad, 15 Iowa, 524; Knowles *v.* Rablin, 20 Iowa, 101; Chase *v.* Abbott, 20 Iowa, 154; Street *v.* Beal, 16 Iowa, 68; Heimstreet *v.* Winnie, 10 Iowa, 430; Veach *v.* Schaup, 3 Iowa, 194; Bates *v.* Ruddick, 2 Iowa, 423; Hayward *v.* Stearns, 39 Cal. 58, 60; Green *v.* Dixon, 9 Wis. 532; Story's Eq. Pl. § 193; Haines *v.* Beach, 3 Johns. Ch. 459; Draper *v.* Lord Clarendon, 2 Vern. 518; Lomax *v.* Hide, 2 Vern. 186; Godfrey *v.* Chadwell, 2 Vern. 601; Morret *v.* Westerne, 2 Vern. 663; Rolleston *v.* Morton, 1 Dr. & W. 171; Besser *v.* Hawthorne, 3 Ore. 129; Pardee *v.* Steward, 37 Hun, 259; Douthit *v.* Hipp, 23 S. C. 205; Hensley *v.* Whiffin, 54 Iowa, 555; Stanbrough *v.* Daniels, 77 Iowa, 561; Williams *v.* Brownlee, 101 Mo. 309; De Lashmutt *v.* Sellwood, 10 Ore. 319; Johnson *v.* Hosford (Ind., 1887), 10 N. E. 407. See, however, *per contra*, Morris *v.* Wheeler, 45 N. Y. 708, — a

prior incumbrancers are even proper defendants, for as their liens are paramount to the mortgage, they cannot be in any manner affected by the action or the decree therein.[1] It is said in Iowa, however, that they are proper parties.[2] If a mortgage is given by a husband and wife on lands which are her separate estate, he is a necessary co-defendant with his wife, except in the very few States whose statutes expressly exclude him in actions having reference to the wife's separate property. If he united with the wife in the note, bond, or other obligation secured by the mort-

clearly erroneous decision. The holder of an interest in the land not adverse or paramount to the mortgage, but also not subject to it, may be made a party defendant. Brown *v.* Volkenning, 64 N. Y. 76, 84. As to the proper relief against persons holding subsequent interests, see Heath *v.* Silverthorn Lead Min. Co., 39 Wis. 146. [Osborn *v.* Logus (1895), 28 Ore. 306, 42 Pac. 997; Gammon *v.* Johnson (1900), 126 N. C. 64, 35 S. E. 185; Williams *v.* Kerr (1893), 113 N. C. 306, 18 S. E. 501. In Gaines *v.* Childers (1901), 38 Ore. 200, 63 Pac. 487, the court said: "If encumbrancers are not made parties to a suit to foreclose a lien, they are, of course, in no respect bound by the decree or proceeding thereunder; but the decree itself is valid, and vests in the purchaser the legal title to the premises, and the right, in a proper proceeding, to compel such lien creditors to redeem."

A purchaser at a sheriff's sale, where land is sold under the execution of a judgment junior in lien to a mortgage thereon, and who seeks to refer for the security of his title to a judgment senior to such mortgage, is a proper party to the foreclosure of the mortgage: Baum *v.* Trantham (1895), 45 S. C. 291, 23 S. C. 54.]

[1] Story's Eq. Pl. § 193; Rose *v.* Page, 2 Sim. 471; Delabere *v.* Norwood, 3 Swanst. 144 (*n.*); Wakeman *v.* Grover, 4 Paige, 23; Parker *v.* Fuller, 1 Russ. & My. 656; Hagan *v.* Walker, 14 How. U. S. 37; Richards *v.* Cooper, 5 Beav. 304; Arnold *v.* Bainbrigge, 2 De G., F. & J. 92; Audsley *v.* Horn, 26 Beav. 195; 1 De G., F. & J. 226; Person *v.* Merrick, 5 Wis. 231; Wright *v.* Bundy, 11 Ind. 398; Rathbone *v.* Hooney, 58 N. Y. 463; Jerome *v.* McCarter, 94 U. S. 734; Wabash, St. L. & P. Ry. Co. *v.* Central Trust Co. of N. Y., 22 Fed. Rep. 138. As to whether they are proper though not necessary defendants, see Warren *v.* Burton, 9 S. C. 197; Baas *v.* Chicago & N. W. Ry. Co., 39 Wis. 296; Emigrant I. Sav. Bk. *v.* Goldman, 75 N. Y. 127; Lockman *v.* Reilly, 95 N. Y. 64; Hinson *v.* Adrian, 86 N. C. 61; Harwell *v.* Lehman, 72 Ala. 344; Foster *v.* Johnson & Trowbridge, 44 Minn. 290; First Nat. Bk. of Salem *v.* Salem Capital Flour Mills Co., 31 Fed. Rep. 580.

[See, on the contrary, Van Loben Sels *v.* Bunnell (1901), 131 Cal. 489, 63 Pac. 773, where the court said: "There is no doubt of the jurisdiction of the court to adjudicate the claims of a prior encumbrancer if made a party. Such encumbrancers are not necessary parties, but they are always proper parties, and it is good practice to join them for the purpose of liquidating their claims. Whenever a prior encumbrancer is made a party, it is his right to file a cross-complaint to foreclose his lien." To the same effect see also Gammon *v.* Johnson (1900), 126 N. C. 64, 35 S. E. 185; Jacobi *v.* Mickle (1894), 144 N. Y. 237, 39 N. E. 66, where a prior encumbrancer was made a party and suffered default, and was held to be barred thereby from foreclosing his mortgage. Prior encumbrancers may be made parties for the purpose of determining the amount and rank of their liens: Missouri, etc. Trust Co. *v.* Richardson (1899), 57 Neb. 617, 78 N. W. 273. Held proper but not necessary parties: Globe Loan & Trust Co. *v.* Eller (1901), 61 Neb. 226, 85 N. W. 48.]

[2] Standish *v.* Dow, 21 Iowa, 363; Heimstreet *v.* Winnie, 10 Iowa, 430.

gage, he is a proper defendant in Minnesota, for the further reason that a judgment for deficiency may be rendered against him in the action.[1]

§ 240. *343. **Joinder of Wife of Mortgagor.** In regard to the necessity or propriety of joining the wife of the mortgagor, or of any subsequent owner of the mortgaged premises, there is some conflict among the decisions. The solution of this question depends mainly upon the law of the State regulating the wife's right of dower.[2] In most of the States the common-law doctrines as to dower prevail without substantial alteration. In some, however, they have been entirely abrogated, or at least radically changed. As at the common law, the wife's inchoate dower right attached to all lands owned in fee by the husband during the marriage, any mortgage, except for purchase-money, given by the husband, in which the wife does not join, is subject to her dower right. When such a mortgage — not for purchase-money — is executed by the husband alone, a foreclosure thereof by an action in which she is even made a party defendant does not affect her rights; she can assert her claim to dower in the land after her husband's death without redemption; the decree as to her is a mere nullity.[3] If the wife unites with her husband in executing the mortgage, her dower right becomes subject to the mortgage lien; in other words, she is entitled to dower in the equity of redemption. This entitles her to redeem upon the same principle that any other junior incumbrancer is thus entitled. In all those States where the common-law doctrines as to dower have not been abrogated, the wife of the mortgagor, who has united in executing the mortgage, though not an absolutely necessary party, must be made a defendant in order to cut off her right of redemption. If not a party to the foreclosure suit, she may come in and redeem from the purchaser.[4] The same is, of course,

[1] Wolf *v.* Banning, 3 Minn. 202, 204. [In Padley *v.* Neill (1896), 134 Mo. 364, 35 S. W. 997, a wife commenced an action to cancel a mortgage on her property, and a foreclosure was allowed on a cross bill without joining her husband.]

[2] [But where a wife renounces her dower right, she is not a necessary party: Miller *v.* Bank (1897), 49 S. C. 427, 27 S. C. 514.]

[3] Moomey *v.* Maas, 22 Iowa, 380; Merchants' Bank *v.* Thomson, 55 N. Y. 7, 11.

[4] McArthur *v.* Franklin, 15 Ohio St. 485; 16 id. 193; Chambers *v.* Nicholson, 30 Ind. 349; Chase *v.* Abbott, 20 Iowa, 154; Anthony *v.* Nye, 30 Cal. 401; Mills *v.* Van Voorhies, 20 N. Y. 412. For the peculiar law of North Carolina, see Creecy *v.* Pearce, 69 N. C. 67; Etheridge *v.* Vernoy, 71 N. C. 184, 185–187; Nimrock *v.* Scanlin, 87 N. C. 119. Wife is a necessary defendant in Wisconsin: Foster *v.* Hickox, 38 Wis. 408, overruling Cary *v.* Wheeler, 14 id. 281. In Alabama, she is

true of any owner to whom the land or a part thereof has been conveyed, subject to the mortgage, and who remains owner at the time of commencing the action to foreclose.[1] It is not necessary to set out the wife's interest in detail in the plaintiff's pleading; it is sufficient to aver in the usual general formula that she has or claims an interest in the land adverse to the plaintiff.[2] A contrary rule prevails in a few States, in which it is held that the wife, under the circumstances mentioned, need not be made a defendant.[3] This ruling must be based upon the local law of dower radically different from the common law.

§ 241. *344. **Joinder of Wife of Mortgagor in Foreclosure of Purchase-Money Mortgage.** There is a marked conflict in the decisions defining the wife's right under a purchase-money mortgage. One theory holds that the legal position of a wife whose husband has executed a purchase-money mortgage in which she did not unite is exactly the same as that of a wife who has united with her husband in executing a mortgage not given for purchase-money. The lien of the mortgage is, of course, paramount to the dower interest, but she still has a right of redemption, and, in order to cut this off, she must be made a defendant in the foreclosure action.[4] The same rule also applies to the wife of the person to whom the land or a part of it has been conveyed, subject to a purchase-money mortgage, and who is owner at the time of the foreclosure.[4] The other theory denies that the wife whose husband executes a purchase-money mortgage in which she does not join has any interest in the land, or any right of redemption. According to this view, she need not be made a defendant in the action to foreclose, and is cut off by decree and sale, although omitted as a party.[5] When a trustee of a married

not a necessary party, though she claims an equity in the land on the ground that her funds were used in paying the purchase-money: Flowers *v.* Barker, 79 Ala. 445. [Wife is a proper, if not a necessary, party: Hausmann Bros. M'f'g Co. *v.* Kempfert (1896), 93 Wis. 587, 67 N. W. 1136. So is the widow, who joined in the mortgage: Chadbourn *v.* Johnston (1896), 119 N. C. 282, 25 S. E. 705.]

[1] Watt *v.* Alvord, 25 Ind. 533, and cases last cited.

[2] Anthony *v.* Nye, 30 Cal. 401.

[3] Thornton *v.* Pigg, 24 Mo. 249; Riddick *v.* Walsh, 15 Mo. 538; Powell *v.* Ross, 4 Cal. 197. This last case cannot be reconciled with Anthony *v.* Nye, *supra*. [In Morgan *v.* Wickliffe (1903), — Ky. —, 72 S. W. 1122, under Ky. St., § 2135, restricting the wife's dower right, it was held that the wife was not a necessary party to a suit to foreclose a mortgage in which she had joined.]

[4] Mills *v.* Van Voorhies, 20 N. Y. 412. Also in Foster *v.* Hickox, 38 Wis. 408.

[5] Fletcher *v.* Holmes, 32 Ind. 497, per Elliott J.; Etheridge *v.* Vernoy, 71 N. C. 184–186. [See also, Schaefer *v.* Purviance (1903), — Ind. —, 66 N. E. 154.]

woman purchased lands in trust for her, and gave a purchase-money mortgage therefor, it was held, in Nevada, that the wife and her husband were both necessary defendants in an action brought to foreclose the mortgage.[1]

§ 242. * 345. **Parties in Foreclosure of Mortgage upon Homestead. Adverse Claimant as Party. Other Cases.** Under the law of California in respect to homesteads, it is held that the husband and wife must both join in a mortgage of the homestead in order that it should have any validity as against either; and of course the wife is a necessary defendant in an action to foreclose such a mortgage in which she has joined.[2] In an action to foreclose a mortgage, a person who sets up a claim to the land adverse and paramount to the title of the mortgagor, and who therefore denies the efficacy of the mortgage lien, cannot properly be joined as a co-defendant by the plaintiff.[3] Such an adverse claim to the land in opposition to the mortgage cannot be tried in the equitable action to foreclose. So far as mere legal rights are concerned in such an action, the only proper parties are the mortgagor and the mortgagee, and those who have acquired rights under them subsequent to the mortgage. The mortgagee or holder of the mortgage cannot make one who claims prior and adversely to the title of the mortgagor a defendant for the purpose of trying the validity of his adverse claim.[4] In Iowa, a

[1] Mavrich *v.* Grier, 3 Nev. 52. And when mortgaged land is conveyed in trust, or vested in trustees, the *cestuis que trustent* are necessary defendants in a suit to foreclose. Clark *v.* Reyburn, 8 Wall. 318; Faithful *v.* Hunt, 3 Anst. 751; Calverley *v.* Phelp, 6 Mad. 229; Osbourn *v.* Fallows, 1 Rus. & M. 741; Newton *v.* Earl Egmont, 4 Sim. 574, 584, 5 Sim. 130, 135; Coles *v.* Forrest, 10 Beav. 552, 557; Goldsmid *v.* Stonehewer, 9 Hare App. 38; Story's Eq. Pl. §§ 206, 207; United States Trust Co. of N. Y. *v.* Roche, 116 N. Y. 120, 130; Kirkpatrick *v.* Corning, 38 N. J. Eq. 234.

[2] Revalk *v.* Kraemer, 8 Cal. 66; Marks *v.* Marsh, 9 Cal. 96; Moss *v.* Warner, 10 Cal. 296; Sargent *v.* Wilson, 5 Cal. 504. See also Mabury *v.* Ruiz, 58 Cal. 11; Hefner *v.* Urton, 71 Cal. 479. [Held in Spalti *v.* Blumer (1894), 56 Minn. 523, 58 N. W. 156, that a decree of foreclosure, where the wife is not a party, will not affect her homestead interest. Children whose homestead rights are not subject to a mortgage, are not proper parties to its foreclosure: Hoppe *v.* Fountain (1894), 104 Cal. 94, 37 Pac. 894.]

[3] [So held in Joslin *v.* Williams (1901), 61 Neb. 859, 86 N. W. 473.]

[4] Eagle Fire Ins. Co. *v.* Lent, 6 Paige, 637, per Walworth Chan.; Corning *v.* Smith, 6 N. Y. 82; Palmer *v.* Yager, 20 Wis. 91, 103, per Dixon C. J.; Pelton *v.* Farmin, 18 Wis. 222. See also Roberts *v.* Wood, 38 Wis. 60; Crogan *v.* Spence, 53 Cal. 15; Houghton *v.* Allen, 75 Cal. 102; McComb *v.* Spangler, 71 Cal. 418, 423; Farmers' Loan & T. Co. *v.* San Diego Street-Car Co., 40 Fed. Rep. 105; but may try the validity of a claim which is not thus adverse and paramount, and may make the holder thereof a defendant: Brown *v.* Volkenning, 64 N. Y. 76, 84; Baas *v.* Chicago & N. W. Ry. Co. 39 Wis. 296; Lyon *v.* Powell, 78 Ala. 351.

trust deed of land or of chattels intended as security for a debt is by statute regarded as a mortgage, and may be foreclosed by action in the same manner as a mortgage.[1] A subsequent incumbrancer, as, for example, a mortgagee, who has not been made a party to the foreclosure of a prior mortgage, may redeem the land from the sale, and, in his action to compel the redemption, he should make the mortgagor and his prior mortgagee, and the purchaser at the sale and his grantees, if any, the parties defendant.[2] The grantee of the purchaser is an indispensable defendant in such an action; and if his omission is properly objected to by the actual defendant, the action must fail.[3]

§ 243. * 346. **III. Parties in Creditors' Actions; and Actions by or on Behalf of Creditors to set aside Fraudulent Transfers by their Debtors. General Remarks.** It is not within the scope of this work to inquire into the nature of creditors' suits, nor to discuss the question when and under what circumstances they may be maintained. My only present concern is with respect to the proper selection of parties defendant, whenever the actions themselves may be properly brought. The general purpose of a creditor's suit proper is to reach, at the instance of a judgment creditor whose legal remedies of judgment and execution thereon have been exhausted, the assets of the judgment debtor, which, either by reason of their intrinsic nature, or by reason of their transfer alleged to have been fraudulent as against the creditor, are or have been placed beyond the reach of an execution at law,

[1] Darlington *v.* Effey, 13 Iowa, 177. Trust deeds appear to be used in place of mortgages in several other of the Western States.

[2] Anson *v.* Anson, 20 Iowa, 55; Knowles *v.* Rablin, 20 Iowa, 101; Street *v.* Beal, 16 Iowa, 68; Burnap *v.* Cook, 16 Iowa, 149. So, too, where the prior mortgagee seeks a second time to foreclose his mortgage against a subsequent mortgagee who was not made a party to the first foreclosure suit, all the purchasers at the first foreclosure sale are necessary parties: Moulton *v.* Cornish, 61 Hun, 438.

[3] Winslow *v.* Clark, 47 N. Y. 221, 263; citing Dias *v.* Merle, 4 Paige, 259. And in an action to set aside a foreclosure sale for fraud, the purchaser is a necessary defendant: Wilson *v.* Bell, 17 Minn. 61, 64.

[*Where Mortgagee is not Payee of Debt.* It was held in Swenney *v.* Hill (1902), 65 Kan. 826, 70 Pac. 868, that "if promissory notes be given to one person, and a mortgage securing them is given to another, who by the terms of the latter instrument is given active powers and authority over the subjects of the mortgage relation, the mortgagee is a necessary party to a suit brought by the payee of the notes to foreclose the mortgage." (Syllabus by the court.)

Where the Mortgagee Dies. An action for possession and foreclosure brought by a mortgagee against a mortgagor and others, cannot be continued by the mortgagee's executor when the mortgagee dies pending the suit, without joining the mortgagee's heirs as parties: Hughes *v.* Gay (1903), 132 N. C. 50, 43 S. E. 539.]

and which are therefore denominated equitable assets. Certain species of property, as, for example, things in action, although in the ownership of the debtor, cannot be seized on execution. The distinctive feature of the action, however, is to reach land, and sometimes chattels, which the debtor, having owned by a legal title, has transferred to some grantee or assignee in fraud of his creditors; or to reach such land, and sometimes personal property, the legal title to which stands, and always has stood, in other parties, while by reason of alleged facts the equitable ownership, at least so far as the creditors are concerned, is held by the debtor himself, and the property is thus, as is alleged, liable to be taken and applied to the discharge of the creditor's demands. Under what circumstances a transfer of property is fraudulent as against the creditors, or the equitable ownership is held by the debtor while the legal title is vested in another, it is not now the place to inquire. Assuming that such circumstances exist, and that when they exist an action may be maintained by the judgment creditor whose legal remedies are exhausted, to reach the property and have it applied in some manner to the payment of his demands, it may be asked, Who should be made parties defendant in such an action? The answer to this question is plain, and the rule has been well established, depending as it does upon the most evident principles of equity jurisprudence. The creditor's suit, properly so called, and which has been thus described in general terms, should not be confounded with actions that creditors may sometimes bring, based upon the law of trusts and the right of a *cestui que trust* to compel the performance of his duty by a trustee.

§ 244. * 347. **Parties Defendant in Action by Judgment Creditor to reach Equitable Assets; and to reach Property fraudulently Transferred.** In an action by a judgment creditor to reach the equitable assets of the debtor in his own hands, or to reach property which has been transferred to other persons, or property which is held by other persons under such a state of facts that the equitable ownership is vested in the debtor, the judgment debtor is himself an indispensable party defendant, and the suit cannot be carried to final judgment without him. In some cases, as when the property has been assigned at different times to different assignees, or is held by different legal owners, who are all made co-defendants, he is the very link which unites them all together,

the common centre to which they are all connected, and it is because he is a party defendant that they can all be joined in one action as co-defendants.[1] Even if the objection to his nonjoinder be not taken by the actual defendants, the court will on its own motion order him to be brought in.[2] If the judgment debtor himself is dead, his administrator or executor is an indispensable

[1] [Sheppard *v.* Green (1896), 48 S. C. 165, 26 S. E. 224; First Nat. Bank *v.* Shuler (1897), 153 N. Y. 163, 47 N. E. 262, in which the court said: "The authorities are decisive in affirming the general rule that, in a creditor's action brought to impeach and set aside a general assignment by a debtor of his property for the benefit of creditors, the court will not proceed to judgment in the absence of the debtor as a party defendant, unless by death or other circumstance his joinder, as a defendant, is wholly impracticable. It has been held in some cases that in a suit brought by a creditor against a fraudulent alienee of the debtor, to set aside a specific transfer for fraud, where the conveyance was absolute and transferred as between the parties an indefeasible title or interest, the fraudulent vendor is not a necessary party. (Buffington *v.* Harvey, 95 U. S. 103; Campbell *v.* Jones, 25 Minn. 155; Potter *v.* Phillips, 44 Ia. 357; see, also, Fox *v.* Moyer, 54 N. Y. 130). But the relaxation of the rule has never, so far as we can discover, been extended to the case of an assignment in trust for the benefit of creditors." See also Williamson *v.* Selden (1893), 53 Minn. 73, 54 N. W. 1055; Bevins *v.* Eisman (1900), Ky., 56 S. W. 410; First Nat. Bank *v.* Gibson (1903), — Neb., — 94 N. W. 965.] Lawrence *v.* Bank of the Republic, N. Y. 320; Shaver *v.* Brainard, 29 Barb. 25; Wallace *v.* Eaton, 5 How. Pr. 99; Logan *v.* Hale, 42 Cal. 645; Allison *v.* Weller, 6 N. Y. Sup. Ct. 291; Vanderpoel *v.* Van Valkenburgh, 6 N. Y. 190; Gaylords *v.* Kelshaw, 1 Wall. 81; Miller *v.* Hall, 70 N. Y. 250; Hubbell *v.* Merchants' Bk. of Syracuse, 42 Hun, 200; Hickox *v.* Elliott, 10 Sawy. 415; s. c. 22 Fed. Rep. 13, 20; Coffey *v.* Norwood, 81 Ala. 512; Potter *v.* Phillips, 44 Iowa, 353; Blanc *v.* Paymaster Min. Co., 95 Cal. 524; Williamson *v.* Selden (Minn. 1893), 54 N. W. 1055; Dunn *v.* Wolf, 81 Iowa, 688; Weaver *v.* Cressman, 21 Neb. 675; Taylor *v.* Webb, 54 Miss. 36. Where the creditor seeks to establish his debt, as well as to subject the property fraudulently conveyed to the payment thereof, the debtor must, of course, be made a party: Chadbourne *v.* Coe (C. C. A.), 51 Fed. Rep. 479. As illustrations of various actions by creditors, see Boone Co. *v.* Keck, 31 Ark. 387; Holland *v.* Drake, 29 Ohio St. 441; Fraser *v.* Charleston, 13 S. C. 533; Potter *v.* Phillips, 44 Iowa, 353; Green *v.* Walkill Nat. Bank, 7 Hun, 63; Dewey *v.* Moyer, 9 id. 473; Haines *v.* Hollister, 64 N. Y. 1; Scott *v.* Indianap. Wagon Works, 48 Ind. 75.

[See Glover *v.* Hargadine-McKittrick Dry Goods Co. (1901), 62 Neb. 483, 87 N. W. 170, where the court said: "The vendor in a conveyance alleged and proved to have been fraudulently made and to be for that reason void as against creditors is always a proper but not in all cases a necessary party to an action by the latter to set the instrument or transaction aside. If he has reserved or retained no title or interest in or lien upon the property, but has parted with it both absolutely and completely, he has no rights to be affected by the result of the litigation and his presence may be dispensed with." (Syllabus by the court.)

In Gores *v.* Field (1901), 109 Wis. 408, 84 N. W. 867, creditors brought an action against the directors and officers of an insolvent bank, which had made a general assignment, to recover losses sustained by their mismanagement, and it was held that the corporation, being in fact defunct, was not a necessary party. But in Ready *v.* Smith (1902), 170 Mo. 163, 70 S. W. 484, in a somewhat similar action, in which, however, the corporation was still a going concern, the corporation was held a necessary party.]

[2] Shaver *v.* Brainard, 29 Barb. 25. It was said that a decree without his presence is impossible. [First Nat. Bank *v.* Shuler (1897), 153 N. Y. 163, 47 N. E. 262.]

defendant;[1] and if the objection be taken for the first time in the appellate court, the cause will be remanded in order that he may be added as a defendant.[2] When, however, the debtor conveyed his land to A. for the purpose of a second conveyance to his own wife in fraud of his creditors, which second conveyance was made, and the debtor afterwards died, it was held that his heirs were neither necessary nor proper parties to the creditor's action brought to set aside these conveyances. "The conveyance of their ancestor, though fraudulent, concludes them, and effectually cuts off all their interest in the property."[3]

§ 245. *348. Assignee of Judgment Debtor a Necessary Party. Where Legal Title is in Third Person and Equitable Ownership in Debtor. If the object of the action be to reach property which has been assigned by the debtor, the assignee is a necessary party defendant, even if he be a non-resident of the State;[4] and on the same principle, if the plaintiff seek to reach property of which the legal title is in a third person, but the equitable ownership of which is alleged to be in the debtor, such holder of the legal title must be a defendant.[5] When the debtor conveyed land to a third person with the purpose that such person should at once convey the same to the debtor's wife, which second conveyance was forthwith made, it was held, in an action against the debtor and his wife to reach the land in her hands, that the first grantee was a necessary party defendant.[6] A debtor fraudulently con-

[1] Alexander *v.* Quigley, 2 Duvall, 300; Postlewaite *v.* Howes, 3 Iowa, 365; Coates *v.* Day, 9 Mo. 315; [Prentiss *v.* Bowden (1895), 145 N. Y. 342, 40 N. E. 13; Sheppard *v.* Green (1896), 48 S. C. 165, 26 S. E. 224; First Nat. Bank *v.* Shuler (1897), 153 N. Y. 163, 47 N. E. 262. In the last case the wife of the debtor was one of the alleged fraudulent vendees, and she became his executrix upon his death pending the suit. She was already a party in her individual capacity, and was not made a party in her representative capacity. Held that she was not bound as executrix and the judgment could not be sustained.]

[2] Postlewaite *v.* Howes, 3 Iowa, 365.

[3] Harlin *v.* Stevenson, 30 Iowa, 371, 375.

[4] Gray *v.* Schenck, 4 N. Y. 460. [Where a husband and wife jointly execute a fraudulent conveyance of the husband's real property, the wife is not a proper party in an action by creditors to set aside the conveyance, but the wife of a fraudulent grantee is a proper party: Tatum *v.* Roberts (1894), 59 Minn. 52, 60 N. W. 848. See also Stevenson *v.* Matteson (1893), 13 Mont. 108, 32 Pac. 291.

Where an action is brought by a creditor to set aside a fraudulent confession of judgment by the debtor in favor of H., and a conveyance of land to H. under execution sale, the administrator and heir at law of H. are necessary parties: Sloan *v.* Hunter (1899), 56 S. C. 385, 34 S. E. 658. If the grantee be dead, his heirs are necessary parties: Bevins *v.* Eisman (1900), Ky., 56 S. W. 410.]

[5] Ogle *v.* Clough, 2 Duv. 145.

[6] Bennett *v.* McGuire, 5 Lans. 183, 188. The necessity of making this grantee a defendant is not apparent. It is true, *his*

veyed land to A., and took back a purchase-money mortgage which he assigned to B. In an action to set aside the conveyance, or to reach the mortgage, it was held that the debtor and both A. and B. were proper and necessary parties defendant.[1]

§ 246. * 349. **Assignees of Separate Parcels of Property should be joined. Reason herein.** When the action is brought for either of these objects, if the debtor has at different times assigned, in alleged fraud of his creditors, different parcels of his property to different assignees, or if different parcels of property are held by different persons in alleged fraud of the debtor's creditors, so that the equitable ownership is claimed to be vested in him, all of these assignees, or all of these holders of the legal title, may be joined with the debtor as co-defendants in one action.[2] The reason given for this rule permitting separate assignees or holders of the legal title to be joined, although they take by different conveyances and at different times, is, "that they all have a common interest centering in the point at issue in the cause; so that, while the title to one piece of property is in one defendant, and the title to some other distinct piece is in another defendant, yet these various titles were taken and are now held for a common purpose, and to accomplish the same fraudulent end. All are privy to have been concerned in acts tending to the same illegal result. The matters are not distinct, but are in truth all connected with the same fraudulent transaction in which all the defendants have participated.[3]

§ 247. * 350. **Other Cases. Trustees of an Express Trust. Innocent Third Parties.** In an action brought by or on behalf of a judgment creditor, to reach a fund in the hands of an express trustee for the debtor, such debtor is a necessary defendant, and

deed is sought to be set aside, but he has no interest whatever in the result; all title has passed out of him, and he cannot be affected by the judgment. See Spicer *v.* Hunter, 14 Abb. Pr. 4.

[1] Foster *v.* Townshend, 12 Abb. Pr. N. S. 469. When a debtor had conveyed land in fraud of his creditors, and the grantee had executed a mortgage thereon, the mortgagee was held a necessary defendant in a creditor's suit to set aside the conveyance. Copis *v.* Middleton, 2 Mad. 410.

[2] Morton *v.* Weil, 11 Abb. Pr. 421; Reed *v.* Stryker, 12 Abb. Pr. 47; Jacot *v.* Boyle, 18 How. Pr. 106; Hamlin *v.* Wright, 23 Wis. 491; Winslow *v.* Dousman, 18 Wis. 456; North *v.* Bradway, 9 Minn. 183.

[3] Winslow *v.* Dousman, 18 Wis. 456, 462, per Cole J.; Hamlin *v.* Wright, 23 Wis. 491, 494; Brinkerhoff *v.* Brown, 6 Johns. Ch. R. 139, 157; Fellows *v.* Fellows, 4 Cow. 682; Boyd *v.* Hoyt, 5 Paige, 65; N. Y. & N. H. R. Co. *v.* Schuyler, 17 N. Y. 592; Story's Eq. Pl. §§ 285, 286; Dix *v.* Briggs, 9 Paige, 595; Sizer *v.* Miller, 9 Paige, 605.

should be joined with the trustee; he is the person directly interested in the fund, and the one to be directly affected by the judgment.[1] When a creditor's suit was brought to reach property fraudulently transferred by the debtor, and the alleged fraudulent transfer was consummated through the means of a third person, who in good faith received a conveyance of the property in trust for the alleged fraudulent grantee, and who subsequently conveyed the same to such grantee in accordance with the trust, such third person was held not to be a proper defendant; there was simply no cause of action against him, because he was free from any fraudulent intent.[2]

§ 248. *351. **IV. Actions Relating to the Estates of Deceased Persons.** The "administration suit" in chancery, by means of which the estates of deceased persons are usually settled in England, is uncommon, if not entirely unknown, in the United States. The actions which will fall under the above heading are almost entirely special cases, depending upon special circumstances: suits by judgment creditors to reach the property of deceased debtors, or of beneficiaries to reach trust property held by deceased trustees, or of heirs or next of kin, or legatees, to set aside the fraudulent transactions of administrators and executors, and the like. It is almost impossible, therefore, to collect these various cases into any well-defined groups; each must stand upon its own facts, and will illustrate as far as possible the broad generalities of the equitable doctrine as to parties.[3]

[1] Vanderpoel *v.* Van Valkenburgh, 6 N. Y. 190.

[2] Spicer *v.* Hunter, 14 Abb. Pr. 4; Bartlett *v.* Drew, 57 N. Y. 587, 589. For a peculiar case of misjoinder of defendants in a creditor's action, see Gale *v.* Battin, 16 Minn. 148, 150.

[*Receiver as Party.* Held in Daisy Roller Mills *v.* Ward (1897), 6 N. D. 317, 70 N. W. 271, that where judgment creditors brought suit merely to set aside conveyances of real estate as fraudulent, and asked for no accounting for rents and profits, a receiver of the rents and profits appointed after the conveyances were made is not a necessary party.

Other Creditors as Parties. In an action between certain creditors and the general assignee, raising the issue as to the general assignment being void by reason of creating preferences, the creditors alleged to have been preferred are not necessary parties: Bradley *v.* Bailey (1895), 95 Ia. 745, 64 N. W. 758. But where one creditor seeks to be placed ahead of prior creditors such prior creditors must be made parties: State *ex rel. v.* Hickman (1899), 150 Mo. 626, 51 S. W. 680.]

[3] For various examples of such actions see Littell *v.* Sayre, 7 Hun, 485; Skidmore *v.* Collier, 8 id. 50; Selover *v.* Coe, 63 N. Y. 438; Janes *v.* Williams, 31 Ark. 175; Williams *v.* Ewing, 31 id. 229; Whitsett *v.* Kershaw, 4 Col. 419; Wall *v.* Fairley, 77 N. C. 105; Harris *v.* Bryant, 83 id. 568; Conolly *v.* Wells, 33 Fed. Rep. 205 (in an action against executors for an accounting, all must be joined, including one who was outside the jurisdiction of the court); Howth *v.* Owens, 29 Fed. Rep.

§ 249. *352. **Illustrations.** A testator left real and personal property in fee to A., but if she should die without issue, $10,000 of it were given over to B. The original executor of this will died leaving the trust fund mingled with his own property, and the whole passed to *his* executor, C. A. died without issue, and B. brought an action to recover the legacy of $10,000, making C., the then executor of the original executor, the defendant. It was held by the Court of Appeals in New York, that C. was a necessary party, but that the administrator of A. was also a necessary defendant without whom the issues in the cause could not be decided.[1] "He [this administrator] is a trustee of the next of kin of A., and they are interested in the fund after satisfying all charges upon it, and have a right to be heard upon any claim which tends to take it away for the benefit of another or to reduce it."[2] In an action brought by one executor against his co-executor for an account, — the ground of the proceeding being the breach of his trust by the latter, and the misuse of funds belonging to the estate, — the legatees, next of kin, and creditors of the deceased are not necessary defendants unless the accounting is to be final; if it is made the final accounting and settlement of the trust, then all these persons must be brought in as defendants.[3] The administrator, in violation of his trust, fraudulently conveyed lands of the estate to a person who was a participant in the fraud. This grantee died intestate. The children — the only heirs and next of kin — of the deceased original owner brought an action against the administrator and the heirs of the grantee, to set aside the fraudulent transfer, to compel a re-conveyance of the land, and for an accounting by the administrator. This action was held proper; the heirs of the grantee were held to be necessary defendants, and properly united with the

722 (representative of deceased executor must be joined). For a full discussion of the jurisdiction of equity over administration suits in this country, see 3 Pom. Eq. Jur. §§ 1152–1154, and extended note to § 1154.

[In Payne *v.* Johnson's Ex'ors (1893), 95 Ky. 175, 24 S. W. 238, the court said that "while all creditors are not necessary parties to an action by an administrator for the settlement of an estate, still they are entitled to be heard; and in a case like this [where creditors of the testator are claiming contract liens upon property which is charged by the will with the payment of debts generally], with no one representing them and their debts a charge upon the realty, they, or some of them, were necessary parties to the action enforcing this lien."]

[1] Auburn Theol. Sem. Trs. *v.* Kellogg, 16 N. Y. 83.

[2] Ibid., p. 96, per Denio J.

[3] Wood *v.* Brown, 34 N. Y. 337.

administrator.[1] And when in a similar case the fraudulent administrator had at different times conveyed portions of the land to different grantees, an action by the heirs of the deceased owner against the administrator and all of these grantees, was sustained. "If there is a common point of litigation, the decision of which affects the whole number of defendants, and will settle the rights of all, they may all be joined in the same proceeding."[2]

§ 250. * 353. **When Administrator is not a Necessary Party. Illustration.** An administrator is not a necessary party defendant unless some claim is made against the estate which he would have the right to resist, or unless the judgment would be in some manner prejudicial to the estate;[3] *a fortiori*, he is not a necessary defendant when the immediate object of the action is to increase the amount of assets available to the payment of the debts of the deceased, even though the ultimate purpose of the proceeding may be the benefit of the creditor who prosecutes it. Thus, where the deceased in his lifetime had received an absolute deed of lands, which he did not put upon record, and had subsequently with a fraudulent intent destroyed this deed, and procured the grantor therein to execute another conveyance of the same land without consideration to a third person who took the same with full knowledge and collusively and put the same upon record, a judgment creditor of the deceased, whose judgment was recovered while the deceased held the deed to himself, brought an action against the second grantee and the heirs and widow of the deceased, seeking to set aside the second deed, and to establish

[1] Bassett *v.* Warner, 23 Wis. 673. This case is plainly the same in principle as the suit by a judgment creditor against a fraudulent debtor and his grantee.

[2] Bowers *v.* Keesecher, 9 Iowa, 422, 424; citing Story's Eq. Pl. §§ 284, 534; Bugbee *v.* Sargent, 23 Me. 271; Rayner *v.* Julian, Dickens, 677; Brinkerhoff *v.* Brown, 6 Johns. Ch. R. 152; Varick *v.* Smith, 5 Paige, 160.

[3] [See McCabe *v.* Healy (1902), 138 Cal. 81, 70 Pac. 1008, where it was held that the administrator had no concern or interest in a suit between the plaintiff who claims under a contract to make a will and the heirs of the decedent. And also *In re* Healy's Estate (1902), 137 Cal. 474, 70 Pac. 455, where the court says: "It is, in effect, a suit to determine a controversy between the different heirs as to their respective rights of inheritance, and in such a controversy it is well settled that the administrator has no interest, but is a mere officer of the court, holding the estate as a stake holder." See also Hall *v.* Bank (1898), 145 Mo. 418, 46 S. W. 1000, where it was held that an administrator cannot bring a suit in equity to set aside a fraudulent conveyance of land made by the deceased unless an order is first obtained from the probate court directing him to take possession of the land for the payment of debts.]

the original title of the judgment debtor, and to enforce the lien of his own judgment upon the land; this action was held to have been properly brought against the defendants named. The administrator of the deceased was held not to be a necessary party defendant, because the proceeding was really for the benefit of the estate, and he could make no opposition if he were present.[1]

§ 251. * 354. **When Legatees and Next of Kin are neither Necessary nor Proper Parties.** In actions by creditors against executors or administrators to recover debts alleged to be due from the deceased, or by the owners of the property to recover assets which had been in the possession of the deceased and apparently belong to his estate in the hands of his personal representatives, the legatees or next of kin are not necessary nor even proper parties defendant.[2] The executors or administrators represent the estate. They can bring all suits to recover property in the hands of third persons alleged to belong to the estate, without joining the legatees or distributees as co-plaintiffs,[3] and on the same principle they can defend all actions brought against themselves, involving the ownership of property in their own hands, or the indebtedness of the estate, without the presence of legatees and next of kin as co-defendants. Thus in an action against executors to reach certain moneys and securities in their possession as apparent assets, but which it was claimed had been held by the testator in trust for the plaintiff and actually belonged to him, the legatees were held not to be necessary defendants.[4] And in an ordinary suit to recover a debt due from the deceased, brought against the administrator, the widow, and the next of kin, it was held that all these defendants, except the administrator, were improperly joined; he represents them, and his defence is their defence.[5]

[1] Cornell *v.* Radway, 22 Wis. 260, 265, per Dixon C. J. It was said that the administrator or executor might bring the suit; but this authority did not take away the right of the creditor. Wis. R. S., ch. 100, §§ 16–18. But see *per contra*, as to the necessity of the personal representative being made a party in such actions, 1 Dan. Ch. Pl. (4th Am. ed.), p. 200, and cases cited.

[2] [Byrd *v.* Byrd (1895), 117 N. C. 523, 23 S. E. 324.]

[3] [But where a suit was brought by the heirs of a devisee under a will to recover property misdirected by the life tenant, the administrator was held a necessary party: Burford *v.* Aldridge (1901), 165 Mo. 419, 63 S. W. 109.]

[4] King *v.* Lawrence, 14 Wis. 238.

[5] Nelson *v.* Hart, 8 Ind. 293. That the personal representatives are the only

§ 252. *355. **When a Different Rule applies.** A different rule, however, prevails in an action by a distributee against the administrator, legatee against the executor, or beneficiary against the trustee, when the right asserted, if it exists at all, is also held by all the other parties similarly situated with the one who sues, and the decision would in fact determine all their rights. In such a case, in order that the trustee may not be subjected to a multiplicity of suits, when the whole controversy could be decided in one, the equitable doctrine primarily requires that all the distributees, legatees, or beneficiaries should unite as plaintiffs; but if any refuse to join, they should be made defendants.[1] The statutes of several States permit an equitable action to be brought by the heirs of the testator to set aside a will of lands for any cause which can invalidate it. In such a suit the devisees under the will are indispensable defendants.[2] In fact, the executor can hardly be called a necessary party, for he takes no interest in the land. Conversely, in an action to reach the land of a deceased intestate, his heirs are indispensable defendants, without whom

proper defendants in such actions, see Story's Eq. Pl. §§ 104, 140; Anon., 1 Vern. 261; Lawson *v.* Barker, 1 Bro. C. C. 303; Brown *v.* Dowthwaite, 1 Mad. 446; Jones *v.* How, 7 Hare, 267; Haycock *v.* Haycock, 2 Ch. Cas. 124; Jennings *v.* Paterson, 15 Beav. 28; Micklethwait *v.* Winstanley, 13 W. R. 210; Pritchard *v.* Hicks, 1 Paige, 270; Wiser *v.* Blachly, 1 Johns. Ch. 437; Davison *v.* Rake, 45 N. J. Eq. 767. In general, all the personal representatives must be joined. Offey *v.* Jenney, 3 Ch. Rep. 92; Hamp *v.* Robinson, 3 De G., J. & S. 97; Conolly *v.* Wells, 33 Fed. Rep. 205; Howth *v.* Owens, 29 Fed. Rep. 722. But if an executor has not proved, he need not be joined. Strickland *v.* Strickland, 12 Sim. 463; Dyson *v.* Morris, 1 Hare, 413; Farrell *v.* Smith, 2 B. & B. 337; Clegg *v.* Rowland, L. R. 3 Eq. 368. And, in an action by a creditor against the heirs and devisees of his deceased debtor, to make his claim out of the land of the deceased in their hands, the joinder of such heirs and devisees was held proper, since the judgment could provide for the order of their liabilities. Rockwell *v.* Geery, 6 N. Y. Sup. Ct. 687; Schermerhorn *v.* Barhydt, 9 Paige, 28; Houston *v.* Levy's Ex., 44 N. J. Eq. 6, Read *v.* Patterson, 44 N. J. Eq. 211; Dandridge *v.* Washington's Ex., 2 Pet. 370; Deegan *v.* Capner, 44 N. J. Eq. 339.

[1] Dillon *v.* Bates, 39 Mo. 292. [Hill *v.* Dade (1900), 68 Ark. 409, 59 S. W. 39: Where a suit is brought by heirs to determine whether an executrix had power under a will to sell the fee of the ancestor's land, all persons holding portions of said land through conveyances from the executrix are proper parties. See also Reiser *v.* Gigrich (1894), 59 Minn. 368, 61 N. W. 30, where the action was brought by the administrator against parties connected with a fund belonging to the estate.]

[2] Eddie *v.* Parke's Ex., 31 Mo. 513. The action was brought against the executors alone. See Morse *v.* Morse, 42 Ind. 365; *infra*, § *379, note. [In Fogle *v.* St. Michael Church (1896), 48 S. C. 86, 26 S. E. 99, it was held that neither the executor nor heir at law was a necessary party in an action to enforce a contract to dispose of property by will, when the executor has turned over the entire assets to the devisee.]

no decree can be made, and it is difficult to see how the administrator could be a necessary party.[1]

§ 253. *356. **V. Trusts. Actions to enforce Performance of Express Trusts. Trustees and Survivors Necessary Parties.** It is a universal and elementary rule that, in an action to enforce the performance of an express trust, the trustee is an indispensable defendant. This doctrine was applied in a case where a debtor had transferred personal property to a trustee upon trust to sell the same, and out of the proceeds to pay the demands of the creditor. The directions of the trust not having been complied with, the creditor brought an action against the debtor alone to foreclose the trust deed and for a sale of the goods. The trustee was held to be a necessary defendant.[2] Where there were originally two or more trustees, and one or more have died, in an action by the beneficiary to enforce the trust, and especially if a violation thereof is alleged against all the trustees, the survivors and the personal representatives of the deceased not only may

[1] Muir *v.* Gibson, 8 Ind. 187, 190. That the administrator is a proper party in such an action, see Lowry *v.* Jackson, 27 S. C. 318. See Silsbee *v.* Smith, 60 Barb. 372. In an action for an account of personal estate which came into the hands of a deceased administrator or executor, *his* personal representatives are necessary defendants. As to the necessary parties in an action to construe a will, see McKethan *v.* Ray, 71 N. C. 165, 170.

[2] Tucker *v.* Silver, 9 Iowa, 261, per Wright C. J. After stating the rule as laid down in the text, the court declares that it has not been changed by the new procedure. See also McKinley *v.* Irvine, 13 Ala. 681; Cassiday *v.* McDaniel, 8 B. Mon. 519; Morrow *v.* Lawrence, 7 Wis. 574; Jones *v.* Jones, 3 Atk. 110. And, in general, all the trustees must be joined. Coppard *v.* Allen, 2 De G., J. & S. 173; Howth *v.* Owens, 29 Fed. Rep. 722. But a trustee who has never acted, and has released all his interest to his co-trustee, need not be made a party. Richardson *v.* Hulbert, 1 Anst. 65. When a trustee has assigned his interest in the trust estate, in general both he and the assignee should be defendants. Story's Eq. Pl. § 209; Bailey *v.* Inglee, 2 Paige, 278. But if he has assigned his entire interest absolutely, the assignee alone should be sued, unless the assignment was a breach of trust. Story's Eq. Pl. §§ 211, 213, 214; Munch *v.* Cockerell, 8 Sim. 219. As examples of this general rule, when a demand is to be enforced against idiots or lunatics, their committees or guardians must be sued, the lunatics or idiots themselves being proper but not necessary parties. Beach *v.* Bradley, 8 Paige, 146. And in suits relating to the property of insolvents or bankrupts, their assignees are necessary defendants. Storm *v.* Davenport, 1 Sandf. Ch. 135; Movan *v.* Hays, 1 Johns. Ch. 339; Sells *v.* Hubbell, 2 Johns. Ch. 394; Botts *v.* Patton, 10 B. Mon. 452. And the assignees are the only necessary defendants; neither the insolvents or bankrupts, nor the creditors, need be joined with them. Collett *v.* Wollaston, 3 Bro. C. C. 228; Lloyd *v.* Lander, 5 Mad. 282, 288; Sells *v.* Hubbell, 2 Johns. Ch. 394; Springer *v.* Vanderpool, 4 Edw. Ch. 362; Wakeman *v.* Grover, 4 Paige, 23; Dias *v.* Bouchaud, 10 Paige, 445. [Rumsey *v.* People's Ry. Co. (1900), 154 Mo. 215, 55 S. W. 615. And when a trustee wrongfully conveyed trust property, the grantee was held a necessary party to

be united as co-defendants,[1] but they *must* be so joined, or else no decree enforcing the trust can be made.[2]

§ 254. * 357. **Joining Beneficiaries. Distinction between Actions in Opposition to, and in Furtherance of, the Trust.** There is a broad distinction between the case of an action brought in opposition to the trust, to set aside the deed or other instrument by which it was created, and to procure it to be declared a nullity, and that of an action brought in furtherance of the trust, to enforce its provisions, to establish it as valid, or to procure it to be wound up and settled. In the first case, the suit may be maintained without the presence of the beneficiaries, since the trustees represent them all and defend for them. In the second, all the beneficiaries must be joined, if not as plaintiffs, then as defendants, so that the whole matter may be adjusted in one proceeding, and a multiplicity of suits avoided.[3] The reason of this distinction is obvious. It is, that any one person interested in opposition to the trust has a right to test the validity thereof, and his voluntary action cannot be controlled by the will of

a suit to enforce the trust against the property: Bridge Co. *v.* Fowler (1895), 55 Kan. 17, 39 Pac. 727.]

[1] Sortore *v.* Scott, 6 Lans. 271, 276. It was held that the rule forbidding such union of parties in a legal action against joint debtors had no application to such an equitable suit. See also Petrie *v.* Petrie, 7 Lans. 90; King *v.* Talbot, 40 N. Y. 76. See also Hazard *v.* Durant, 19 Fed. Rep. 471.

[2] Sherman *v.* Parish, 53 N. Y. 483, 490. Action by a sole beneficiary against a trustee for an alleged breach of the trust. There had been other trustees who were dead, and their personal representatives were not made defendants. Folger J. said: "It is the principle of courts of equity, in cases of breach of trust, when no general rule or order of the court interferes, and when the facts of the case call for a contribution or recovery over, that all persons who should be before the court to enable it to make complete and final judgment are necessary parties to the action. Nor has our mode of procedure abrogated the rule." He cites Hill on Trustees, 520, 521; Perry on Trusts, §§ 875, 876, 877; Lewin on Trusts, 845; Munch *v.* Cockerell, 8 Sim. 219; Perry *v.* Knott, 4 Beav. 179; Shipton *v.* Rawlins, 4 Hare, 619; Cunningham *v.* Pell, 5 Paige, 607; New York code, § 118. The court add the following very important rule: That, on timely objection to the want of necessary parties, if the plaintiff does not bring them in, the complaint must be dismissed, *but not absolutely;* the dismissal should be without prejudice. *The complaint, however, should not even be thus dismissed if the cause can be made to stand over on terms, in order to enable the plaintiff to bring in the necessary parties.* This ruling is in exact conformity with the plain intent of the codes, and with the views expressed by me in the text in a former paragraph. See also Haines *v.* Hollister, 64 N. Y. 1; Howth *v.* Owens, 29 Fed. Rep. 722. An heir at law is a proper, though not a necessary, party to a suit against the legal representative of his ancestor to recover loss sustained by a breach of trust of the ancestor as executor. McCartin *v.* Traphagen's Adm., 43 N. J. Eq. 323.

[3] [But in an action by trustees, brought in furtherance of their duty as such, in respect to the trust property, the beneficiaries are not necessary parties: Roberts *v.* New York Elevated R. R. Co. (1898), 155 N. Y. 31, 49 N. E. 262.]

others, while the trustees themselves are sufficient to represent and defend all the interests of those who claim under the trust.[1] But when the trust is assented to, and the purpose is simply to carry out its provisions, all the beneficiaries are alike interested in that object and in reaching that same result, and it is just to the trustee that the controversy should be ended in one proceeding. As illustrations of this principle: In an action brought to set aside a trust deed made by a railroad company to a trustee for the benefit of bondholders, and to restrain a sale of the road thereunder, the beneficiaries under the trust were declared not to be necessary or even proper parties, and the application of one of them — a bondholder — to be admitted as a defendant was denied, although he alleged that the trustee intended to make no defence, and was actually colluding with the plaintiff and the company.[2] On the same principle, where a testator had devised all his lands to his executors with power to sell and distribute the proceeds among his heirs, an action by a third person claiming to own part of these lands, denying that they belonged to the testator, and seeking to reach them or their proceeds in the hands of the executors, was held to be properly brought against the executors alone without joining the heirs of the deceased as defendants. The suit in effect sought to set aside the trust *pro tanto* between the executors and the heirs.[3] In like manner, an action by one

[1] [The trustee is a necessary party in a suit to set aside the deed of trust: Markwell *v.* Markwell (1900), 157 Mo. 326, 57 S. W. 1078. But it was held in Robinson *v.* Kind (1896), 23 Nev. 330, 47 Pac. 1, that the beneficiaries were also necessary parties in a suit by one of them to revoke the trust.]

[2] [F. G. Oxley Stave Co. *v.* Butler County (1894), 121 Mo. 614, 26 S. W. 367: "If the trustees were made parties and notified, that was sufficient. This is undoubtedly the rule in trusts of this character. Whatever binds the trustee in proceedings to enforce the trust, binds the bondholders, and whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them." See also Rumsey *v.* Peoples' Ry. Co. (1900), 154 Mo. 215, 55 S. W. 615.] Winslow *v.* Minn. & Pac. R. Co., 4 Minn. 313, 316. As to when the *cestuis que trustent* are or are not necessary defendants, see Verdin *v.* Slocum, 9 Hun, 150; Dewey *v.* Moyer, 9 id. 473; Moore *v.* Hegemar, 6 id. 290; Benjamin *v.* Loughborough, 31 Ark. 210; The Trustees *v.* Gleason, 15 Fla. 384; Hill *v.* Durand, 50 Wis. 354. For further instances of actions brought in opposition to the trust, to which the beneficiaries are not necessary parties, see Vetterlein *v.* Barnes, 124 U. S. 169; Redin *v.* Branhan, 43 Minn. 283; Watkins *v.* Bryant, 91 Cal. 492; Ward *v.* Waterman, 85 Cal. 488. The trustee is a necessary party: McArthur *v.* Scott, 113 U. S. 340.

[3] Paul *v.* Fulton, 25 Mo. 156. See also Ridenour *v.* Wherritt, 30 Ind. 485. [Women's Christian Ass'n *v.* Kansas City (1898), 147 Mo. 103, 48 S. W. 960: In an action to have effectuated and carried out a charitable trust established by a will, the heirs of the testatrix are not necessary parties. See also Lackland *v.* Walker (1899), 151 Mo. 210, 52 S. W. 414. In Newman *v.* Newman (1899), 152 Mo. 398,

or more creditors against the debtor and his assignee in trust for all the creditors, to set aside the assignment on the ground of fraud, or for any other reason, is properly brought without joining all or any of the other creditors, who are the beneficiaries, either as defendants or as plaintiffs.[1]

§ 255. * 358. **Same Subject.** On the other hand, if an action is brought based upon the assignment or other deed as a valid transaction, seeking to enforce the trust, to obtain an accounting, to procure a final settlement, or for any other similar relief which recognizes and adopts the trust, and which, when obtained, would alike beneficially affect all the persons similarly situated, all the creditors or other *cestuis que trustent* must either unite as plaintiffs, or, if the suit is instituted by one or by some, the others must be joined as defendants. The court will not permit the same question to be litigated in separate suits at the instance of each person who has a demand identical in its nature with that held by all the others.[2] An action by distributees against their administrator, or by any beneficiaries against their trustee, to open an account once settled, on the ground of an alleged fraud, and for a new accounting and distribution of the shares

54 S. W. 19, real estate was conveyed to a trustee, his heirs and assigns. After his death the *cestui que trust* brought suit to vest the title in a new trustee, on the ground that the trustee in his lifetime had illegally conveyed the same. It was held that the heirs of the trustee were necessary parties, although the trustee by will had conveyed all his property to another as trustee, since the title on the trustee's death descends to his heirs.]

[1] Bank of British North America *v.* Suydam, 6 How. Pr. 379; Hancock *v.* Wooten, 107 N. C. 9. See, however, Hudson *v.* Eisenmayer Milling, &c. Co., 79 Tex. 401. See also Mitchell *v.* Bank of St. Paul, 7 Minn. 252, which was an action by a stockholder to set aside proceedings of the officers, and particularly an assignment in trust for creditors; also, French *v.* Gifford, 30 Iowa, 148, 159.

[2] Bank of British North America *v.* Suydam, 6 How. Pr. 379; Garner *v.* Wright, 24 How. Pr. 144, 28 id. 92. Generally, when a demand is payable out of a trust fund, the trustees and the beneficiaries must be joined as defendants in the action to recover it. Emmert *v.* De Long, 12 Kan. 67, 83. Except in the cases of administrators and executors, and of assignees for the benefit of creditors, the general rule is that in all actions against trustees based upon the existence of the trust, the beneficiaries also must be made parties. Story's Eq. Pl. §§ 192, 193, 207; Helm *v.* Hardin, 2 B. Mon. 232; Clemens *v.* Elder, 9 Iowa, 272; Van Doren *v.* Robinson, 16 N. J. Eq. 256. See also Brokaw *v.* Brokaw's Ex., 41 N. J. Eq. 215; Biron *v.* Scott, 80 Wis. 206. If, however, the *cestuis que trustent* are very numerous, the rule is sometimes relaxed, or a portion of them only are brought in as representatives for the whole number. Story's Eq. Pl. §§ 118, 150; Holland *v.* Baker, 3 Hare, 68; Harrison *v.* Stewardson, 2 Hare, 530. In Fitzgibbon *v.* Barry, 78 Va. 755, a *cestui que trust*, whose interest was future and very uncertain and contingent, was held an unnecessary party to a suit to substitute a new trustee. [See, also, Howe *v.* Gregg (1897), 52 S. C. 88, 29 S. E. 394; Cook *v.* Basom (1901), 164 Mo. 594, 65 S. W. 227.]

claimed to be due, is plainly controlled by the same rule. It is entirely analogous to the suit above mentioned by creditors to procure an accounting from their assignee; it adopts and seeks to carry out the trust. All the distributees or beneficiaries must therefore be made parties, if not as plaintiffs, then as defendants.[1]

§ 256. * 359. **Implied Trustee Necessary Party in Actions to reach Property Impressed with Implied Trust or to enforce a Lien thereon. Examples.** In actions to reach property impressed with an implied trust, or to enforce a lien thereon, the person in whom the legal title is vested, and who is an implied trustee, is, of course, a necessary defendant. Some examples will illustrate this rule. A husband purchased land with his own funds, but procured the deed to be made to his wife; he afterwards employed a person to erect a dwelling-house upon the land, who obtained a mechanic's lien on the premises for the price of his labor and materials. An action to enforce the lien was held to be properly brought against the wife and the husband; the legal title was held by her in trust for her husband, as this title was to be divested by the judgment which was based upon a demand against the *cestui que trust*, both were necessary parties.[2] Land was purchased by a husband, but by arrangement was conveyed to his wife, the sale and conveyance being procured, as was alleged, by the fraudulent representations of both. The grantor, alleging the fraud and the non-payment of the price, brought an action against the husband and wife to establish his debt and to

[1] Dillon *v.* Bates, 39 Mo. 292. This rule is general. Whenever an action is brought for an accounting and settlement of a trust estate, all persons interested in the estate must be parties. Devaynes *v.* Robinson, 24 Beav. 86; Coppard *v.* Allen, 2 De G., J. & S. 173; Hall *v.* Austin, 2 Coll. 570; Biggs *v.* Penn, 4 Hare, 469; Chancellor *v.* Morecraft, 11 Beav. 262; Penny *v.* Penny, 9 Hare, 39. If several trustees have been guilty of a breach of trust, all must [may] be joined in a suit by the *cestui que trust* brought to obtain relief against such breach. The liability of the defaulting trustees in such a case is joint and several. See 2 Pom. Eq. Jur. § 1081, and numerous cases cited; Stockton *v.* Anderson, 40 N. J. Eq. 486; Walker *v.* Symonds, 3 Swanst. 75; Munch *v.* Cockerell, 8 Sim. 219, 231; Perry *v.* Knott, 4 Beav. 179, 181; Shipton *v.* Rawlins, 4 Hare, 619. And in an action by one trustee against a co-trustee for a breach of the trust, all the beneficiaries who have concurred in such breach are necessary defendants. Jesse *v.* Bennett, 6 De G., M. & G. 609; Williams *v.* Allen, 29 Beav. 292; Roberts *v.* Tunstall, 4 Hare, 257, 261.

[2] Lindley *v.* Cross, 31 Ind. 106. [National German-American Bank *v.* Lawrence (1899), 77 Minn. 282, 79 N. W. 1016: In an action by a judgment creditor of the husband to enforce a resulting trust against the land of the wife for the payment of the judgment, on the ground that the consideration for the grant to the wife was paid by the husband, the husband is a proper though not a necessary party.]

enforce a lien for the same upon the land. Pending the suit the wife died, and her heirs were substituted as defendants in her place. The Supreme Court of Iowa, conceding that the heirs were necessary parties, held that the wife's administrator was a proper and, under certain aspects of the case, a necessary defendant, and ordered him to be brought in. If the action was simply to recover a pecuniary demand from the defendant, he was clearly a necessary party; but if it was only to establish a specific lien, he was only a proper party.[1] A railroad company having placed certain of its bonds in the hands of a trustee upon trust to pay therefrom a debt due to a certain creditor of the company, and the trustee having, in violation of his duty, surrendered up the bonds to the company, and permitted them to be cancelled, whereby the security was utterly lost, it was held, in an action by the creditor against the trustee for a breach of his trust, that the railroad company was not a necessary defendant.[2] The owner of bonds and other securities deposited them with his agent for a specific purpose. The agent, in violation of his fiduciary capacity, disposed of them to divers persons at different times and in different amounts. The owner brought an action against the agent and all the transferees for the purpose of setting aside the sales and reaching his property or its proceeds. It was held that this common action was improperly brought; that there was no community of interest among the defendants; and that a separate suit should have been instituted against the agent and each assignee.[3]

[1] Parshall *v.* Moody, 24 Iowa, 314

[2] Ridenour *v.* Wherritt, 30 Ind. 485.

[3] Lexington & B. S. R. Co. *v.* Goodman, 5 Abb. Pr. 493, per Peabody J. This decision, as it seems to me, is in direct conflict with the well-settled principle which has been stated in the text, and which is fully sustained by the authorities.

[*Guardians:* "The administrator of a guardian is a necessary party to a suit involving an account of the guardianship": Brassell *v.* Silva (1897), 50 S. C. 181, 27 S. E. 622. In a proceeding to determine whether certain additional credits should be allowed to a removed guardian, the guardian is not a necessary party: Wilson's Guardianship (1902), 40 Ore. 353, 68 Pac. 393. In an action against an incompetent person, the guardian is neither a necessary nor proper party: Redmond *v.* Peterson (1894), 102 Cal. 595, 36 Pac. 923. See also Leavitt *v.* Bell (1898), 55 Neb. 57, 75 N. W. 524.

Administrators and Executors: An administrator cannot be sued in the same action in his individual and in his representative capacity, nor can a complaint against him as a representative be amended so as to constitute an action against him as an individual: Sterrett *v.* Barker (1897), 119 Cal. 492, 51 Pac. 695. In an action against executors *de son tort*, the complaint should be against them as executors generally: First Nat. Bank *v.* Lewis (1895), 12 Utah, 84, 41 Pac. 712.]

§ 257. *360. **VI. Actions against Corporations and Stockholders and between Partners. Introductory.** Actions to wind up the affairs of corporations, and those permitted by creditors against stockholders to enforce a personal liability of the latter, depend so entirely upon special statutory provisions, and these are so different in different States, that no general rule can be laid down concerning them which shall be a part of the common procedure. In fact, the subject does not strictly belong to a treatise upon the principles of the codes. I have collected some cases, however, which indicate the tendencies of the courts in the various States.[1]

§ 258. *361. **Receivers.**[2] **Creditors. Directors.** An insurance company became insolvent, and a receiver was appointed to wind up its affairs. While it was in an insolvent condition, the directors had declared dividends which had been paid to stockholders. Certain creditors brought separate actions against individual stockholders to recover back the dividends so paid and received, which actions were pending. In this condition of affairs the receiver instituted a suit against all the stockholders to compel a repayment of all the illegal dividends, and made the above-men-

[1] As examples, see Chase *v.* Vanderbilt, 62 N. Y. 307; Osgood *v.* Maguire, 61 id. 524; Westcott *v.* Fargo, 61 id. 542; Hackley *v.* Draper, 60 id. 88; Hun *v.* Cary, 82 id. 65; People *v.* Albany & Vt. R. Co., 77 id. 232; Watkins *v.* Wilcox, 4 Hun, 220; Pierce *v.* Milwaukee Constr. Co., 38 Wis. 233.

[2] [*Actions by and against Receivers:* A corporation which has passed into a receiver's hands is no longer capable of suing or being sued, and should not be joined with the receiver: Idaho Gold Reduction Co. *v.* Croghan (1899), 6 Idaho, 471, 56 Pac. 164; Ueland *v.* Haugan (1897), 70 Minn. 349, 73 N. W. 169. A receiver appointed in another State has a right to maintain an action in the courts of Kentucky: Hallam *v.* Ashford (1902), Ky., 70 S. W. 197. A receiver is a stranger to all proceedings instituted before his appointment, and remains a stranger until made a party by the court, and the action may legally proceed to judgment without his being made a party: St. Louis, etc. Ry. Co. *v.* Holladay (1895), 131 Mo. 440, 33 S. W. 49. A receiver, being an officer of the court appointing him, cannot be sued in any other court without the consent of the appointing court: Smith *v.* St. Louis, etc. Ry. Co. (1899), 151 Mo. 391, 52 S. W. 378. A personal tax assessed against the corporation cannot be collected in an action against the receiver personally, instituted under G. S. 1894, § 1569: State *v.* Red River, etc. Co. (1897), 69 Minn. 131, 72 N. W. 60. A receiver, in order to maintain an action, must allege facts showing his appointment, by what jurisdiction he was appointed, and enough of the proceedings to show that his appointment was legal, and the allegations must be made with sufficient certainty to admit of being traversed: Rhorer *v.* Middlesboro Co. (1898), 103 Ky. 146, 44 S. W. 448.

"The failure of a party to obtain leave of the court to sue a receiver appointed by it, does not affect the jurisdiction of the court in which the suit is brought, to hear and determine the matter. The requirement is for the protection of the receiver, and if he makes no objection to the suit being brought without leave, it is difficult to perceive why anyone else should be permitted to do so": Tobias *v.* Tobias (1894), 51 O. St. 519, 38 N. E. 317.]

tioned creditors defendants, asking against them an injunction to restrain the further prosecution of their actions. It was held by the New York Court of Appeals that the receiver could maintain such an action; that the creditors could not; that all the stockholders were properly sued together;[1] and that the creditors were properly joined so as to restrain their proceedings and avoid a circuity of action, and settle the whole in one controversy.[2] A stockholder, suing on behalf of all the others, instituted an action against a railroad company to compel the declaration of a dividend, alleging that funds were in its hands sufficient and appropriate for that purpose. The action was dismissed because, if sustainable at all, it should have been against the directors, who were the managing trustees, and whose duty it was to declare a dividend, if any such duty existed.[3]

§ 259. * 362. **Judgment Creditors. Stockholders.** In a suit by judgment creditors of a corporation (on behalf of all others who should come in) against the stockholders, who were made liable by statute for the debts of the company in specified contingencies, certain other judgment creditors were united as defendants. Upon a general demurrer interposed by them, they were determined to be neither necessary nor proper defendants. They should have been joined as plaintiffs, if at all; but this was not necessary, and the complaint contained no allegation that they had refused to unite in that manner.[4] In Ohio, under statutes making stockholders liable to judgment creditors when the ordinary legal remedies against the corporation have been exhausted, it has been held that all the stockholders must be united as defendants, and proceeded against in a single action.[5]

[1] [All properly sued together in action to enforce stock liability, even when resident in different counties: Gainey *v.* Gilson (1897), 149 Ind. 58, 48 N. E. 633. *Contra*, in Kell *v.* Lund (1896), 99 Ia. 153, 68 N. W. 593. Held in Waller *v.* Hamer (1902), 65 Kan. 168, 69 Pac. 185, that all who were within the jurisdiction of the court must be brought in. See also Ryan *v.* Jacques (1894), 103 Cal. 280, 37 Pac. 186.]

[2] Osgood *v.* Laytin, 5 Abb. Pr. N. S. 1; [Van Pelt *v.* Gardner (1898), 54 Neb. 701, 75 N. W. 874; Gianella *v.* Bigelow (1897), 96 Wis. 185, 71 N. W. 111; Smith *v.* Dickinson (1898), 100 Wis. 574, 76 N. W. 766.]

[3] Karnes *v.* Rochester & G. Val. R. Co., 4 Abb. Pr. N. S. 107, per T. A. Johnson J. [In an action to compel a corporation to deliver shares of stock, the directors are proper but not necessary parties: Wells *v.* Green Bay, etc. Canal Co. (1895), 90 Wis. 442, 64 N. W. 69.]

[4] Young *v.* N. Y. & Liv. S. S. Co., 10 Abb. Pr. 229, per Hogeboom J.

[5] Umsted *v.* Buskirk, 17 Ohio St. 113. *Contra*, Thompson *v.* Lake, 19 Nev. 103, 115; Hatch *v.* Dana, 101 U. S. 210; Baines *v.* Babcock (Cal., Sept. 1891), 27 Pac. R. 674. That the corporation is not a necessary party to such an action, see Flour City Nat. Bk. *v.* Wechselberg, 45 Fed.

§ 260. * 363. **Corporation, Officers, and Assignee.** An action by stockholders of a bank against the president and other officers, the corporation itself, and an assignee, alleging fraud and violation of duty by the officers, misapplication of funds terminating in a fraudulent assignment, and praying that the assignment might be set aside, the officers removed, a receiver appointed, and the bank wound up, was sustained in Minnesota as being within the jurisdiction of an equity court, and was declared to be brought against the proper parties.[1] In a similar action, based upon the same facts, and asking for a removal of the officers, the appointment of a receiver to take charge of the assets, and for an election under the direction of the court, the corporation was held to be a necessary party defendant as well as the officers implicated.[2]

§ 261. * 364. **Assignor of Stock. Rule in Indiana. In New York.** The holder of stock in a corporation assigned it to a creditor as collateral security for the debt, and this creditor in turn assigned or pledged the security to a third person. The latter having commenced an action to enforce his right of property against the

Rep. 547; Sleeper *v.* Goodwin, 67 Wis. 577, 586; Nolan *v.* Hazen, 44 Min. 478. In a bill by creditors of a corporation to enforce the liability of a stockholder for his unpaid subscription, the corporation, if it still exists, is a necessary party: Patterson *v.* Lynde, 112 Ill. 196. [All the stockholders and all the creditors must be made parties: Van Pelt *v.* Gardner (1898), 54 Neb. 701, 75 N. W. 874; Gianella *v.* Bigelow (1897), 96 Wis. 185, 71 N. W. 111; Gainey *v.* Gilson (1897), 149 Ind. 58, 48 N. E. 633 (even where they reside in different counties), but see contrary rule in Kell *v.* Lund (1896), 99 Ia. 153, 68 N. W. 593, where it is held that each stockholder is entitled to a separate action in the county of his residence.]

[1] Mitchell *v.* Bank of St. Paul, 7 Min. 252. [The corporation is not a necessary party in a suit by the receiver of a corporation against the stockholders to recover the amount of their liability for the debts of the corporation: Moore *v.* Ripley (1898), 106 Ga. 556, 32 S. E. 647. Corporation not a necessary party in a suit by corporation creditors to enforce unpaid stock subscriptions: Van Pelt *v.* Gardner (1898), 54 Neb. 701, 75 N. W. 874. Nor is it a necessary party, when insolvent, in an action by a receiver to recover money belonging to the corporation from a third party: Nealis *v.* Am. Tube & Iron Co. (1896), 150 N. Y. 42, 44 N. E. 944. The corporation is an indispensable party defendant in a suit to marshal its assets: Steele Lumber Co. *v.* Laurens Lumber Co. (1896), 98 Ga. 329, 24 S. E. 755.

In an action by stockholders against the directors of a corporation for an accounting for moneys received from an improper sale of stock, where one of the defendants dies pending the suit, his administrator may be substituted without giving rise to a misjoinder: Morgan *v.* King (1900), 27 Colo. 539, 63 Pac. 416.]

[2] French *v.* Gifford, 30 Iowa, 148, 159. See also Wickersham *v.* Crittenden, 93 Cal. 17, 33; Swan Land & Cattle Co. *v.* Frank, 39 Fed. Rep. 456. [In J. K. Orr Co. *v.* Kimbrough (1896), 99 Ga. 143, 25 S. E. 204, the court said: "Although an equitable petition may mention the name of a corporation and contain a prayer for certain relief against it, such corporation is not a party to the petition where there is no prayer for process as to it."]

corporation alone, it was decided, in Indiana, that both of the assignors were necessary defendants under the special provisions of the code of that State, which require the assignors of things in action not negotiable to be made parties in a suit by the assignee.[1] But in New York, where the debtor, defendant in an action by an assignee of the demand, was entitled to an accounting with the assignor in respect of the claim sued upon, in order to ascertain in fact whether any such claim existed, and applied for an order bringing him in as a defendant for that purpose, it was held that such assignor was neither a necessary nor a proper party, and could not be brought in.[2] The courts of New York seem to have established the rule under the code for that State, that an assignor of a thing in action is never a proper, much less a necessary, defendant in an action by the assignee, even when the plaintiff's contention depends upon the legal relations and liabilities existing between the defendant — the debtor — and the assignor. This doctrine is entirely contrary to that which prevails in many of the States, and which is sanctioned by their codes and approved by their courts; and it seems to be equally opposed to the former doctrine of equity, which permitted, if it did not require, the presence of the assignor in all cases where the assignment did not convey a legal title, and especially where an accounting or other settlement of matters in dispute between the assignor and the defendant was necessary in order to ascertain the amount of the plaintiff's demand.[3]

§ 262. *365. **Accounting by one Partner against another**[4] **and by Surviving Partner.** In an action virtually of accounting by one partner against another to recover the plaintiff's share of the assets or profits, and, *a fortiori*, when the action is confessedly one for accounting, all the partners must be defendants.[5] This special rule assumes that there has been no settlement, no balance ascertained and agreed upon, so that a simple action at law

[1] Ind. & Ill. Cent. R. Co. *v.* McKernan, 24 Ind. 62.

[2] Allen *v.* Smith, 16 N. Y. 415. See also Andrews *v.* Gillespie, 47 N. Y. 487, which holds that the mortgagee who assigned the mortgage is not a proper defendant in an action to foreclose, even though the defence pleaded by the mortgagor is that of mistake in drawing the mortgage, and prays the relief of reformation.

[3] Story's Eq. Pl. § 153, and notes; 1 Dan. Ch. Pl. (4th Am. ed.), pp. 197–199, and notes; Miller *v.* Bear, 3 Paige, 467, 468; Whitney *v.* McKinney, 7 Johns. Ch. 144; Trecothick *v.* Austin, 4 Mason, 41–44.

[4] [See § *104, and cases cited in the notes to that section.]

[5] Duck *v.* Abbott, 24 Ind. 349; Settembre *v.* Putnam, 30 Cal. 490.

could be maintained therefor by one partner against another, but the situation is such that an action for an accounting is the only relief given by the law. In such equitable action all the partners are necessary parties. A partnership, being engaged in the business of buying and selling lands, for purposes of convenience had all the titles taken in the name of one member of the firm. He died, being at the time thus the apparent owner of lands which were actually firm property. An action by the survivor for an account and settlement was properly brought against the heirs, widow, and administrator of the deceased; these persons were all held to be necessary parties.[1]

§ 263. *366. **VII. Actions for Specific Performance. Conflict of Opinion herein.** It is the established rule of equity procedure that, in the ordinary and direct action to compel the specific performance of a contract for the sale of lands, the parties to the contract themselves, or the persons who have become substituted in their place, as the heirs,[2] and under certain circumstances the executors or administrators, are the only proper parties plaintiff or defendant. A suit for the purpose of obtaining this special relief cannot be combined with a cause of action for relief against other persons claiming an interest in the same land; in other words, this action cannot be made to determine the titles of other claimants, nor to foreclose the liens of subsequent incumbrancers.[3] This well-settled rule has, however, been departed

[1] Gray *v.* Palmer, 9 Cal. 616. But the heirs of a devisee of the deceased, it has been held, are not necessary parties: Van Aken *v.* Clarke, 82 Iowa, 256. [In an action against a receiver of a partnership on a contract made by him as receiver, the surviving partner is not a necessary party: Painter *v.* Painter (1902), 138 Cal. 231, 71 Pac. 90. And where one partner institutes proceedings for a receiver of partnership assets to prevent another partner from wasting them, firm creditors are not necessary parties: Allen *v.* Cooley (1898), 53 S. C. 414, 31 S. E. 634.]

[2] [It was held in Salinger *v.* Gunn (1895), 61 Ark. 414, 33 S. W. 959, that in a suit by the vendee of land for specific performance of the contract of sale, the heirs of the deceased vendor are necessary parties.]

[3] Taskel *v.* Small, 3 My. & Cr. 63, 68, per Lord Cottenham, Chan.; Mole *v.* Smith, Jacob, 490, 494, per Lord Eldon, Chan.; Wood *v.* White, 4 My. & Cr. 470; Robertson *v.* Gr. Western Ry. Co., 10 Sim. 314; Fagan *v.* Barnes, 14 Fla. 53, 57; Knott *v.* Stephens, 3 Oreg. 269; Moulton *v.* Chafee, 22 Fed. Rep. 26; Ashley *v.* Little Rock (Ark. 1892), 19 S. W. 1058; Washburn & M. Man. Co. *v.* Chicago G. W. F. Co., 109 Ill. 71. In Tasker *v.* Small, mortgagees of the land were held to be improper defendants. In another case, a tenant of the vendor in possession was declared an improper party. All persons interested in the subject-matter of the action as holders of the legal or equitable titles to the premises in question were declared to be necessary parties, plaintiff or defendant, in McCotter *v.* Lawrence, 6 N. Y. Sup. Ct. 392, 395.

from by some State courts. Thus, in a case decided by the Supreme Court of Minnesota, a contract to convey land had been given, and the vendee had gone into possession. Subsequently to the execution of the agreement and the change of possession, certain persons had recovered judgments against the vendor, which they claimed to be liens upon the land. These judgment creditors were held to be proper defendants in the suit for a specific performance brought by the vendee for the purpose of cutting off their rights of redemption, it being assumed that their liens were subordinate to the vendee's rights.[1] And it was held in a recent case in California that, in an action to compel the specific performance of such a contract, — the land being an undivided share of a specific tract, — all persons subject to the vendee's equities, and holding adversely to him, must be made defendants.[2]

§ 264. * 367. **Holder of Adverse Claim. Personal Representative of Deceased Vendor. Heirs. New York and Iowa Cases.** In a somewhat peculiar case recently decided by the Supreme Court of New York, a person holding a subsequent and adverse claim to the plaintiff was declared to be a necessary defendant to a complete determination of the issues. The action being brought to procure the specific performance of a land contract made between the plaintiff and the defendant, the complaint alleged that the defendant had made a subsequent contract to convey the same land to F., and prayed an injunction restraining defendant from making a conveyance to F. Upon this allegation and prayer for relief, it was held that such subsequent vendee was a necessary party.[3]

[1] Seager *v.* Burns, 4 Minn. 141, 145, per Emmet J. The judge made no suggestion of a doubt whether these creditors were proper parties. The whole discussion turned upon the question whether the general allegation of the plaintiff, that they "claimed an interest," etc., was enough. They were likened by the court to junior incumbrancers in a mortgage foreclosure. None of the authorities last cited were mentioned.

[2] Agard *v.* Valencia, 39 Cal. 292. This case is somewhat peculiar, and the facts are exceedingly complicated. The decision certainly seems to conflict with the general rule as established by equity courts, and as stated in the text.

[3] Fullerton *v.* McCurdy, 4 Lans. 132. When A. agrees to convey to B., and afterwards conveys to C., who has notice of the prior contract, C. is a necessary defendant in an action by the original vendee to compel a specific performance. Stone *v.* Buckner, 12 Sm. & M. 73; Daily *v.* Litchfield, 10 Mich. 29; Spence *v.* Hogg, 1 Coll. 225; Atchison, T. & S. F. Ry. Co. *v.* Benton, 42 Kan. 698. One to whom the vendor had assigned the contract as collateral security was held to be a proper defendant in Butler *v.* Gage (Colo. Sup. 1889), 23 Pac. R. 462. [See also Water Supply Co. *v.* Root (1895), 56 Kan. 187, 42 Pac. 715, where the court in the syllabus said: "Where A. makes a written

Where the vendor has died, and the vendee brought his action against the sole heir at law of the deceased, but conceded in his complaint that the entire purchase-money had not been paid, and averred a tender and a readiness to pay, the administrators of the vendor were held to be necessary defendants in New York.[1] It would appear from the reasoning of this case that its decision is confined to the single case in which the vendor has died before the purchase-money has been entirely paid, and in which the same remains unpaid up to the time of commencing the action. If the purchase price has been paid in full, either to the vendor during his lifetime, or to his administrators after his death, then his heirs would seem to be, in general, the only necessary parties defendant, his personal representatives not then having any interest in the controversy.[2] In the face of a statute providing that an action for a specific performance of a land contract may be brought against the executor or administrator of a deceased vendor, and that other parties are not necessary, but may at the discretion of the court be brought in, the Supreme Court of Iowa has held that such personal representatives are not necessary, but only proper parties; that in the absence of the statute the heirs of the vendor are the only proper or possible parties; and that, the language of the statute being permissive, it will not be construed to make the administrators or executors necessary defendants.[3]

contract for a sale of real property to B., which is forthwith placed on record, and afterwards conveys the property to C., who buys with constructive notice of the rights of B., under his contract, *held*, that an action to compel a conveyance of the legal title, after full performance of his part of the contract by B., may be maintained against C., and that A. is not an indispensable party to the action."]

[1] Potter *v.* Ellice, 48 N. Y. 321, 323. See also Thompson *v.* Smith, 63 N. Y. 301; Rain *v.* Roper, 15 Fla. 121; Butler *v.* Gage (Colo. Sup. 1889), 23 Pac. R. 462.

[2] All the heirs of a deceased vendor are necessary defendants in the action. House *v.* Dexter, 9 Mich. 246; Duncan *v.* Wickliffe, 4 Scam. 452. See also Rogers *v.* Wolfe, 104 Mo. 1.

[3] Judd *v.* Moseley, 30 Iowa, 423, 427; Story's Eq. Pl. §§ 160, 177; Champion *v.* Brown, 6 Johns. Ch. 402; Townsend *v.* Champernowne, 9 Price, 130. See also Lowry *v.* Jackson, 27 S. C. 318; Sawyer *v.* Baker, 66 Ala. 292; Houston *v.* Blackman, 66 Ala 559; Coffey *v.* Norwood, 81 Ala. 512; Walters *v.* Walters, 132 Ill. 467. If the vendor sues the heirs alone of the deceased vendee, the latter can insist upon the administrators being brought in. Story's Eq. Pl. § 177; Cock *v.* Evans, 9 Yerg. 287. The vendor and the vendee having both died, the heirs and widow of the latter brought a suit against the devisees of the vendor to whom the land had been devised, and the parties were all held to be proper, in Peters *v.* Jones, 35 Iowa, 512, 518; see cases cited by Miller J. at page 518. When the obligor in a title bond has died, his heirs at law are necessary parties to a suit by his personal representatives to subject the land to the payment of the purchase-money: Grubb *v.* Lookabill, 100 N. C. 267.

§ 265. * 368. **Prior Mortgagee. Agent of Vendor. Person Making Redemption.** In an action against the vendor to compel the specific performance of his contract, the plaintiff united with him as co-defendants the holders of two prior mortgages embracing the land agreed to be conveyed, which had been given by the vendor, alleging in his complaint that the vendor had agreed to pay off and remove these mortgages, and that they included other lands in addition to that claimed by the plaintiff, which were sufficient to satisfy the demand secured thereby, and praying that the mortgagees might be compelled to sell such other lands first. The New York Court of Appeals, however, held that these mortgagees could not be joined as co-defendants in the action.[1] When in the contract for the sale and conveyance of land the vendor appointed a certain person as his agent to make and deliver a deed in his name to the vendee, and directed the agent to execute and deliver the same, and neither the vendor nor the agent complied with the terms of the agreement, an action brought against the vendor and the agent as co-defendants was held to be improper, and the agent was declared not to be a proper party in any aspect of the case, since he had no interest in the controversy adverse to the plaintiff.[2] Land had been sold at execution sale, and afterwards redeemed in alleged compliance with the statute which prescribes the manner of redemption. The purchaser, denying the validity of the redemption, brought an action against the sheriff alone to compel an execution and delivery of the deed, and this action was held insufficient; it should have embraced the person who made the redemption, and who claimed to hold the land by virtue thereof, as a co-defendant with the sheriff.[3]

§ 266. * 369. **VIII. Actions to quiet Title. Scope of Statute herein in Western States. Multiform Use of.** The nature of the action to quiet title is such that it is impossible to lay down any but the most general rule in relation to its parties defendant.

[1] Chapman *v.* West, 17 N. Y. 125.

[2] Dahoney *v.* Hall, 20 Ind. 264.

[3] Crosby *v.* Davis, 9 Iowa, 98. Where the vendee sub-contracts, there is a distinction depending upon the nature of the sub-contract. If A. agrees to convey to B., and the latter in turn agrees with C. that the conveyance shall be made by A. directly to him, — C., — then C. must be joined with B. in the action, primarily as a plaintiff; but if not, then as a defendant; but if the agreement between B. and C. is that B. will convey the land to C., then B. is the only necessary party in the action against A. Alexander *v.* Cana, 1 De G. & Sm. 415; Chadwick *v.* Maden, 9 Hare, 188; B—— *v.* Walford, 4 Russ. 372.

The very object of the proceeding assumes that there are other claimants adverse to the plaintiff, setting up titles and interests in the land or other subject-matter hostile to his. Of course all these adverse claimants are proper parties defendant, and if the decree is to accomplish its full effect of putting all litigation to rest, they are necessary defendants.[1] Originally, and independent of statute, this particular jurisdiction of equity was only invoked when either many persons asserted titles adverse to that of the plaintiff, or when one person repeatedly asserted his single title by a succession of legal actions, all of which had failed, and in either case the object of the suit was to settle the whole controversy in one proceeding. The action has, however, been greatly extended by statute, especially in the Western States, and is there an ordinary means of trying a disputed title between two opposite claimants. The general scope of these statutes is as follows: The plaintiff must be in possession claiming an estate in the lands.[2] The adverse claimant or claimants must be out of possession, and must assert a hostile title or interest. In this condition the possessor of the land, without waiting for any proceeding, legal or equitable, to be instituted *against* him, may take the initiative, and, by commencing an equitable action, may compel his adversaries to come into court, assert their titles, and have the controversy put to rest in a single judgment. It is plain, therefore, that this statutory suit is the converse of the legal action of ejectment. The action to quiet title is not, however, confined to the ownership of lands; its use is multiform; it may be invoked to determine conflicting rights over personal property, and even rights growing out of contract where a multiplicity of actions depending upon the same questions will thereby be avoided. I shall now give some illustrations of the action and of its different forms. It will be seen that each case must stand

[1] [Browning *v.* Smith (1894), 139 Ind. 280, 37 N. E. 540: In a suit for quieting title to land, the omission of the holder of an equity of redemption as party defendant does not prevent the decree from operating to bar and foreclose those who were made parties.]

[2] [See, however, Styer *v.* Sprague (1896), 63 Minn. 414, 65 N. W. 659, where a grantor who had conveyed land by warranty deed with full covenants, and had delivered possession to the grantee, under an agreement that a portion of the purchase price should be deposited with a third party to be paid over after a cloud on the title should be removed, has sufficient interest to maintain an action to quiet title. See, also, Kruczinski *v.* Neuendorf (1898), 99 Wis. 264, 74 N. W. 974, where one not in possession was allowed to maintain an action to remove a cloud from his title.]

mainly upon its own circumstances under the guidance of the general principle which requires all persons whose rights and interests could be affected by the decree to be made parties.

§ 267. * 370. **Illustrations of Action and its Forms.** The officers of a railroad company, in violation of their duty and of the charter, and with a fraudulent intent, issued large amounts of spurious stock of the corporation, which had all the appearance on the face of being genuine. These issues had been made at different times, and to various persons, and the stock was actually held by three hundred and twenty-six separate owners, who had bought it in the course of business supposing it to be genuine. Most of these holders had commenced suits against the company to compel it to recognize the stock as valid in their hands. Under these circumstances the corporation began an action against all these three hundred and twenty-six persons as defendants, to procure the stock to be declared spurious, to enjoin the suits then pending, and to determine the controversy at one blow. The suit was sustained as a bill of peace and to quiet title, and the defendants were held to have been properly united in the one proceeding; their stock was tainted (if at all) by a common vice, and the same fundamental question disposed of all their claims.[1] On the same principle, the receiver of an insolvent insurance company was permitted to unite all the judgment creditors of the corporation who were separately suing the stockholders on their personal liability, and to enjoin their actions in order that the liability of all the stockholders might be enforced by himself in the same action.[2]

§ 268. * 371. **Same Subject.** In an action to quiet title to lands by correcting mistakes in deeds thereof, all persons having any interest in the land, or having any interests which could be affected by the relief demanded, must be brought before the

[1] N. Y. & N. H. R. Co. *v.* Schuyler, 17 N. Y. 592. The final result was, that the court pronounced the stock valid as against the company, and each defendant obtained a separate judgment against the plaintiff. s. c. 34 N. Y. 30. Bills of peace are sometimes permitted to be brought against a part only of those claiming adversely to the plaintiff when their number is very large; but in all such cases the right must be general among all these claimants. Story's Eq. Pl. §§ 120, 130 *et seq.*; London *v.* Perkins, 4 Bro. P. C. 158; Hardcastle *v.* Smithson, 3 Atk. 245; Adair *v.* New River Co., 11 Ves. 429; Newton *v.* Earl of Egmont, 5 Sim. 130; Harrison *v.* Stewardson, 2 Hare, 530; Holland *v.* Baker, 3 Hare, 68. See also Supervisors *v.* Deyoe, 77 N. Y. 219.

[2] Osgood *v.* Laytin, 5 Abb. Pr. N. S. 1 (Ct. of App.).

court as defendants.[1] When the land has passed through several owners by a succession of conveyances, all the series of grantors, or their heirs if they themselves are dead, are necessary defendants.[2] In another case involving the same principle, a sale had been made under a power of sale contained in a mortgage of land, and a deed of the land executed by or on behalf of the mortgagee to the purchaser. In the description of the premises contained in this mortgage there was an important mistake, which was repeated in the deed to the purchaser who took the conveyance in ignorance thereof. On discovery of this error he brought an action to reform the mortgage and his deed by correcting the mistake, and made the mortgagor the only defendant. The Supreme Court of Missouri held upon these facts the mortgagee was a necessary defendant, and must be brought in before any judgment could be rendered.[3]

§ 269. * 372. **Case in New York.** The general rule governing actions to quiet and determine title to lands brought by the one in possession against the persons who set up adverse claims was clearly and accurately stated by the New York Court of Appeals in a recent case. The proceeding was instituted under a statute which corresponds in its important features with the description of that class of enactments given in a preceding paragraph (§ * 369). The party in possession had united all the adverse claimants as defendants in his suit, and this was objected to as a misjoinder. The court stated the doctrine in the following manner: "It is claimed on the part of the respondents that the plaintiff could not unite all the claimants as defendants in the action. I cannot doubt that this claim is entirely unfounded. Here are twenty-four persons claiming title to this real estate. They all

[1] [In Hannibal, etc. R. R. Co. *v.* Nortoni (1900), 154 Mo. 142, 55 S. W. 220, it was sought to quiet title by having a deed set aside which was executed by a third party. Held that the grantor and grantee of fraudulent deed were necessary parties.]

[2] Flanders *v.* McClanahan, 24 Iowa, 486. See this case for a very elaborate discussion of the doctrine stated in the text; but see Thomas *v.* Kennedy, 24 Iowa, 397; and see Beckwith *v.* Darges, 18 Iowa, 303. In an action to reform a deed, both the grantor and the grantee are necessary parties. Pierce *v.* Faunce, 47 Me. 507. As to necessary or proper defendants in actions to correct mistakes in instruments, see Newman *v.* Home Ins. Co., 20 Minn. 422, 424; Durham *v.* Bischoff, 47 Ind. 211. Also Bush *v.* Hicks, 60 N. Y. 298; Mills *v.* Buttrick, 4 Col. 123; Stevenson *v.* Polk, 71 Iowa, 278; Coggswell *v.* Griffith (Neb. 1888), 36 N. W. Rep. 538; Roberts *v.* Chamberlain, 30 Kan. 677.

[3] Haley *v.* Bagley, 37 Mo. 363. The court finally held that the purchaser could not maintain such an action at all; that he was not in such privity with the mortgagor as to entitle him to the relief.

denied the plaintiff's right upon the same ground, and claimed title from the same source, and therefore had the same defence to the action. It cannot be that under the Revised Statutes it would have been necessary for the plaintiff to have instituted in such a case twenty-four special proceedings. Under the Revised Statutes these defendants, if they had all been in possession of this real estate, claiming the same title which they set up as defendants in this action, could all have been united as defendants in an action of ejectment; and they could, if they had chosen to do so, all have united in an action of ejectment against the plaintiff. Hence there was no error in the joinder of these defendants."[1]

§ 270. * 373. **IX. Actions for Partition. Their General Purpose. General Creditors. Holders of Liens on Entire Tract.** The action of partition has been made the object of so many special and varying statutory regulations in the different States, that it cannot properly be said to fall within the domain of the general procedure as the same is established by the codes. I shall only attempt, therefore, to point out its general features relating to parties defendant, and such as are common to all or several of the States in which the reformed system prevails. The primary object of the action is to divide the land according to their respective interests among the co-owners. The proceeding may be instituted by any co-owner, and all the other co-owners are of course necessary defendants, and they are in such case the only necessary or even proper defendants, for the rights of no other classes of persons could be affected by the decree making the division.[2] General

[1] Fisher *v.* Hepburn, 48 N. Y. 41, 55, per Earl J. Goldsmith *v.* Gilliland, 24 Fed. Rep. 154; Kincaid *v.* McGowan, 88 Ky. 91; Ellis *v.* Northern Pac. R. Co., 77 Wis. 114; Keens *v.* Gaslin, 24 Neb. 310; Johnson *v.* Robinson, 20 Minn. 170; Story's Eq. Pl. §§ 144, 198; Sutton *v.* Stone, 2 Atk. 101; Reynoldson *v.* Perkins, Amb. 564; Mead *v.* Mitchell, 17 N. Y. 210, 214, 215; Clemens *v.* Clemens, 37 N. Y. 59. [Heckman *v.* Swett (1893), 99 Cal. 303, 33 Pac. 1099, was an action to quiet title to a fishing privilege. The plaintiff was the owner of certain lands on the north side of the Eel river, and the defendants each severally owned certain lands on the south side of the same river, opposite the plaintiff's lands. The court says: "The court further found that the defendants claimed and exercised their rights and interests severally and separately, each to a distinct part of the shore. The question of misjoinder of parties defendant was presented by demurrer and answer. The joinder of the several defendants was proper. They severally claimed rights affecting plaintiff's right appurtenant to his land, and their claim, though under different patents, was from the same source, and the injury to the plaintiff, as well as their defence to the action, depended as to each upon the same facts. Pom. Rem. & Rem. Rights, § * 372; Fisher *v.* Hepburn, 48 N. Y. 41–55."]

[2] [Only a joint tenant or a tenant in common can maintain an action for the partition of real estate: Phillips *v.* Dorris (1898), 56 Neb. 293, 76 N. W. 555. An

creditors of any co-owner, or of any prior owner of the whole tract of land, — as, for example, the deceased ancestor of the present co-owners, — or of any prior owner of part of the land, not having obtained judgment, and not therefore holding any lien upon the premises or a part of them, would not be proper defendants for any purpose, any more than the general creditors of a mortgagor in the case of a foreclosure. The holders of liens upon the entire tract to be divided, such as judgment creditors of the former owner, or the holders of mortgages given by a former owner, would not be necessary defendants, nor would they be even proper parties to the action. Their liens would be utterly unaffected by the decree and subsequent division in pursuance thereof. As their judgments or mortgages were incumbrances upon the whole land prior to the titles of the present co-owners, the division of the real estate among these co-owners would leave the same liens undisturbed and effectual upon the same premises in their full force and effect. The transaction would be the same in substance as the conveyance by a mortgagor of the mortgaged premises to a grantee who takes them subject to the existing lien. Such incumbrancers are therefore, according to the doctrines of equity, not even proper parties defendant, when the action is simply for a division of the soil.

§ 271. * 374. **Holders of Liens on Undivided Shares.** The case of those who hold liens upon the undivided shares of individual co-owners, may appear at first view to be somewhat different from the one last described, but it really falls within the same principle. As long as the co-owner's share remains undivided, the incumbrance upon it is equally vague; that is, it is not a lien upon any specific and determined part of the whole common tract, but upon an undivided and undistinguished fraction of it. As the single co-owner himself cannot say of any particular spot of the territory in question, "*This* is mine, I am entitled to the exclusive possession of this," so his judgment creditor or mortgagee cannot say of any particular lot, "I have a lien upon *this*, and can enforce that lien by selling this specific portion." The sole effect of the decree and the decision in execution thereof is to allot a certain specified and determined piece of land to the co-owner in place of his former undefined share, and to transfer the lien-holder's

administrator of a deceased joint tenant is not a proper party to a partition suit: Throckmorton *v.* Pence (1893), 121 Mo. 50, 25 S. W. 843.]

incumbrance to this specified and determined portion of the soil. The incumbrance itself is neither increased nor diminished in amount; it is merely changed from its floating to a fixed character. It is plain, therefore, that the incumbrancer thus described has no real legal or equitable interest in the partition suit when the same is instituted and carried on to its end for the mere purpose of dividing the land among the co-owners. His rights are unaffected; his lien undisturbed. The only apparent interest which he has, or can possibly have, is not in the action itself, nor even in the judgment ordering a partition, but in the execution of that judgment. It may be said that he has an interest to see that the division is properly made, so that the co-owner on whose share he has the lien will receive a fair allotment, and that thus the value of his own security will be preserved. He has such an interest undoubtedly, but it is not a *legal* one; nor does it commence until the cause is decided and the judgment rendered. Moreover, the actual division is made by officers of the court, — the sheriff, or commissioners appointed in the case, — and they act under the direction and control of the court itself. As in the case of all other administrative official acts the law presumes that they will be rightly done, it does not require a person to be made a party to the action in order that he may be in a position to protect himself against the wrongful acts of the officers who are appointed to carry a judgment of the court into effect. Persons are made parties in order that they may have an opportunity of presenting their rights and claims to the judge before he makes his decree, to the end that they may be considered and passed upon and established by the judgment itself. When that judgment can in no possible manner affect his rights, he is not even a proper party to the suit. I have thus stated the principles of equity unmodified by statute which govern the action of partition when the same is brought for an actual division of the land. The statutory provisions in relation to the action may have altered these rules in some particulars; but I have only designed to present the equity doctrine pure and simple with the reasons therefor; so that local changes, wherever they have been made, will be the more readily understood and their effect appreciated.[1]

[1] Prior to any contrary statute, the rule was well settled that incumbrancers on the undivided shares, or on the whole tract, are not proper parties. Harwood *v.* Kirby, 1 Paige, 469, 471; Sebring *v.* Mersereau, Hopk. 501, 503; s. c. on app.

§ 272. * 375. **Different Rule where Object of Suit is to sell Land and divide Proceeds.** There is another aspect, however, of the partition suit which places it in very different relations to the holders of liens and incumbrancers either upon the whole land paramount to the titles of the co-owners, or upon the undivided shares of the co-owners themselves. Its object is sometimes to sell the whole land, and to divide the proceeds, and not to divide the land itself. When this is the nature of the judgment, it is plain that the rights and interests of the lien-holders must be adjusted and determined in the one action, and especially so when the land is to be sold free from all incumbrance, so that the lien of all the mortgages and judgments will be transferred from the real estate to the fund which is the proceeds thereof, and they will be paid off and satisfied therefrom. There is then a necessary antagonism between the co-owners and all classes and species of incumbrancers upon their undivided shares. Their rights are clashing; they are opposing claimants of the same fund; the interests of all are to be finally established and satisfied at the one judicial proceeding. It is evident, therefore, upon the most familiar principles of equity jurisprudence in its relation to parties, that in the aspect of the action now described, all the holders of liens and incumbrances upon the undivided shares of individual co-owners, created subsequent to the inception of their titles, are not only proper but necessary defendants in order that a decree should be made determining all these conflicting rights and claims, while the holders of prior liens, if not necessary, are at

9 Cow. 344, 345; Wotten *v.* Copeland, 7 Johns. Ch. 140, 141; Agar *v.* Fairfax, 17 Ves. 542, 544; Baring *v.* Nash, 1 Ves. & B. 551. All the tenants in common, or owners of undivided shares, must be parties either plaintiffs or defendants. Burhans *v.* Burhans, 2 Barb. Ch. 398; Teal *v.* Woodworth, 3 Paige, 470. When a tenant in common has assigned his share for the benefit of his creditors, such creditors are not proper parties. Van Arsdale *v.* Drake, 2 Barb. 599. A widow entitled to dower in an undivided share is a necessary party. Wilkinson *v.* Parish, 3 Paige, 653; Green *v.* Putnam, 1 Barb. 500; Gregory *v.* Gregory, 69 N. C. 522, 526. But a widow who is entitled to dower in the whole tract is not a necessary defendant unless a sale of the land is to be made. Tanner *v.* Niles, 1 Barb. 560. It is held in New York that, independent of statute, subsequent contingent remainder-men, or persons holding under executory devises, who may hereafter come into being, are bound by a decree in partition made by a court of equity, when the present owners of a vested estate of inheritance in the land have been made parties. Mead *v.* Mitchell, 17 N. Y. 210, 214, 215; Clemens *v.* Clemens, 37 N. Y. 59. [Held in Chalmers *v.* Trent (1894), 11 Utah 88, 39 Pac. 488, that the holder of a lien upon a joint tenant's share was a necessary party to a suit for partition, and that such necessary party might be brought in by cross-bill.]

least proper parties for a complete adjudication.[1] It may sometimes be impossible at the commencement of the action to determine whether the judgment will be given for a simple partition of the land itself, or for a sale of the land and a division of the proceeds after satisfying the incumbrances, and therefore the classes of persons described may be joined as defendants from motives of precaution. The results thus reached from an analysis of the action itself with its peculiar relief, and the application thereto of familiar equity doctrines, have, however, been largely modified in many States by statutory regulations.[2]

[1] It is held in Indiana, that all persons interested should be made parties, and that lien-holders on undivided shares may be joined. Milligan *v.* Poole, 35 Ind. 64, 68. In Missouri, all the co-owners, including infants by their curator, may unite in the proceeding as plaintiffs, so that it will be entirely *ex parte*. Larned *v.* Renshaw, 37 Mo. 458; Waugh *v.* Blumenthal, 28 Mo. 462. Where a deed of trust covered a portion of the land, the trustee and *cestui que trust* were held to have been properly made defendants in order to bind their interest, although no relief was asked against them. Reinhardt *v.* Wendeck, 40 Mo. 577; Harbison *v.* Sanford, 90 Mo. 477. Such a deed of trust is equivalent to a mortgage, so that these defendants were, in fact, incumbrancers. As to the parties in Ohio, see Tabler *v.* Wiseman, 2 Ohio St. 207; Williams *v.* Van Tuyl, 2 Ohio St. 336. In New York, it is said that all incumbrancers should be brought in as parties in order that the land may be sold free. Bogardus *v.* Parker, 7 How. Pr. 305.

[2] [Most of the States have special statutes respecting parties to suits for partition. The following brief synopsis of these statutes will indicate their general scope and effect.

Arizona: Any owner or claimant of real estate or any interest therein, or a part owner of personalty, may compel a partition. Rev. St., 1901, §§ 3492–3515.

Arkansas: Every person having an interest in the premises, including tenants for years, for life, by curtesy, or in dower, those entitled to the reversion, remainder, or inheritance, and all who, upon any contingency, may become entitled to any beneficial interest in the premises, whether in possession or otherwise, shall be made parties. Sand. & Hill's Dig. §§ 5415–5417.

California: "The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise upon the property, or upon any particular portion thereof; and generally to all persons unknown who have or claim any interest in the property." Code Civ. Pro., § 756.

Colorado: Same as in Arkansas. Code 1883, Chap. XXIV. §§ 2, 3.

Idaho: Same as in California. Code Civ. Pro., 1901, § 3398.

Indiana: Any person holding lands as joint tenant or tenant in common, whether in his own right or as executor or trustee, may compel partition, and trustees, administrators, and executors, may be made parties to answer as to any interest they may have in the property. Burns' St., 1901, § 1200.

Iowa: Persons having apparent or contingent interests in the property may be made parties. Creditors having general specific liens upon the entire property, may be made parties, and those holding liens upon one or more of the undivided interests shall be made parties. Code, 1897, §§ 4243, 4244, 4250.

Kansas: "Creditors having a specific or general lien upon all or any portion of the property may be made parties." Gen. St., 1901, § 5103.

Kentucky: "All persons interested in the property who have not united in the petition shall be summoned." Code, § 499.

Minnesota: "The summons shall be addressed by name to all the owners and lien-holders who are known, and generally

§ 273. *376. **Joinder of Wife of Tenant in Common. Administrator of Deceased Tenant in Common. In New York.** In New York, when the action for a partition is brought by one tenant in common in fee, his wife is a necessary party, but rather as a defendant than as a plaintiff. Her inchoate right of dower is entitled to protection.[1] If one tenant in common dies, so that his estate

to all persons unknown, having or claiming an interest in the property." St., 1894, § 5771.

Missouri: "Every person having any interest in such premises, whether in possession or otherwise, shall be made a party to such petition." Rev. St., 1899, § 4376.

Montana: "Every person having an undivided share, in possession or otherwise in the property, as tenant in fee, for life, or for years; every person entitled to the reversion, remainder or inheritance of an undivided share, after the determination of the particular estate therein; every person who, by any contingency, contained in a devise, or grant, or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof; every person having an inchoate right of dower in the property or any part thereof, which has not been admeasured, must be a party to an action for partition. But no person other than a joint tenant or a tenant in common of the property, shall be a plaintiff in the action." "The plaintiff may, at his election, make a tenant in dower, for life, or for years, of the entire property, or a creditor or other person, having a lien or interest, which attaches to the entire property, a defendant in the action." Also a section identical with the California statute given above. Code Civ. Pro., §§ 1342, 1343, 1347.

Nebraska: "All tenants in common, or joint tenants of any estate in land may be compelled to make or suffer partition of such estate or estates." "Creditors having a specific or general lien upon all or any portion of the property may or may not be made parties, at the option of the plaintiff." Comp. St. 1901, §§ 6323, 6325.

Nevada: Same as in California. Comp. Laws, 1900, § 3365.

New York: Has the same provisions quoted above from Montana, with others too long to be set out here. Code Civ. Pro., §§ 1538, 1539.

North Dakota: Same as California. Rev. Codes, 1899, § 5799.

Ohio: Each tenant in common, coparcener, or other interested person, shall be named as defendant in the petition. Bates' St., § 5756.

Oklahoma: "Creditors having a specific or general lien upon all or any portion of the property, may be made parties." St., 1893, § 4513.

Oregon: "The plaintiff may, at his election, make a tenant in dower by the curtesy for life or for years of the entire property or any part thereof, or creditors having a lien upon the property or any portion thereof, other than by judgment or decree, defendants in the suit." Hill's Laws, § 425.

South Dakota: Same as California. Ann. St., 1901, § 6597.

Utah: Same as California. Rev. St., 1898, § 3526.

Washington: "The plaintiff may, at his option, make creditors having a lien upon the property, or any portion thereof, other than by a judgment or decree, defendants in the suit." Bal. Codes, § 5559.

Wisconsin: "Every person having an interest, as aforesaid [enumerating substantially the same parties as in the Montana statute], whether in possession or otherwise, and every person entitled to dower in such premises, if the same has not been admeasured, may be made a party to such action." "The plaintiff need not, in the first instance, but may, at his election, make any creditor having a lien upon the premises or any part thereof, or any undivided interest or estate therein a defendant." St. 1898, §§ 3102, 3103.

Wyoming: Same as Ohio. Rev. St., 1899, § 4083.]

[1] Rosekrans *v.* White, 7 Lans. 486. [But it was held in Haggerty *v.* Wagner,

descends to his heirs, if other of the co-owners were indebted to him for rents and profits of the land, his administrator should be joined as a party defendant with his heirs, since the sum due for these rents and profits, and which would be ascertained by an accounting and determined by the decree, would go to his personal estate in the hands of the administrator, and not to his heirs.[1]

§ 274. * 377. **In Indiana and California.** In Indiana, the widow takes an undivided portion of the husband's land in fee, as his statutory heir. In an action of partition, brought by the widow against the other heirs of her deceased husband in that State, his creditors, it is held, cannot be made defendants for any purpose.[2] Under the California homestead laws, the wife is a necessary co-defendant with her husband in the partition of lands which they claim or she claims to be a homestead.[3] The general rule is laid down in that State that "all persons having or claiming any interest in the land are not only proper but necessary parties to a suit for partition." [4]

(1897), 148 Ind. 625, 48 N. E. 366, that the wife of a tenant in common is not a necessary party. And in Cochran *v.* Thomas (1895), 131 Mo. 258, 33 S. W. 6, the husband of a co-tenant was held not to be a necessary party, under G. S., 1865, chap. 152. Same rule stated in Estes *v.* Nell (1897), 140 Mo. 639, 41 S. W. 940. In Chalmers *v.* Trent (1894), 11 Utah, 88, 39 Pac. 488, the wife of a co-tenant was held a necessary party.]

[1] Scott *v.* Guernsey, 60 Barb. 163, 181; s. c. on app. 48 N. Y. 106. [In Budde *v.* Rebenack (1896), 137 Mo. 179, 38 S. W. 910, it was held that in an action for partition of lands devised to minors, brought before the settlement of the estate, the executor is a proper party defendant. In such a proceeding against infants, it was held in Bogart *v.* Bogart (1896), 138 Mo. 419, 40 S. W. 91, they must be represented by a legal guardian and curator, otherwise the purchaser at the sale under the decree obtains no title as to them.]

[2] Gregory *v.* High, 29 Ind. 527. The court said: "Any decree of partition between the widow and heirs could not conclude the rights of the creditors against the estate of the deceased; nor could creditors prove their claims in such a proceeding to which the administrator was not a party."

[3] De Uprey *v.* De Uprey, 27 Cal. 329.

[4] Ibid. p. 332, per Sanderson J. See Gates *v.* Salmon, 35 Cal. 576.

[In Hiles *v.* Rule (1893), 121 Mo. 248, 25 S. W. 959, the court said: "No judgment in partition should be made when it appears that the parties, who are not before the court, have an existing vested interest in the subject-matter of the suit. In such case the parties interested should be brought in, or partition should be denied." And it was held that the general rule that defect of parties, appearing on the face of the petition and not objected to by demurrer, is waived, does not apply to partition suits. So, in Lilly *v.* Menke (1894), 126 Mo. 190, 28 S. W. 643, it was held that a petition in partition which discloses the interests of persons not made parties does not state a cause of action.

In Campbell *v.* Stokes (1894), 142 N. Y. 23, 36 N. E. 811, it was held that in an action of partition among a testator's children, they taking as life tenants, grandchildren living at the time of the suit were necessary parties, since they were presumptively entitled to possession on the death of the life tenant. Becker *v.* Stroeher (1902), 167 Mo. 306, 66 S. W.

§ 275. *378. **X. Actions for Various Miscellaneous Objects. Partnership Matters and Accounting.** An action by one partner against another for a dissolution and a winding up of the concern, partly based on the ground of a fraudulent transfer of firm property by the defendant partner to a third person, may properly include this assignee as a co-defendant, since the sale may be declared void, and he may be ordered to account.[1] When two of three partners — or any part of the entire firm — entered into a contract with a third person, by which they transferred, or agreed to transfer, to him a certain share of *their* interest in the concern — a mine — and a like share of the profits made by their interest, an action by such assignee to determine his rights, and to obtain his share in the profits, would be properly brought against the two contracting parties alone; the other members would not be necessary defendants. But if the action is to wind up the concern, to dissolve the firm, and to sever the interests of the respective members, all the partners are indispensable parties; if the action is instituted by one, or by his assignee, all the others must be joined as defendants.[2] And, as a general proposition, in an action to compel an accounting growing out of any transactions or relations, all persons interested in obtaining the account, or in the result thereof, are necessary parties, and should be made defendants, if not plaintiffs.[3]

1083: Where a deed of trust is executed after a partition suit has been instituted, the beneficiary and trustee, while they may be made parties to the partition if they so desire, are not necessary parties.]

[1] Webb *v.* Helion, 3 Robt. 625; Wade *v.* Rusher, 4 Bosw. 537.

[2] Settembre *v.* Putnam, 30 Cal. 490. See Blood *v.* Fairbanks, 48 Cal. 171, 174, 175; and Skidmore *v.* Collins, 8 Hun, 50. Where a bill is filed against one partner to set aside partnership transactions, and vacate a conveyance of real estate, assets of the partnership, but held in the name of one of the partners for the benefit of the firm, and for an account, all the partners are necessary parties. Bell *v.* Donohoe, 8 Sawyer, 435; s. c. 17 Fed. Rep. 710.

[3] Petrie *v.* Petrie, 7 Lans. 90, 95. The general doctrine is, that all persons interested in resisting the plaintiff's demands must be made defendants. As an example, all joint debtors, and all persons liable to contribute towards satisfying the plaintiff's claim, should be joined. Story's Eq. Pl. § 169; Madox *v.* Jackson, 3 Atk. 406; Bland *v.* Winter, 1 Sim. & S. 246; Jackson *v.* Rawlins, 2 Vern. 195; Ferrer *v.* Barrett, 4 Jones Eq. 455; Hart *v.* Coffee, 4 Jones Eq. 321; Dunham *v.* Ramsey, 37 N. J. Eq. 388. When a debt is joint, all the joint debtors must be made defendants; as, for example, if the suit is to enforce a demand against a firm, all the partners must be joined; and if the action is brought against the personal representatives of a deceased partner, the survivors must also be co-defendants. Story's Eq. Pl. §§ 166–168; Pierson *v.* Robinson, 3 Swanst. 139 (n.); Scholefield *v.* Heafield, 7 Sim. 667; Hills *v.* McRae, 9 Hare, 297; Butts *v.* Genung, 5 Paige, 254. *Re* McRae, 25 Ch. D 16; *Re* Hodgson, 31 Ch. D. 177; *Re* Barnard, 32 Ch. D. 447. See also Littell *v.* Savre, 7 Hun, 485; Southal *v.* Shields, 81 N. C. 28; Getty *v.* Develin, 70

§ 276. * 379. **Rescission and Cancellation.** In actions to obtain this remedy, each case must to a great extent stand upon its own circumstances. There is one general principle which is generally applicable, and which regulates the selection of parties in all causes of this nature, whatever be the particular facts upon which each depends. It is the simple but comprehensive rule that all persons whose rights, interests, or relations with or through the subject-matter of the suit, would be affected by the cancellation or rescission, should be brought before the court as defendants, so that they can be heard in their own behalf. This general principle is assumed or expressly announced by all the decided cases, and those which are quoted are intended simply as illustrations.[1]

§ 277. * 380. **Same Subject.** — In an action to set aside an award, even for the misconduct of the arbitrators, the arbitrators themselves cannot properly be made defendants, as they have no interest in the subject-matter, nor are they legally affected by the relief if granted.[2] For the same reason, a sheriff is neither a necessary nor a proper defendant in an action to set aside a deed of land given by him upon a sale under an execution against the plaintiff.[3] The owner of land who had been induced to sell by the fraud and collusion of his own agent, and of the purchaser, conveyed the entire tract to such purchaser, who took the apparent ownership in fee of the whole; but, in fact, by a secret arrangement between himself and the vendor's agent, the latter was entitled to one half of the land so sold and conveyed, and actually advanced to that end one half of the purchase price. An action by the grantor to set aside this conveyance was held to be properly brought against the ostensible purchaser of the whole, who took the deed in his own name, and the agent jointly, because the latter was in reality one of the purchasers, and his equitable interest would be affected by the decree of cancellation.[4]

N. Y. 509; Fulkerson *v.* Davenport, 70 Mo. 541 (equitable set-off).

[1] Morse *v.* Morse, 42 Ind. 365; Zimmerman *v.* Schoenfeldt, 6 N. Y. Sup. Ct. 142. See also Sanders *v.* Yonkers Vill., 63 N. Y. 489, 493; Hammond *v.* Pennock, 61 id. 145; Potter *v.* Phillips, 44 Iowa, 353; Watkins *v.* Wilcox, 4 Hun, 220; Hill *v.* Lewis, 45 Kan. 162; Dailey *v.* Kinsler (Neb.), 47 N. W. 1045.

[2] Knowlton *v.* Mickles, 29 Barb. 465.

[3] Draper *v.* Van Horn, 15 Ind. 155. See, however, Colorado Man. Co. *v.* McDonald, 15 Colo. 516, to the effect that it is a matter for the discretion of the trial court whether the sheriff in such a case should be made a party. See also Gilbert *v.* James, 86 N. C. 244.

[4] Roy *v.* Haviland, 12 Ind. 364

§ 278. *381. **Same Subject.** — In an action against a trustee to cancel a mortgage given to him as such, or to set aside a deed to him absolute on the face, which it was alleged was in fact a mortgage, all the persons interested in the mortgage debt and the security thereof, and particularly the beneficiaries for whose benefit the trustee held the security, are necessary parties defendant, and their absence would be fatal to the recovery of the relief demanded.[1] When the lands of a deceased testator or intestate have been sold in pursuance of an order of the surrogate, on the application of the administrator or executor, for the alleged purpose of paying the debts of the deceased, an action to set aside such sale must be brought not only against the persons to whom the land was sold, and the present owners thereof, but also against the personal representatives of the deceased, so that the question whether there were debts of such a nature and extent as to render the sale necessary may be determined.[2] Bonds having been issued in the name of a town in aid of a railroad under color of legal authority, and the town subsequently bringing an action to set aside the entire proceedings on the ground of illegality and to procure the bonds to be delivered up and cancelled, all the holders of such bonds, it was held, could be united as defendants therein, so that their rights could be determined in one proceeding; it was not considered requisite to such joinder that any common interest in respect to their ownership of the securities should exist among the defendants; it was enough that their rights as holders all depended upon the one question involved in the suit.[3] If a judgment has been recovered against two or more jointly, and one of them afterwards institutes an action to set aside such judgment or to restrain its enforcement on the ground of want of jurisdiction in the court which rendered it, or on the ground of fraud, his co-judgment-debtors must be made parties to the proceeding, either as plaintiffs, or, upon their refusal to join, as defendants; their presence before the court is necessary to any adjudication upon the merits.[4]

[1] Clemons *v.* Elder, 9 Iowa, 272, 275.

[2] Silsbee *v.* Smith, 60 Barb. 372. In such an action all persons who participated in the fraudulent transaction, and who claim a present interest in the property affected by it, should be made defendants. Howse *v.* Moody, 14 Fla. 59, 63, 64.

[3] Venice *v.* Breed, 65 Barb. 597.

[4] Gates *v.* Lane, 44 Cal. 392. [All the parties to a judgment should be made parties to the proceeding to annul it: Day *v.* Goodwin (1898), 104 Ia. 374, 73 N. W. 864.

Land was conveyed to two sons of the

§ 279. * 382. **Enforcement of Liens.** — In an action by a sub-contractor or materialman to enforce the mechanic's lien given by statute, it is proper to make the contractor a party defendant as well as the owner of the building, so that all the claims may be adjusted in one suit.[1] It is decided, in California, that when the building or other premises upon which the labor was performed is owned by a partnership, all the members of the firm are necessary defendants in an action to enforce a mechanic's lien, even though the plaintiff was employed by one of the partners alone,

grantor in consideration of their agreement to support their mother during her natural life. Soon afterwards the grantor died, the sons failed to keep their contract, and the mother, together with the children of the grantor other than the grantees, brought suit for rescission of the contract. Held that the heirs of the grantor were proper parties: Lane *v.* Lane (1899), 106 Ky. 530, 50 S. W. 857.

Reformation. Grigsby *v.* Barton County (1902), 169 Mo. 221, 69 S. W. 296: All persons who will be affected by the reformation of an instrument should be made parties. See also Horner *v.* Bramwell (1896), 23 Colo. 238, 47 Pac. 462. If a party necessary to the suit is not brought in, the case will be dismissed on motion at the close of the evidence: Steinbach *v.* Prudential Ins. Co. (1902), 172 N. Y. 471, 65 N. E. 281.]

[1] Carney *v.* La Crosse & M. R. Co., 15 Wis. 503; Lewis *v.* Williams, 3 Minn. 151; Lookout Lumber Co. *v.* Mansion Hotel & B. Ry. Co., 109 N. C. 568; Davis *v.* John Mouat Lumber Co. (Colo. App. 1892), 31 Pac. R. 187; Northwestern Cement, etc. Co. *v.* Norwegian-Dan. Ev. L. A. Sem., 43 Minn. 449. Compare Hubbard *v.* Moore, 132 Ind. 178; Green *v.* Clifford, 94 Cal. 49. But it is held in Missouri that the sub-contractor need not bring in all of several joint contractors; the statute requiring the "original contractor" to be made a defendant is satisfied if one of them is joined. Putnam *v.* Ross, 55 Mo. 116; Steinmann *v.* Strimple, 29 Mo. App. 478; Horstkotte *v.* Menier, 50 Mo. 158, does not conflict with this decision, since it merely holds that the original contractor must be a defendant.

[Contractor is proper but not necessary party in suit by materialman: Wood *v.* Oakland, etc. Transit Co. (1895), 107 Cal. 500, 40 Pac. 806. Contractor is necessary party in suit by sub-contractor: Union Pac. Ry. Co. *v.* Davidson (1895), 21 Colo. 93, 39 Pac. 1095; Charles *v.* Hallack Lumber Co. (1896), 22 Colo. 283, 43 Pac. 548; H. B. C. Co. *v.* N. Y. C., etc. R. R. Co. (1895), 145 N. Y. 390, 40 N. E. 86. Contractor is not necessary party in suit by materialman: Bethune *v.* Cleveland, etc. Ry. Co. (1899), 149 Mo. 587, 51 S. W. 465. Contractor is a necessary party in suit by materialman: Castleberry *v.* Johnston (1893), 92 Ga. 499, 17 S. E. 772. The person with whom the plaintiff contracted is a necessary party: Gilliam *v.* Black (1895), 16 Mont. 217, 40 Pac. 303. The person to whom the premises are sold during the life of the lien is a necessary party: Pickens *v.* Polk (1894), 42 Neb. 267, 60 N. W. 566.

In Blanshard *v.* Schwartz (1898), 7 Okla. 23, 54 Pac. 303, the court, quoting with approval the case of Johnson *v.* Keeler, 46 Kan. 304, said: "In an action to foreclose a mechanic's lien, all lien holders and encumbrancers should be made parties, and a lien holder who is not made a party in the first instance is entitled, upon application, to come in at any time before final judgment, and, by answer in the nature of a cross petition, set forth his claim of lien, and ask to have the same foreclosed."

An attorney who has a lien on the judgment recovered for his client, who secures an affirmation of the judgment on appeal, may properly make the sureties on the appeal bond parties to a suit to enforce the lien: Coombe *v.* Knox (1903), 28 Mont. 202, 72 Pac. 641.]

was ignorant of the other co-owners, and had filed his notice of lien only against the one employing him.[1] It may be stated as a general rule, that in all actions to enforce a lien, the person in whose adverse possession the property subject thereto is held, is a necessary defendant, or otherwise the decree would virtually be a nullity.[2]

§ 280. * 383. **Same Subject.** — A contract for the sale of lands being pledged or assigned by the vendee as collateral security for the payment of a debt, and the creditor — the pledgee, or assignee — bringing an action to foreclose the right of redemption, and to sell the security, and to apply the proceeds in payment of his own demand, the vendor in the contract is held not to be a necessary party defendant in such suit.[3] The same rule must apply to all kinds and forms of securities and things in action which are pledged or assigned for the purpose of collateral security, such as bonds, notes, certificates of stock, and the like. The obligor on the bond, the maker of the note, the corporation which issued the stock certificate, cannot be a necessary defendant in an action to foreclose and sell.

§ 281. * 384. **Same Subject.** A mortgage was foreclosed in a summary manner prescribed by statute in Iowa, and the premises were conveyed to A., the mortgagee. He afterward assigned the mortgage and the note secured by it to B., and entered into a written agreement to convey to him the land. B. subsequently brought an action to foreclose the same mortgage against the mortgagor, and the subsequent incumbrancers, and also made A. a defendant, setting up the former summary proceedings and A.'s

[1] McDonald *v.* Backus, 45 Cal. 262.

[2] Wingard *v.* Banning, 39 Cal. 543. A junior incumbrancer should be made a defendant, or his right of redemption will not be cut off. Evans *v.* Tripp, 35 Iowa, 371. When the original owner of the premises on which the lien exists has conveyed all his interest by deed, he is no longer a necessary defendant if no personal judgment is asked; the suit must be against the grantee. McCormick *v.* Lawton, 3 Neb. 449, 451. In an action by the vendor in a land contract against the vendee to foreclose the latter's rights, and to sell his interest in the land for the balance of the purchase-price unpaid, the vendee's wife must be made a co-defendant, in North Carolina, in order to cut off her inchoate dower right. Bunting *v.* Foy, 66 N. C. 193. See also Winslow *v.* Urquhart, 39 Wis. 260; Church *v.* Smith, 39 id. 492; DeForest *v.* Holum, 38 id. 408; Boorman *v.* Wisconsin, etc. Co., 36 id. 207; Rice *v.* Hall, 41 id. 453; Crawfordsville *v.* Barr, 65 Ind. 367; Chapman *v.* Callahan, 66 Mo. 299; Thompson *v.* Smith, 63 N. Y. 301. [It was held in National Bank of Deposit *v.* Rogers (1901), 166 N. Y. 380, 59 N. E. 922, that where a bank brought an action to enforce a lien upon property assigned by the pledgor to an assignee for the benefit of creditors, the assignor, while a proper, is not a necessary party.]

[3] Vaughn *v.* Cushing, 23 Ind. 184.

agreement to convey, averring that such proceedings were invalid and worked no change in the rights of the parties, and also alleging that there was a mistake in the description of the land contained in the contract made by A., and praying that such mistake might be corrected, that A. might be ordered to convey the proper premises, and that the title might be quieted, or, if the former proceedings should be held invalid, that the usual decree of foreclosure of the mortgage might be rendered and the land sold thereunder. This action was held by the Supreme Court of Iowa to be properly brought; there was no improper joinder of defendants or of causes of action.[1]

§ 282. *385. **Contribution.** It is a general rule of the equitable procedure that, in an action to enforce an obligation to contribute and to recover the amounts due from contributors, all the persons liable to make contribution should be joined as defendants, in order that their respective amounts may all be adjusted in a single suit. On the other hand, when several parties are entitled to a share from a common source, and the claims have not been adjusted and made specific and personal, but they all depend upon the same facts and involve the same questions, all the claimants should unite in the action, or at least should be brought before the court as defendants, if they are not joined as plaintiffs.[2]

§ 283. *386. **Actions by Taxpayers.** In many States taxpayers and freeholders are permitted to maintain actions to set aside proceedings by local authorities, and to restrain the enforcement and collection of the tax which is the result of such proceedings, on the ground of their illegality. In such actions not only the officials themselves whose proceedings are sought to be set aside, and the administrative officers whose function it is to enforce the tax, must be made defendants, but also all other persons whose

[1] Thatcher *v.* Haun, 12 Iowa, 303. This was, in fact, a suit to reform a contract for the conveyance of land, and to compel a specific performance as reformed, or, in the alternative, for the foreclosure of a mortgage. If the relief was proper, the parties defendant were clearly so.

[2] Carr *v.* Waldron, 44 Mo. 393; Story's Eq. Pl. § 169; Madox *v.* Jackson, 3 Atk. 406; Bland *v.* Winter, 1 S. & S. 246; Jackson *v.* Rawlins, 2 Vern. 195; Hart *v.* Coffee, 4 Jones Eq. 321. In an action by a surety for contribution, the general rule is that all the co-sureties must be made defendants, and the personal representatives of any that are dead, and also the principal debtor. Story's Eq. Pl. § 169 *a*; Ferrer *v.* Barrett, 4 Jones Eq. 455; Haywood *v.* Ovey, 6 Mad. 113; Moore *v.* Moberly, 7 B. Mon. 299; Trescott *v.* Smyth, 1 McCord Ch. 301. See also McDearman *v.* McClure, 31 Ark. 559 (between co-tenants); Rosenthal *v.* Sutton, 31 Ohio St. 406 (between co-sureties).

rights or interests may be adversely affected by a decree granting the relief demanded by the plaintiffs. For example, in such a suit brought to set aside the proceedings of certain municipal authorities, and to restrain the levy and collection of a special tax imposed by them for the purpose of paying certain illegal judgments held by different judgment creditors, all these judgment creditors were declared to be necessarily joined as defendants; they had a common interest among them all, centring in the point at issue in the cause.[1]

§ 284. * 387. **Actions to Redeem.** In an action by a mortgagor or person holding under him to redeem, all those, in general, should be made defendants whose interest will be affected by the decree. If the mortgagee is living, he is, of course, an indispensable defendant; and if he is dead, his personal representatives, according to the theory of mortgages which prevails in this country.[2] As a general rule, all persons who are interested in the mortgage-money or debt secured by the mortgage must be joined.[3] Thus, if the mortgage is held by a trustee, the *cestui que trust* should be a co-defendant.[4] If the mortgagee has absolutely assigned all his interest in the mortgage, he is no longer a necessary party in the suit to redeem, but the assignee takes his place; and if there are several successive assignments of such a character, the last assignee is the only necessary defendant.[5] But

[1] [Anderson *v.* Orient Fire Ins. Co. (1893), 88 Ia. 579, 55 N. W. 348; Wabaska Electric Co. *v.* City of Wymore (1900), 60 Neb. 199, 82 N. W. 626; McCann *v.* City of Louisville (1901), — Ky. —, 63 S. W. 446; Commonwealth *v.* Scott (1901), 112 Ky. 252, 65 S. W. 596. The State, however, is not a proper party plaintiff in an action against a county auditor to recover money belonging to the county wrongfully received by him, where the county commissioners refuse to sue; nor can it be made such by joining taxpayers as relators: State *v.* Casper (1903), — Ind. —, 67 N. E. 185.] Newcomb *v.* Horton, 18 Wis. 566, 570, per Cole J., citing Brinkerhoff *v.* Brown, 6 Johns. Ch. 139; Fellows *v.* Fellows, 4 Cow. 682; Story's Eq. Pl. §§ 285 *et seq.* See also Wilson *v.* Mineral Point, 39 Wis. 160; Watkins *v.* Milwaukee, 52 id. 98; Bettinger *v.* Bell, 65 Ind. 445; Hayes *v.* Hill, 17 Kans. 360; Graham *v.* Minneapolis, 40 Minn. 436.

[2] [Wood *v.* Holland (1893), 57 Ark. 198, 21 S. W. 223.]

[3] Story's Eq. Pl. § 188; Palmer *v.* Earl of Carlisle, 1 Sim. & S. 423; Osbourn *v.* Fallows, 1 Rus. & M. 741; McCall *v.* Yard, 1 Stockt. 358; Large *v.* Van Doren, 14 N. J. Eq. 208.

[4] Story's Eq. Pl. §§ 192, 208; Drew *v.* Harman, 5 Price, 319; but see Swift *v.* State Lumber Co., 71 Wis. 476. Where the mortgagee had assigned the mortgage in trust for his family, it was held that, in an action to redeem, the mortgagee, the trustee, and the beneficiaries were all necessary defendants. Wetherell *v.* Collins, 3 Mad. 255.

[5] Story's Eq. Pl. § 189; Chambers *v.* Goldwin, 9 Ves. 269; Hill *v.* Adams, 2 Atk. 39; Whitney *v.* McKinney, 7 Johns. Ch. 144; Williams *v.* Smith, 49 Me. 564; Beals *v* Cobb, 51 Me. 348; Bryant *v.* Erskine, 55 Me. 153, 158. See also Swift *v.* State Lumber Co., 71 Wis. 476.

where the mortgagee has made only a partial assignment, and retains any interest in the mortgage or in the debt secured by it, he must be joined with the assignee as a co-defendant.[1] When the suit is brought, not by the mortgagor, but by a subsequent mortgagee or other incumbrancer, to redeem from a prior mortgage, all the owners of the equity of redemption are necessary co-defendants with the holder of such prior mortgage.[2] If the mortgagor conveys his entire estate in the land, he need not be made a party in an action to redeem by his grantee.[3] Persons having partial interests in the equity of redemption, or subsequent liens or incumbrances upon it or upon a portion of it, may redeem; but in such case they must bring in all other parties who are interested in the land; such other persons are necessary parties to the action either as plaintiffs or defendants, in order that all the rights and claims may be determined in one decree.[4]

SECTION SEVENTH.

WHEN ONE PERSON MAY SUE OR BE SUED ON BEHALF OF ALL THE PERSONS INTERESTED.

§ 285. *388. **Statutory Provision.** In immediate connection with the general topics treated in the preceding two sections, there are certain special subjects which, though subordinate, are sufficiently important to require a separate notice, and they will therefore be considered in the present and the following two sections.[5] The first of these involves an answer to the questions,

[1] Story's Eq. Pl. § 191; Hobart *v.* Abbott, 2 P. Wms. 643.

[2] Story's Eq. Pl. §§ 186, 191; Palk *v.* Clinton, 12 Ves. 48; Lord Cholmondeley *v.* Lord Clinton, 2 Jac. & W. 134; Smith *v.* Moore, 49 Ark. 100 (chattel mortgage); Hunt *v.* Rooney, 77 Wis. 258. As to the necessary defendants in an action for redemption by a subsequent incumbrancer when the prior mortgage has been foreclosed without making him a party, see Anson *v.* Anson, 20 Iowa, 55; Knowles *v.* Rablin, 20 Iowa, 101; Street *v.* Beal, 16 Iowa, 68; Burnap *v.* Cook, 16 Iowa, 149; Winslow *v.* Clark, 47 N. Y. 261, 263; Dias *v.* Merle, 4 Paige, 259; Bloomer *v.* Sturges, 58 N. Y. 168.

[3] Williams *v.* Smith, 49 Me. 564; Hilton *v.* Lothrop, 46 Me. 297; Bailey *v.* Myrick, 36 Me. 50; [Craig *v.* Miller (1893), 41 S. C. 37, 19 S. E. 192, citing the text.]

[4] Story's Eq. Pl. §§ 185, 186; Henley *v.* Stone, 3 Beav. 355; Chappell *v.* Rees, 1 De G., M. & G. 393; Fell *v.* Brown, 2 Bro. C. C. 278; Palk *v.* Lord Clinton, 12 Ves. 58, 59; Farmer *v.* Curtis, 2 Sim. 466; [Dunn *v.* Dewey (1898), 75 Minn. 153, 77 N. W. 793.]

[5] [The close connection of the statutory provision under discussion with the provision requiring the joinder of parties when united in interest, when the New York Code was adopted, is shown by the following quotation from Tobin *v.* Portland Mills Co. (1902), 41 Ore. 269, 68 Pac.

When may one person sue as the representative of others who, although not named, are regarded as virtual co-plaintiffs in the action? and, When may one person in like manner be sued as the representative of others who are regarded as co-defendants? The statutory provision permitting this method of bringing the parties before the court is as follows: "When the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." [1]

§ 286. *389. **Author's Analysis of Language of Statute. Two Distinct Cases. Essential Elements of each Case.** Following the course which has generally been adopted thus far, I shall first examine this provision of the codes by an independent analysis of its language, and shall then state the interpretation which has been put upon it by the courts. It is very evident that it describes two distinct and separate cases in which a plaintiff or defendant may be clothed with the representative character de-

743: "In McKenzie *v.* L'Amoureux, 11 Barb, 516, Mr. Justice Harris, commenting upon the exceptions spoken of by Judge Story, and explaining the adoption of the section of the code adverted to, says: 'So far was the legislature from intending any change in the rule on this subject, that, in making the great changes contemplated by the adoption of the code, it was careful to preserve this convenient practice of the Court of Chancery. The code commissioners had reported a section, copied substantially from one of the rules of the Supreme Court of the United States, providing that those who are united in interest must be joined as plaintiffs or defendants, except that, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. This, too, was the practice in the Court of Chancery. The legislature adopted the provision thus reported, but added to the section as follows: And when the question is one of common or general interest of many persons; or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole: Code, § 119. This was also in acordance with the then existing practice of the courts of equity. The legislature seems to have apprehended that by adopting the rule reported by the commissioners it might be understood to have rejected the kindred rules embraced in the latter clause of the section. To prevent this misapprehension the latter clause was added, thus retaining in the new practice the same rules by which to determine whether the proper parties were before the court which then prevailed in the Court of Chancery.' "]

[1] New York, § 119 (448); California, § 382; Kansas, § 38; Iowa, § 2549; Kentucky, § 37; South Carolina, § 142; Oregon, § 381; Nevada, § 14; Nebraska, § 43; North Carolina, § 62; [Utah, Rev. St., 1898, § 2917; North Dakota, Rev. Codes, 1899, § 5232; South Dakota, Ann. St., 1901, § 6079; Arizona, Rev. St., 1901, ~~§ 1313; Montana, § 584; Idaho, Code~~ Civ. Pro., 1901, § 3170; Colorado, § 12; Indiana, Burns' St., 1901, § 270; Wisconsin, St., 1898, § 2604; Oklahoma, St., 1893, § 3910; Washington, Bal. Code, § 4834; Wyoming, Rev. St., 1899, § 3482; Arkansas, Sand. & Hill's Dig., § 5632; Connecticut, Gen. St., 1902, § 619; Nebraska, § 43.]

scribed, and may thus stand in the place of others whose rights and interests are determined together with his own.[1] These two cases depend upon distinct and separate facts and circumstances, and are as follows: (1) There must be a "question of common or general interest" to *many* persons involved in the action. The two essential elements of this case are, the question of common or general interest to be determined, and the many persons who have this common or general interest in the matter at issue. The "many persons" in this case is opposed to the *very numerous* parties in the other, and is doubtless satisfied by a number actually less. It is certainly not necessary, in order to fulfil its requirements, that there should be any *impracticability* of bringing all the persons having the common or general interest before the court. (2) The second case depends entirely upon the number of the persons who should, according to the ordinary rule, be made plaintiffs or defendants. The single essential element is the impracticability of bringing all the parties before the court on account of their great number. The language does not in terms require any question of common or general interest to this great number, but it is difficult to conceive of an action in which a very large number of persons should be capable of joining as plaintiffs — so large that it would be impracticable to bring them all actually before the court — unless the question to be determined was one of common or general interest to them all.[2] It inevitably follows, therefore, from the customary nature

[1] [See Hawarden *v.* The Youghiogheny & Lehigh Coal Co. (1901), 111 Wis. 545, 87 N. W. 474, in which the court said: "It is to be noted that there are two cases named in the statutes referred to in which one may sue for all, viz.: (1) When the question is one of common or general interest of many persons, and (2) when the parties are very numerous, and it is impracticable to bring them all before the court. The latter class was under consideration in the cases of George *v.* Benjamin, 100 Wis. 622, and Hodges *v.* Nalty, 104 Wis. 464; hence what is said in those cases as to the number of persons which will be deemed 'very numerous,' is inapplicable here, because this case comes under the first subdivision, which only requires the presence of a question of common or general interest of many persons." See also Tobin *v.* Portland Mills Co. (1902), 41 Ore. 269, 68 Pac. 743, quoting the text.]

[2] [The language of the courts, respectively, in the cases of Tobin *v.* Portland Mills Co. (1902), 41 Ore. 269, 68 Pac. 743, and George *v.* Benjamin (1898), 100 Wis. 622, 76 N. W. 619, suggests, but does not settle, the question, whether the statutory provision can be invoked when the interest is joint. In the former case the court, in referring to the latter clause of the section, said: It "in effect enacts the third exception to the rule in equity, in respect to the necessity of making all persons immediately interested in the subject-matter parties, omitting therefrom, however, the words, 'and although they have, or may have, separate, distinct interests.' This omission cannot mean that the legislative

of litigations, that these two cases described by the statute are in practice constantly united; they constantly run into each other. In fact, it seldom if ever happens that a suit arises which falls strictly within the terms of the second case, and not within those of the first.[1]

§ 287. *390. **Necessary Allegations herein.** Whenever these provisions are invoked, in order that a plaintiff may be entitled to sue or a defendant to be sued in the representative character described, the facts showing that the requirements of either case have been complied with must not only exist, but must be alleged by the plaintiff as the very ground and reason for adopting the peculiar form of action permitted by the statute. The complaint or petition must show either that many persons have a common or general interest in the questions involved in the action, or else that the number of persons who would be joined as plaintiffs or defendants, if the ordinary rule was applied, is so very great that it is impracticable to make them all actual parties. Unless the pleading contains these averments, the action must be regarded as though brought by the single plaintiff or against the single defendant named.[2] It should be carefully observed that

assembly intended thereby to limit the third exception to cases in which the very numerous parties mentioned had a joint and indivisible interest in the subject-matter of the suit, for to give the statute such construction would render the statute superfluous, as the preceding clause of the section extends the second exception to that very class of parties, but limits it to a less number." It seems to be assumed by the court, in this language, that the statute applies to the case of a joint and indivisible interest in the subject-matter of the suit. Turning to the language of the court in George *v.* Benjamin, we find it reads as follows: "It requires but a mere inspection of the complaint to show that the claim that the question involved in this action is 'one of a common or general interest to many persons' is not justified by the facts alleged. It shows positively and definitely that *all* are united in interest. . . . It seems too plain for argument that the complaint fails to state any fact which shows that the parties to this contract have a common or general interest which would enable each to maintain an action in his own name if he was before the court." The court then proceeds to show that, in accordance with the common law rules as stated by Dicey and Chitty, "the fact that all the parties to the contract are united in interest affords a sufficient reason for holding that they are necessary parties to the action." And finally concludes the discussion of this question by saying: "So in whatever view we consider the case we are unable to see how the plaintiff can maintain the action alone." Bearing in mind the facts of the two cases, it is difficult to reconcile the language of the courts.]

[1] [See Hawarden *v.* The Youghiogheny & Lehigh Coal Co., *supra*, for a case where the two do not "run into each other." Hodges *v.* Nalty (1899), 104 Wis. 464, 80 N. W. 726.]

[2] [Castle *v.* Madison (1902), 113 Wis. 346, 89 N. W. 156. In this case the court said: "It is argued that it is impracticable to bring in all the riparian owners, and that all interests are represented in the suit as it is. This contention cannot be sustained. It is not shown that

this provision does not create any new rights of action, nor enlarge any of those now existing. The suit cannot be sustained by one as the representative of the many others who really sue in his name, unless it could have been maintained if all these many others had been regularly joined as co-plaintiffs, or unless it could have been maintained by each of them suing separately and for himself. The statutory provision is simply a matter of convenience, a rule of form, a means of enabling many persons to have their rights determined without their actual appearance in court as litigant parties.

§ 288. * 391. **Judicial Interpretation of Statute. Order Pursued in Examination of Decided Cases.** Passing to the judicial interpretation of the clause, I shall ascertain, from an examination of the decided cases, (1) when one person may sue or be sued in a representative capacity; and (2) the purpose and object of such form of action, and especially its effects upon the rights and duties of the other persons who are represented in and by the actual party.[1] The conclusions reached in the preceding paragraphs as to the meaning of the provision, and the two distinct cases mentioned in it, are fully sustained by the authorities. The construction of this section of the codes has been established by the courts, and the rule is settled as already stated, that, where the question to be decided is one of "common or general interest" to a number of persons, the action may be brought by or against one or all the others, even though the parties are not so numerous that it would be impracticable to join them all as actual plaintiffs or defendants; but, on the other hand, when the parties are so very numerous that it is impracticable to bring them all into court, one may sue or be sued for all the others,

it is impracticable to bring all the owners into the suit. We shall not assume that it is because they are numerous. Further, the owners who have been let in are not here in a representative capacity. The order making them parties allows them in on their own behalf alone, and not on behalf of any other riparian owner. If it be shown that there is difficulty in making the numerous owners defendants, "and the court believes that some may be proceeded against as representatives of a class under the statute, so that the litigation as carried on will end the controversy as to those thus represented, the court may so determine when the merits of the answer in abatement are considered." The number of owners referred to was 256. See Tobin *v.* Portland Mills Co. (1902), 41 Ore. 269, 68 Pac. 743.]

[1] [In McCann *v.* City of Louisville (1901), — Ky. —, 63 S. W. 446, the court said: "The purpose of the section is to avoid a multiplicity of suits, and settle the rights of all parties having a common or general interest in one suit." See, however, Northwestern Loan Co. *v.* Muggli (1895), 8 S. D. 160, 65 N. W. 442.]

even though they have no common or general interest in the questions at issue;[1] and the necessary facts to bring the case within one or the other of these conditions must be averred.[2]

§ 289. * 392. **Statute re-enacts Equity Rule. Must be some Connection between Parties Represented in both Cases. Test.** This section of the codes is a re-enactment of a rule which had prevailed in equity, and is to receive a construction which will make it identical with the pre-existing doctrine.[3] Although the case

[1] McKenzie *v.* L'Amoureux, 11 Barb. 516. See also Towner *v.* Tooley, 38 Barb. 598, 607.

[2] Bardstown & L. R. Co. *v.* Metcalf, 4 Metc. (Ky.) 199, 204.

[3] [George *v.* Benjamin (1898), 100 Wis. 622, 76 N. W. 619. In this case thirty-one persons by written agreement formed a syndicate to purchase, manage, and sell a tract of land, and each agreed to contribute a certain sum at once, and to pay from time to time such sums as should be needed for payments. One of the number was made trustee, and a trust in favor of each was declared to the extent of a one-thirty-first interest in the land. The suit was brought by the trustee in behalf of himself and associates against one of the parties to said agreement to recover $4,900, claimed to be due on the agreement. Plaintiff, to support his right to bring the action in his own name alone, relied upon the provisions of the statute under discussion in the text. The court said: "He seeks to sustain his right to maintain this action on the two grounds mentioned in the statute, — that the question involved is one of common and general interest of many persons, and that the parties are very numerous, and it is impracticable to bring them all before the court. As stated in Day *v.* Buckingham, 87 Wis. 215, and repeated in Frederick *v.* Douglas Co., 96 Wis. 411, this statute has been construed as merely re-enacting the rules which prevailed in equity, and which otherwise might have been held to be abolished by the code. So, also, it has been held that when the question is one of common or general interest, the action may be brought by one or more for the benefit of all who have such common or general interest, without showing that the parties are even numerous, or that it would be impracticable to bring them all before the court. . . . It requires but a mere inspection of the complaint to show that the claim that the question involved in this action is 'one of common or general interest to many persons' is not justified by the facts alleged. On the contrary, the complaint shows that the question involved arises out of contract, personal to each one of the subscribers to it. It shows positively and definitely that *all* are united in interest. Each subscriber to the contract agrees with every other subscriber that he will 'pay such sum or sums as shall be needed for future payments on said property, as the same are demanded and required by the parties in interest herein.' . . . It would seem too plain for argument that the complaint fails to state any fact which shows that the parties to this contract have a common or general interest which would enable each to maintain an action in his own name if he was before the court." In Hodges *v.* Nalty 104 Wis. 464, 80 N. W. 726, the court, after quoting statutory provisions under discussion, made reference to George *v.* Benjamin as follows: "This section was recently considered in the case of an action to enforce payment of a subscription to a business enterprise (George *v.* Benjamin, 100 Wis. 622), and it was held that the complaint did not show a common or general interest in all the subscribers, and that the number of subscribers, which was thirty-one in that case, was not so large as to be called very numerous and render it impracticable to bring them all before the court; hence it was held that all must join in that case. That case rules the present case upon the first branch of the section, . . ." Platt *v.* Colvin (1893), 50 O. St. 703, 36 N. E. 735. For a very interesting and recent case,

secondly mentioned omits the element of a "common or general interest," and speaks only of the very great number as the sole ground for permitting one to sue or to be sued for all the others, yet even in this case there must be some connection between the parties who are to be represented, according to the familiar principles of equity procedure. The right which the suit is brought to assert must in some manner or degree belong to all who are represented by the actual plaintiff; and all the persons who are represented by the actual defendant must have some interest adverse to the demand for relief set up by the action. The parties thus represented by the plaintiff or defendant may not be in privity with each other, but there must be some bond of connection which unites them all with the questions at issue in the action. The test would be to suppose an action in which all the numerous persons were actually made plaintiffs or defendants, and if it could be maintained in that form, then one might sue or be sued on behalf of the others; but if such an actual joinder would be improper, then the suit by or against one as a representative would be improper, notwithstanding the permission contained in this section of the statute.[1]

§ 290. * 393. **Applicable both to Legal and Equitable Actions. Number of Parties in Second Case.** The provision applies both to legal and to equitable actions, since no restriction or limitation is contained in its language; but when the second case is relied upon, the parties must be so numerous that it is really impracticable to make them all actual plaintiffs or defendants; and it has

see Commonwealth *v.* Scott (1901), 112 Ky. 252, 65 S. W. 596, where the court, after a review of the equity practice, says: "Section 25 of Civil Code of Practice of this State, which is substantially a re-enactment of section 37 of the former Code, recognizes and codifies this equitable practice. It is this: 'If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all.'" Tobin *v.* Portland Mills Co. (1902), 41 Ore. 269, 68 Pac. 743.]

[1] Reid *v.* The Evergreens, 21 How. Pr. 319, 321, per Emmott J. citing Story's Eq. Pl. § 123; Adair *v.* New River Co., 11 Vesey, 444; 1 Turner & Russ. 297; 2 Sim. 369; 1 Dan. Ch. Pl. pp. 235, 237; Story's Eq. Pl. §§ 99–103; and legatees or next of kin, 1 Dan. Ch. Pl. p. 238; Story's Eq. Pl. §§ 104–106; Brown *v.* Ricketts, 3 Johns. Ch. 553; Fish *v.* Howland, 1 Paige, 20, 23; Hallett *v.* Hallett, 2 Paige, 18–20, 21. For further illustrations in cases of voluntary associations and the like, see Story's Eq. Pl. §§ 107–115 *b*; 1 Dan. Ch. Pl. pp. 238, 239. The same principle applies, under similar circumstances, to defendants. 1 Dan. Ch. Pl. pp. 272, 273; Story's Eq. Pl. §§ 116 *et seq.*; Wood *v.* Dummer, 3 Mason, 315–319, 321, 322; Gorman *v.* Russell, 14 Cal. 531; Cullen *v.* Duke of Queensberry, 1 Bro. C. C. 101; 1 Bro. P. C. 396.

been held that the number thirty-five was not sufficiently great.[1] When one sued on behalf of an association by its name, upon a promissory note, and alleged in his complaint that it was unincorporated, and that its members were very numerous, the *mere* facts thus alleged were held to be insufficient.[2] Undoubtedly in such a case the plaintiff should sue on behalf of the persons who compose the society, and not on behalf of the society itself. Indeed, this point has been directly decided. It is held that, in case of such a society whose members are too numerous to bring them all before the court, the plaintiff must make one of them a defendant as a representative of the others, and not make the association a defendant.[3]

§ 291. * 394. **Particular Instances.** The following are some particular instances in which these principles have been applied, and in which it has been held that the action might be maintained by one or more for the benefit of the others. One creditor may sue on behalf of all the other creditors in an action to enforce the terms of an assignment in trust for the benefit of creditors, to obtain an accounting and settlement from the assignee and other like relief; also, in an action to set aside such an assignment on the ground that it is illegal and void; and also one judgment creditor may sue on behalf of all other similar creditors in an action to reach the equitable assets, and to set aside the fraudulent transfers of the debtor. In all these classes of cases the creditors have a common interest in the questions to be determined by the controversy.[4] When a mortgage had been given

[1] Kirk *v.* Young, 2 Abb. Pr. 453, per Clerke J. at S. T. Undoubtedly, a number much less than thirty-five would be sufficient when a "common interest" is set up. In an action by creditors it was held, by a very able English judge, that twenty was too small a number Harrison *v.* Stewardson, 2 Hare, 530. [See Hodges *v.* Nalty (1899), 104 Wis. 464, 80 N. W. 726, from which we quote as follows: "Seventy-five persons is surely a very large and unwieldy number of persons to join in an action where it is practicable for a few to settle the controversy for the benefit of all. A line must be drawn somewhere, and, while it may be difficult to draw it at any precise number, we hold that seventy-five is a sufficient number, in a case like the present, to justify the court in allowing one or more to sue for all." This was a case in which ten subscribers brought an action for the benefit of all subscribers who had paid their subscriptions against a subscriber who had refused to pay his subscription. See also George *v.* Benjamin (1898), 100 Wis. 622, 76 N. W. 619, holding that thirty-one "was not so large as to be called very numerous and render it impracticable to bring them all before the court." Tobin *v.* Portland Mills Co. (1902), 41 Ore. 269, 68 Pac. 743.]

[2] Habicht *v.* Pemberton, 4 Sandf. 657.

[3] Keller *v.* Tracy, 11 Iowa, 530; Stewart *v.* Erie & W. Transp. Co., 17 Minn. 372, 398.

[4] Greene *v.* Breck, 10 Abb. Pr. 42; Brooks *v.* Peck, 38 Barb. 519. See Story's Eq. Pl. §§ 99–103; 1 Dan. Ch. Pl. (4th

by a railroad company to a trustee in order to secure bondholders, and he desired to obtain directions of the court in respect to the payment of coupons, and brought an action for that purpose, and alleged in his complaint that the holders of the coupons were very numerous, so that it was impracticable to bring them all before the court, it was held proper, and within the provision of the code, to make a few of these persons defendants as the representatives of all the others, with suitable averments showing the reasons for such a form of action.[1] Conversely, a suit can be maintained by one on behalf of all to foreclose a mortgage when the number of mortgagees, or of bondholders, is large. It would be hardly necessary in such a case that the number of persons should be so great as to make it impracticable to bring them all in; they have a common interest in the questions at issue.[2] The provision also applies to actions by distributees for their shares, and by legatees brought to settle the estate and to recover their legacies;[3] and to actions by heirs to set aside a deed or will of their ancestors.[4] In both these cases there is a common interest among the claimants.

§ 292. *395. **Same Subject.** An action by members or shareholders of an unincorporated association for a dissolution, winding up, and division, or for other like relief, plainly falls within

Am. ed.), pp. 235, 237. See also Libby *v.* Norris, 142 Mass. 246; Sears *v.* Hardy, 120 Mass. 524; Mason *v.* Pomeroy, 151 Mass. 164. Twenty creditors were held to be too small a number in Harrison *v.* Stewardson, 2 Hare, 530. [Williams *v.* Meloy (1897), 97 Wis. 561, 73 N. W. 40; Harper *v.* Carroll (1895), 62 Minn. 152, 64 N. W. 145; Corey *v.* Sherman (1895), 96 Ia. 114, 64 N. W. 828; Herrick *v.* Wardwell (1898), 58 O. St. 294, 50 N. E. 903.]

[1] Coe *v.* Beckwith, 10 Abb. Pr. 296. See Reid *v.* The Evergreens, 21 How. Pr. 319. [In Gorley *v.* City of Louisville (1901), — Ky. —, 65 S. W. 844, it was held that where a large number of policemen have claims against the city for compensation during the time they were illegally suspended, several may sue for the benefit of all, and that the aggregate amount would determine the jurisdiction, and not the amount claimed by each one of the parties.]

[2] Blair *v.* Shelby Cy. Agr. Soc., 28 Ind. 175. Action on behalf of one hundred and thirty-eight mortgagees. Bardstown & L. R. Co. *v.* Metcalf, 4 Metc. (Ky.) 199. See also Carpenter *v.* Cincinnati, etc. Ry. Co., 35 Ohio St. 307; Chicago, etc. Land Co. *v.* Peck, 112 Ill. 408.

[3] McKenzie *v.* L'Amoureux, 11 Barb. 516; Towner *v.* Tooley, 38 Barb. 598. In the first of these cases the number of persons represented by the plaintiff was *three*. Story's Eq. Pl. §§ 104, 105; 1 Dan. Ch. Pl. (4th Am. ed.), p. 238; Hallett *v.* Hallett, 2 Paige, 18–20, 21; Fish *v.* Howland, 1 Paige, 20, 23; Brown *v.* Ricketts, 3 Johns. Ch. 553. See also Hills *v.* Putnam, 152 Mass. 123 (bill for instructions as to the disposition of an estate not defective for want of parties, if the numerous claimants are fully represented by those having similar interests); Hills *v.* Barnard, 152 Mass. 67.

[4] Hendrix *v.* Money, 1 Bush (Ky.), 306.

the statutory provision, and may be brought by one of the associates in a representative capacity. In some instances the proceeding would plainly fall within the first subdivision, since there would be a common interest among all the members or shareholders; in other instances, it might, perhaps, fall within the second, and be based upon numbers alone.[1] The question, whether one taxpayer or freeholder can sue for the benefit of others similarly situated, to restrain or set aside the acts of local officials done under color of authority, can only be properly considered and determined by those courts which hold that such actions are proper in their general form. Wherever this particular kind of action is condemned *in toto*, the decision of the particular point now referred to must, of course, be entirely *extra-judicial*. In the States which permit such suits by a taxpayer or freeholder generally, there is some conflict of opinion in respect to the question whether one can sue on behalf of others similarly situated with himself. It has been held in Wisconsin that an action cannot be maintained by one taxpayer as a representative of all others in a local district, to prevent the enforcement of an alleged illegal tax which would be a lien upon real estate, on the ground that the lands owned by the individual taxpayers, and affected by the tax, are distinct and separate parcels, and there is no common interest among the owners thereof. The conclusion was that each taxpayer must sue separately.[2]

§ 293. * 396. **Nature of such Action. What Essential on Part of those not Named in order to become Parties.** I pass now to consider the nature of an action brought by one on behalf of others, and its effects upon the rights and duties of those who are represented by the actual plaintiffs. The persons not named in such cases are not parties to the suit unless they afterwards elect to come in and claim as such, and bear their proportion of the

[1] Warth *v.* Radde, 18 Abb. Pr. 396; Gorman *v.* Russell, 14 Cal. 531; Von Schmidt *v.* Huntington, 1 Cal. 55; Stewart *v.* Erie & W. Transp. Co., 17 Minn. 372, 398; Cockburn *v.* Thompson, 16 Ves. 321; Story's Eq. Pl. §§ 107–115 *b*; 1 Dan. Ch. Pl. (4th Am. ed.), pp. 238, 239; Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40; Dousman *v.* Wisconsin, etc. Co., 40 Wis. 418; Chester *v.* Halliard, 36 N. J. Eq. 313.

[2] Newcomb *v.* Horton, 18 Wis. 566; Perry *v.* Whitaker, 71 N. C. 477; [McCann *v.* City of Louisville (1901), — Ky. —, 63 S. W. 446; Commonwealth *v.* Scott (1901), 112 Ky. 252, 65 S. W. 596. In this case one of many taxpayers of an illegal tax sued to recover, for the benefit of all, the taxes so paid. The action was sustained notwithstanding the party in whose name suit was brought was a non-resident of the county. See, however, Stiles *v.* City of Guthrie (1895), 3 Okla. 26, 41 Pac. 383.]

expenses. It is optional with them whether they will become parties or not, and until they so elect they are, in the language of the books, "in a sense deemed to be before the court."[1] They are so far before the court, that if they neglect, after a reasonable notice to them for that purpose, to come in under the judgment and establish their claims, the court will protect the defendants and parties named from any further litigation in respect of the same fund or other subject-matter, especially so far as such litigation may tend to disturb the rights of the parties as fixed by the judgment. A person who elects to come in and make himself a party must apply for an order making him such, and upon the granting the order he is to all intents and purposes a party.[2]

§ 294. * 397. **Equity Rule. Rule in Kentucky.** This rule, which is merely the doctrine and practice of equity applied to cases arising under the statutory provision, has not been acquiesced in by all the courts. In Kentucky, where the chancery has always existed as a separate tribunal, and where even under the code there is a nominal distinction kept up between legal and equitable actions, it is held that the assent of those who are not actual parties, but who have a common interest with their representative, will be presumed unless they show their disapproval by some act indicating the dissent.[3] This is in direct conflict with the rule first stated. According to the one, the persons who are represented must do some affirmative act of approval and adoption, and regularly this act should be an application to the court, and the obtaining an order declaring them to be in all respects parties; according to the other, these persons must do some act of disaffirmance and rejection, but what particular act is not disclosed.

§ 295. * 398. **Question whether One has made himself a Party may present itself in Two Aspects.** The question whether any specified person among the number of those represented had made himself or was a party to the suit, may present itself in

[1] Story's Eq. Pl. § 99; Adair *v.* New River Co., 11 Ves. 444.

[2] Stevens *v.* Brooks, 22 Wis. 695, 703, 704, per Dixon C. J.; Hallett *v.* Hallett, 2 Paige, 18, per Walworth Ch.; Good *v.* Blewit, 19 Ves. 336, 339, per Lord Eldon; Story's Eq. Pl. § 99; Barker *v.* Walters, 8 Beav. 92; Belmont Nail Co. *v.* Columbia Iron & Steel Co., 46 Fed. Rep. 336. Creditors who refuse to join are postponed to those creditors who do come in under the general creditors' bill. Bank of Rome *v.* Haselton, 15 Lea (Tenn.), 216. See also Bilmyer *v.* Sherman, 23 W. Va. 656.

[3] Flint *v.* Spurr, 17 B. Mon. 499, 513.

two very different aspects, and its answer may be necessary for two very different purposes.[1] In the first place, the question may be, whether this individual, as against the defendants in the action, and perhaps as against those who were the original plaintiffs, or who had made themselves such, is entitled to the immediate benefits of the recovery, to a share in the relief granted by the court in its decree. It is evident that, under this aspect of the matter, a slight affirmative act of assent and adoption may be sufficient if the person is then willing and does contribute his share to the expenses of the litigation. The nature of the cause of action may be such that, if the relief is granted at all, it will necessarily enure to the benefit of all who may be situated in the same position as the actual plaintiff. On the other hand, the cause of action may be such that a separate application will be necessary to bring each person within the operation of the judgment, although the decision made in one case may control that in all others: as, for example, in a creditors' suit to set aside fraudulent transfers of the debtor's land, and let in the liens of the plaintiffs' judgments, a separate action of the court is necessary in the case of each judgment creditor, in order that he may reap the benefit of the general decision pronouncing the debtor's transfer to be void.

[1] [To the point that one cannot be made a party plaintiff against his consent, see Tobin *v.* Portland Mills Co. (1902), 41 Ore. 269, 68 Pac. 743, the court saying: "A person materially interested in the subject-matter of a suit may, against his will, be made a party defendant, but we know of no rule whereby he can, without his consent, be joined as plaintiff. The desire of a person to be joined as a party plaintiff is indicated by a willingness to bear his share of the expenses of the trial and while 35 of the depositors were anxious to participate in the profits of the suit if any were realized, 34 of them, tacitly, at least, expressed their unwillingness so to contribute, thereby manifesting their dissent to being joined as plaintiffs, notwithstanding which a decree is given in their favor, thus in effect making them parties against their will. Besides this, the 101 depositors, having made voluntary affidavits of their respective claims for wheat deposited at Black's warehouse at Halsey, could, if they so desired, have expressed their assent to be joined as plaintiffs, thereby demonstrating the practicability of bringing them all before the court. If the depositors had not been interrogated in respect to their willingness to pay their part of the expenses, the law would probably have presumed that, as they were anxious to secure their share of the grain alleged to have been shipped to the defendants they were also willing to contribute their part of the expenses incurred in recovering it, or its value; but their testimony dispels such presumption, if it could ever have been invoked." But see McCann *v.* City of Louisville (1901), — Ky. —, 63 S. W. 446, in which it is held that, under the facts therein stated, parties may be made plaintiff against their consent. In this case the statutory provision under dicussion was invoked.]

§ 296. *399. **Same Subject.** In the second place, the question may be whether the specified individual who is one of those represented by the actual plaintiff, is concluded and bound by the judgment rendered in the action. This question will generally arise at a subsequent time, and in another action brought by or against the individual, and involving the same issues as those embraced in the former controversy.[1] Is this person bound by the former judgment? Of course he is not bound unless he was practically a party to the proceeding; the plainest principles of common justice refuse to hold a man concluded if he has not had "a day in court." When the matter is presented in this aspect, the strict rule of the equity courts first above stated must be controlling. If the subsequent proceeding is a hostile one against the person, the former adjudication cannot be relied upon as an estoppel or as conclusive, unless he had affirmatively taken the steps which made him an actual party by adopting the suit with all its burdens and benefits, or unless, after having had notice, and an opportunity of coming in and making himself such a party, he had refused or neglected to do so. If, however, this subsequent proceeding is on behalf of the person, set in motion by him, the same doctrine must apply; he cannot under exactly the same circumstances claim and receive the benefits of the former litigation, but disclaim and be freed from its burdens and disabilities.

§ 297. *400. **Conclusion of Author from Discussion.** The conclusion to which I arrive from the foregoing discussion may be summed up as follows: There may be a marked difference in the manner of enforcing the rule, or even in the rule itself, depending upon the position of the litigation, and the situation of the person who invokes its aid or against whom it is invoked. If the prior suit is still pending, and the purpose of the claimant who belongs to the class of persons represented by the actual plaintiff or defendant, be to take a practical part in the controversy, or to share the benefit of the judgment which has been or may be rendered, his mere act of making the claim, coupled with a willingness to bear his share of the expenses, will be of itself a sufficiently positive and affirmative act to make him a party to the proceeding and entitle him to his personal relief. Even in this case, however, the action may be of such a nature and the

[1] Stevens *v.* Brooks, 22 Wis. 695.

judgment of such a character, that a separate order or adjudication of the court will be necessary in order to determine the particular rights under the general decree of each party, and to award to him his special portion of the general relief. The case already mentioned of the different judgment creditors interested in the result of an ordinary creditors' suit, is a sufficiently illustrative example. If, however, the prior suit has been terminated, and the question arises in a subsequent controversy, and involves the conclusive effect of the former adjudication upon the class of persons represented by the actual parties, in order that such judgment should be conclusive upon any particular person of the class either in his favor or against him, there must have been the previous formal act on his part of applying to the court, and an order thereon making him a party to the action, so that his name should have appeared in some manner upon the record; or it must be shown that he had notice of the proceedings, and an opportunity to unite in them of which he neglected or refused to avail himself. These views and conclusions reconcile the decisions which at first sight appear to be conflicting, and they present a practical and harmonious rule of procedure.[1]

§ 293. * 401. **Necessary Averments of Complaint or Petition.** It has already been stated that the complaint or petition should contain averments which bring the action within one or the other of the cases mentioned in the section of the codes. The allegations showing the existence of a common or general interest in the questions at issue in the one case, or the impracticability, on account of numbers, of bringing all the persons before the court in the other, should be positive and specific, so that, if denied, an issue may be raised upon them.[2] It is not necessary, however, that the persons who, it is alleged, have the common or general interest, or who, it is said, are so numerous that they cannot all be brought before the court, should be named, nor be described with particularity; nor is it necessary that they should be an association or special class, or be described as such.[3] The

[1] See on this subject, Story's Eq. Pl. §§ 99, 196; David *v.* Frowd, 1 Myl. & K. 200; Gillespie *v.* Alexander, 3 Russ. 130; Farrell *v.* Smith, 2 Ball & B. 337; Cockburn *v.* Thompson, 16 Ves. 327; Good *v.* Blewit, 19 Ves. 336, 339; Leigh *v.* Thomas, 2 Ves. 312, 313; Hendricks *v.* Robinson, 2 Johns. Ch. 283, 296; Hallett *v.* Hallett, 2 Paige, 18, 19; Bilmyer *v.* Sherman, 23 W. Va. 656; Glide *v.* Dwyer, 83 Cal. 477, 487. See David *v.* Frowd, 1 M. & K. 200; Thompson *v.* Huffaker, 19 Nev. 291.

[2] [Castle *v.* Madison (1902), 113 Wis. 346, 89 N. W. 156; Hodges *v.* Nalty (1899), 104 Wis. 464, 80 N. W. 726.]

[3] Sourse *v.* Marshall, 23 Ind. 194.

general averment descriptive of the persons as a whole is enough; and the question whether any particular individual is included within it will arise, and must be decided upon his application to be admitted as a participant in the suit while in progress, or in the relief after judgment. If any opposition is made to his application, the matter will be sent to a master or referee to hear and report, and upon his report the court will make the proper order admitting or rejecting the applicant.[1]

SECTION EIGHTH.

PERSONS SEVERALLY LIABLE UPON THE SAME INSTRUMENT.

§ 299. *402. **Reasons for Separate Treatment. Two Classes of Statutory Provisions.** The subject-matter of this section has already been treated in a general manner in the discussions relating to joint, joint and several, and several liabilities, and to actions thereon, and to the changes wrought in the common-law rules regulating the same, which are contained in the sixth section of this chapter. It is of so great importance, however, and the statutory provisions have made so sweeping an alteration in the ancient law, and withal there is so marked a difference in the special legislation of the State codes upon this particular topic, that the subject demands an independent and thorough examination. The statutory provisions themselves must be separated into two classes. The first class, which is found in most of the codes, embraces special rules relating only to persons *severally* liable upon the same instrument, and the language which embodies the enactment is substantially alike in all the statutes which contain the provision at all. The second class, which is found in a portion only of the codes, is much more sweeping and radical in its changes; it embraces rules relating to joint, joint and several, and several liabilities arising upon all contracts; while the language used by the legislatures is not the same in any two of the codes.

§ 300. *403. **Quotation of Statutory Provisions.** I quote these two classes of provisions separately. — *First class.* "Persons severally liable upon the same obligation or instrument, including

[1] Stevens *v.* Brooks, 22 Wis. 695.

the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff."[1] In Kentucky the section is somewhat varied, and reads as follows: "Persons severally liable upon the same contract, and parties to bills of exchange, to promissory notes placed upon the footing of bills of exchange, or to common orders and checks, and sureties on the same or separate instruments, may all or any of them, or the representatives of such as may have died, be included in the same action at the plaintiff's option."[2] — *Second class.* The Missouri code contains the following: "Every person who shall have a cause of action against several persons, including parties to bills of exchange and promissory notes, and who shall be entitled by law to one satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper, and he may, at his option, join any executor or administrator or other person liable in a representative character, with others originally liable."[3] According to the last revision of the California code, "All persons holding as tenants in common, joint tenants, or *coparceners*, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party."[4] A section is found in the Nevada code nearly the same as the foregoing in most respects, but with one very marked difference: "Tenants in common, joint tenants, or *copartners*, or any number less than all, may jointly or severally bring or defend, or continue the prosecution or defence of any action for the enforcement of the rights of such person or persons."[5] The changes

[1] New York, § 120 (454); Kansas, § 39; Oregon, § 36; Nevada, § 15; South Carolina, § 143; California, § 383; Minnesota, § 35; Nebraska, § 44; Ohio, § 38; North Carolina, § 63; [Utah, Rev. St., 1898, § 2918; North Dakota, Rev. Codes, 1899, § 5233, in somewhat different form; South Dakota, Ann. St., 1901, § 6080, same form as in North Dakota; Arizona, Rev. St., 1901, § 1306, in somewhat different form; Oklahoma, St., 1893, § 3911; Washington, Bal. Code, § 4836; Montana, § 585; Idaho, Code Civ. Proc., 1901, § 3171; Wyoming, Rev. St., 1899, § 3483, in somewhat different form; Colorado, § 13; Indiana, Burns' St., 1901, § 271; Wisconsin, St., 1898, § 2609.]

[2] [Kentucky, § 26; Arkansas, Sand. & Hill's Dig., § 5633.]

[3] [Missouri, Rev. St., 1899, § 545.]

[4] California, code of 1872, § 384; originally statute of 1857, p. 62.

[5] Nevada, § 14. This section is plainly copied from the California statute of 1857. The change from "coparceners" to "copartners" is remarkable. The use of the word "coparceners" was natural, perhaps, though doubtless entirely unnecessary in the earlier enactments, for certainly no estate in "coparcenary" exists in California. The word used in the Nevada code, unless treated as a mistake, produces a most violent and exceptional change in the prior law. The language

in the common law made by the Iowa and Kentucky codes are radical and complete. In the former: "When two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, including the parties to negotiable paper, common orders, and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all of such representatives. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others."[1] The corresponding section of the Kentucky code differs from this verbally rather than substantially: "If two or more persons be jointly bound by contract, the action thereon may be brought against all or any of them at the plaintiff's option. If any of the persons so bound be dead, the action may be brought

is not broad enough to cover all joint liabilities arising from contract; the single case of partnership liability is excepted. [See *ante*, p. 198, note 2, for other statutes of the same character.]

[1] [Iowa, Code, 1897 § 3465. Lull *v.* Anamosa Nat. Bank (1900), 110 Ia. 537, 81 N. W. 784: "If plaintiff maintains his action against one of several defendants, he may have judgment against that one, and the other defendants may have judgment against plaintiff for costs. The rule is alike applicable to actions *ex contractu* and *ex delicto*." Kellogg *v.* Window (1897), 100 Ia. 552, 69 N. W. 875. In Curran *v.* Stein (1901), — Ky. —, 60 S. W. 839, the court say: "In Gasson *v.* Badgett, 6 Bush, 97, it was held that in an action against two upon an alleged joint contract no judgment could be rendered against one upon proof that the contract was made with him alone. But after this decision was rendered by the act of 1888 the following amendment was made to section 131 of the Code of Practice: 'In an action on a contract alleged to have been made by several defendants, in the event the evidence shall show the contract to have been made with less than all those defendants by whom it is alleged to have been made, this shall not be deemed either a variance or failure of proof, but judgment may be rendered against the party or parties shown to be bound and in favor of those shown not to be bound.'" See also Council Bluffs Savings Bank *v.* Griswold (1897), 50 Neb. 753, 70 N. W. 376, in which the court construing the Iowa statute quoted in the text said: "The evident purpose of the statute above quoted is to abolish the joint liability of persons bound by contract, judgment, or statute, and to authorize the prosecution of actions against any or all of the parties so liable, at the election of the plaintiff," and see further Schowalter *v.* Beard (1900), 10 Okla. 454, 63 Pac. 687, as follows: "Another defence urged is that the obligation is joint, and that all the obligors should be made parties defendant. We think sec. 851, page 219 Oklahoma Statutes of 1893, settles this proposition, as all the obligors on this agreement were parties who received some benefit, and the statute above cited makes all such contracts, presumably, joint and several, and the proof shows that all these defendants were owners of, or parties interested in lot 18, on which the wall was partly erected."]

against any or all of the survivors, with the representatives of all or any of the decedents, or against the latter or any of them. If all the persons so bound be dead, the action may be brought against the representatives of all or of any of them. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others."[1] Substantially, the same change in the common law is made by the North Carolina code.[2]

§ 301. *404. **Two Classes of Statutory Provisions Compared and Distinguished.** These two classes of legislative enactments must be examined separately. The provisions of the first class relate solely to persons *severally*, as opposed to those jointly or jointly and severally liable. The term "severally liable" has long had a well-known technical meaning in the law, and is plainly used with that meaning in this connection. The modification of the former rules made by this section is therefore quite restricted. Again, this several liability must arise from the fact that the persons are all parties to one single instrument, except that, in a few States, sureties upon separate instruments are also included. This latter clause is probably intended to cover the case, which is not infrequent, of two or more official or other bonds given on behalf of the same principal and to the same obligee, and intended to secure the same object, the rights and obligations of the sureties thence arising being the same as if they had all executed a single undertaking.[3] In the third place, there is no limit upon the kind of contract from which this several liability may arise, provided it is in writing. The broad language of the clause includes any and every species of written contract.[4] The instances given of bills, notes, checks, orders, etc., are illustrations merely, and do not restrict the operation of the section to themselves. The result is, that the provision as a whole has the same force and effect in all the States of whose codes it forms a part, with the single exception, already noticed, in reference to sureties upon separate instruments. Fourthly, no change is made

[1] [Kentucky, Codes, 1895, § 27.]

[2] Code of North Carolina, § 63 *a*. "In all cases of joint contract of co-partners in trade, or others, suits may be brought and prosecuted on the same against all or any number of the persons making such contract." See Merwin *v.* Ballard, 65 N. C. 168.

[See *ante*, p. 289, note 1, for similar statutes in Arkansas, Kansas, Missouri, and Minnesota.]

[3] See Powell *v.* Powell, 48 Cal. 234.

[4] The clause does not embrace or apply to oral contracts: Exchange Bank *v.* Ford, 7 Colo. 314.

in the prior rules of law which define the nature of "several liability." The contracts from which such a liability arises, and the cases in which it exists, are left as the codes found them. Finally the only change made by the section is, that while the common law required a separate action by the creditor against each one of the persons thus severally liable, he is now permitted at his option to sue all, one, or any of them.[1] How far the provision permits the joinder of the personal representatives of deceased parties with any or all of the survivors as co-defendants must be a matter for judicial construction; that found in the Kentucky code removes all possible doubt by expressly authorizing such a proceeding. The second class of provisions goes to the root of the matter, and practically destroys all distinction between joint, joint and several, and several liabilities, in respect of actions against the original parties, and of those against the survivors and the representatives of such as have died. These enactments are so express, so full, and so plain in their language, that they leave very little room for forensic exposition or judicial interpretation.

§ 302. *405. **Turning-Point of Decisions herein. Illustrations.** From this analysis of the language I proceed to the judicial interpretation which has been put upon it. Most of the conclusions contained in the foregoing paragraph result so plainly from the express terms of the statute, that no doubt can be entertained of their correctness, and no necessity can arise for judicial construction. It will be found, therefore, that the decisions based upon this section have generally turned, not upon any question as to its meaning, but upon points of the former law. Nearly all of these cases will be seen, when we get at the *ratio decidendi*, to have determined either that the parties were or were not severally liable, or that they were or were not liable upon the same instrument. These points, I say, are preliminary only, and do not belong to any exposition of the statutory provision itself; they simply settle the question whether or not the particular case falls

[1] [Ruffatti *v.* Lexington Mining Co. (1894), 10 Utah, 386, 37 Pac. 591. "In suit upon a contract, where the evidence warrants it, we think it is universally held that a recovery may be had against one or the other, or both, of the defendants, who are sued upon the contract. It is no ground of complaint on the part of the mining company, if it, in fact, was bound by the contract, that the plaintiff saw fit to sue some one else who was not bound, in connection with it, to recover damages for a breach."]

within its terms. The decisions to be cited will illustrate this statement, and show its correctness. In a leading case, giving a construction to the section, the New York Court of Appeals said: "It relates to several, and not to joint liabilities. The latter did not require the aid of a special provision. It relates in terms to cases where a plurality of persons contract several obligations on the same instrument." [1] The Supreme Court of Wisconsin has expressed itself to the same effect. "The language of this statute is very clear and positive, and no doubt can exist as to its meaning. It has changed the rule of the common law with respect to the actions which it mentions. No demurrer can now be sustained for the nonjoinder or misjoinder of parties defendant where a part only of the persons severally liable are included in the action, and the rest omitted, and that fact appears on the face of the complaint." [2]

§ 303. * 406. **Forms of Contract included in Statute. Illustrations. Form of Judgment.** The terms of the statute are so broad and unrestricted, that they include every kind and form of written contract upon which the parties thereto are made severally liable.[3] It is not necessary that they should be bound for the same identical demand or debt, nor that each should be responsible for the aggregate amount of all their several liabilities. In other words, it is not necessary that the judgment should be a joint one for the same single debt, nor even a separate judgment against each for that one sum, nor, as it would seem, a separate judgment against each for the same sum. If a contract should be made by a number of promisors, by which each bound himself in an amount different from that of all the others, the liability would plainly be several, and the agreement itself would be embraced within the terms of the section. The Supreme Court of Kentucky has used the following language in reference to such a contract. "In this case there is but one contract, and it is the same contract between the same parties, but several as to its obligation.

[1] Carman *v.* Plass, 23 N. Y. 286, 287, per Denio J.

[2] Decker *v.* Trilling, 24 Wis. 610, 612, per Dixon C. J. [But see Hodges *v.* Nalty (1899), 104 Wis. 464, 80 N. W. 726, in which the court, speaking of the liability incurred by the subscribers to a fund for the construction of a church, said: "The liability of each subscriber is a several liability, and not a joint liability with the other subscribers, and hence is to be enforced in an action at law against him alone."]

[3] [Main *v.* Johnson (1893), 7 Wash. 321, 35 Pac. 67; Rodini *v.* Lytle (1896), 17 Mont. 448, 43 Pac. 501; Loustalot *v.* Calkins (1898), 120 Cal. 688, 53 Pac. 258.]

And neither the language nor the presumed object of the section can be constructively restricted to a several contract binding each separate obligor for the whole amount of their aggregate liabilities. The letter of the section certainly authorizes no such restriction; and the policy of avoiding a vexatious multiplicity of actions for the breach of the same contract, would apply equally to every contract made at one and the same time by the same parties severally liable upon it."[1] Upon this doctrine a joint action was sustained against twenty-seven persons who had executed the following undertaking: "We the undersigned agree to become bound to A. as sureties for B., each for the sum of $100, for any goods he may buy of said A., each of us to be bound for $100 and no more, it being the true intent and meaning that each incurs for himself a separate liability for $100."[2] Although such an action is brought against all the debtors, and thus *appears* to be joint, the judgment of course is not joint but separate, that is, against each for the amount of his own liability. It could certainly make no difference in the principle if the parties to such an agreement each undertook a different amount of liability instead of all incurring the same. These views have been approved, and it has been expressly held that when persons are bound for separate sums by the same instrument, and are sued jointly, a separate judgment should be entered against each for the amount of his individual indebtedness.[3] The case thus resembles the ordinary contract of subscription, which in accordance with the principle of the decisions above quoted would clearly be embraced within this section.[4]

§ 304. * 407. **Form of Judgment Continued. Discussion by Wisconsin Supreme Court.** The question has been raised whether in an action, under this provision of the codes, against all or some of the persons thus severally liable upon the same instrument, a joint judgment against the defendants can ever be proper, and whether the final determination of the court should not be in the form of a separate judgment against each for his individual liability.[5] It has been said that the statute permitting debtors sever-

[1] Wilde *v.* Haycraft, 2 Duvall, 309, 311, per Robertson J.

[2] Ibid.

[3] People *v.* Edwards, 9 Cal. 286.

[4] [But see Hodges *v.* Nalty (1899), 104 Wis. 464, 80 N. W. 726.]

[5] The case of an action against the makers and indorsers of a note or bill is special. A suit against them resulting in a joint judgment for the amount due, is permitted by express statutes passed long prior to the new procedure.

ally liable to be sued jointly, and the joint action brought in accordance therewith, do not make them *jointly* liable; and it can make no possible difference in the application of this principle, whether each person is severally bound on the contract for the same or for a different sum.[1] An action against the maker, and the personal representatives of a deceased indorser of a promissory note has been sustained under this section, but it was held that a joint judgment against them could not be rendered. This ruling was placed upon the ground that the judgment against one must be *de bonis propriis*, and against the other *de bonis testatoris*.[2] The whole subject has been ably and exhaustively treated by the Supreme Court of Wisconsin, and I shall quote their discussion and conclusions. The action was upon a joint and several promissory note, the plaintiff electing to treat it as several, and proceeding to sue two only of the five makers. He had obtained a joint judgment for the amount of the note against both, and each was of course liable for that entire amount. The court say: "Another objection is to the form of the judgment. The judgment is a joint one against both of the defendants, instead of being several against each. It is urged that this is erroneous. It is contended that the option given to the plaintiff to include in the action all or any of the persons thus severally liable, is to enable him to accomplish in one action what by the former practice required several actions, — that is, to enforce in the action the several liability of each defendant in the same manner as if a separate suit had been brought against him. But for its being obviated by a provision of the statute to which I shall presently refer, this objection would be fatal to the judgment. The form of the judgment is not directed by the statute authorizing persons thus severally liable to be included in the action. The second subdivision of § 11 of chapter 124 of the Revised Statutes of Wisconsin[3] has no relation to the question, because, as held by the Court of Appeals in Pruyn *v.* Black,[4] the words there used, "defendants severally liable," mean defendants liable separately from the defendants not served, though jointly as respects each

[1] Kelsey *v.* Bradbury, 21 Barb. 531; Parker *v.* Jackson, 16 Barb. 33.

[2] Eaton *v.* Alger, 47 N. Y. 345; 2 Keyes, 41; Churchill *v.* Trapp, 3 Abb. Pr. 306. See also Burgoyne *v.* O. L. Ins. & Tr. Co., 5 Ohio St. 586.

[3] This section provides for taking judgment against some of the defendants "severally liable" in an action, when the others have not been served. It is the same as [§ 2884, St., 1898.]

[4] Pruyn *v.* Black, 21 N. Y. 300.

other. And the provisions of § 26 of chap. 132 of the Revised Statutes of Wisconsin[1] do not affect it, for the reason that the judgment there authorized against one or more of several defendants is only when a several judgment may be proper. It seems to me to be left therefore for the courts to determine according to the general principles of the law governing the subject what the form of the judgment shall be; and, acting upon these principles, it seems very clear to me that the judgment should follow the nature of the claim established; and if that is separate and several as against each defendant, then the judgment should be so."[2] The judgment in this case was not, however, reversed, since another section of the Wisconsin code requires the court to disregard any error which does not affect the substantial rights of the parties.

§ 305. *408. **Joint and Several Liability may be treated by Promisee or Obligee as Several under Statute herein.** — Although persons jointly and severally liable on a contract are not mentioned in this section of the codes, it is within the option of the promisee or obligee in such an agreement to treat it as several, and by his act to render it so to all intents and purposes. A joint and several contract has been held, therefore, to fall within the scope and operation of the provision; and the creditor, in pursuance of its permission, has the election to sue each of the debtors singly, or

[1] This section is the general provision relating to judgments, permitting judgment to be rendered for some of the defendants, and against the others, under certain circumstances; it corresponds to [§ 2883, St., 1898.]

[2] Decker *v.* Trilling, 24 Wis. 610, 613, per Dixon C. J. [In Haasler *v.* Hefele (1898), 151 Ind. 391, 50 N. E. 361, it was objected that since the cause of action alleged was joint a separate judgment against each of the two defendants for one-half the amount of plaintiff's claim was erroneous. In answer to this objection the court said: "If any one should complain of this it would seem to be the appellee, who was not given the joint judgment for which she had asked in her complaint. In answer to a similar objection, it was said by this court in Louisville, etc. R. W. Co. *v.* Treadway, 143 Ind. 689: 'The authorities cited by appellant in support of the rule asserted can have no force in this State, for the reason that the question is regulated by our code of civil procedure.'" And it is said the statute provides: "Though all the defendants have been summoned, the judgment may be rendered against any of them severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them severally." See Bunnell *v.* Berlin Iron Bridge Co. (1895), 66 Conn. 24, 33 Atl. 533, in which the court say: "Independently however of such authority, we think the provisions of the Practice Act for including in one action parties defendant having separate and even antagonistic interests, and for authorizing the court by orders for separate trials and otherwise to protect their differing interests, clearly implies the possibility of a 'final judgment' as to one party, although the action continues in court for the disposition of the rights of other parties."]

to sue all, or to sue any number of them.[1] The question might arise, whether, if he elected to sue all, the contract would be regarded as joint in accordance with the former practice, or whether by virtue of this statutory enactment it would be taken as several. I am not aware that this question, which perhaps has little practical importance, has been passed upon by the courts.

§ 306. *409. **Case of Guarantor and Principal Debtor. Weight of Authority. Rule in Iowa.** — It has been decided in many cases, and undoubtedly the weight of authority sustains this ruling, that a guarantor and the principal debtor cannot be sued together in one action; even though the guaranty be written upon the same paper with the agreement which it undertakes to secure. It is said that the principal debt and the collateral undertaking do not constitute one instrument, and the parties therefore do not come within the language of the statute.[2] A different rule, however,

[1] Decker *v.* Trilling, 24 Wis. 610, 612; Clapp *v.* Preston, 15 Wis. 543; Burgoyne *v.* O. L. Ins. & Tr. Co., 5 Ohio St. 586; People *v.* Edwards, 9 Cal. 286; People *v.* Love, 25 Cal. 520, 526. Action on a joint and several bond. The court held it governed by the statute as though several. It has been said, therefore, that this provision has in effect destroyed joint and several liability arising on single express written contract. Heppe *v.* Johnson, 73 Cal. 265; Steffes *v.* Lemke, 40 Minn. 27.

[2] Le Roy *v.* Shaw, 2 Duer, 626; De Ridder *v.* Schermerhorn, 10 Barb. 638; Allen *v.* Fosgate, 11 How. Pr. 218; Phalen *v.* Dingee, 4 E. D. Smith, 379; Carman *v.* Plass, 23 N. Y. 286, 287, per Denio J.; Bondurant *v.* Bladen, 19 Ind. 160; Virden *v.* Ellsworth, 15 Ind. 144. See also Burton *v.* Speis, 5 Hun, 60; Graham *v.* Ringo, 67 Mo. 324; Tyler *v.* Tualatin Academy, 14 Ore. 485. For a form of contract under which the guarantor *may* be sued jointly with the principal debtor, see Decker *v.* Gaylord, 8 Hun, 110, a case analogous to Carman *v.* Plass, cited in the following note. [Loustalot *v.* Calkins (1898), 120 Cal. 688, 53 Pac. 258. In this case Calkins had indorsed note sued upon before delivery and under section 3117 of the Civil Code of that State thereby became liable as an indorser. One Liben and A. C. Calkins, the makers, and J. W. Calkins were joined as defendants. J. W. Calkins demurred because of a "misjoinder of parties defendant in that J. W. Calkins, an alleged and supposed guarantor, is joined with the principal promisors." A joint and several judgment was rendered against the defendants. For reversal upon appeal one of the two grounds relied upon was "the demurrer of J. W. Calkins to the complaint should have been sustained." The court said: "In speaking as to parties who may be joined as defendants, the Code of Civil Procedure, section 383, declares: 'Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.' By a liberal construction of this provision it may be fairly said that an indorser, such as the defendant Calkins, is a party to the promissory note. . . .

"The object of this section of the law is directed solely to the avoidance of a multiplicity of actions. And we see no substantial objection to the application of the rule to a case like the one at bar. Upon an examination of the authorities from other States having statutory provisions substantially similar to the one found in our code, we find those authorities preponderating to the effect that a guarantor and the maker of a promissory note may

prevails in Iowa, and it is there held in a series of cases, that the guarantor and the principal debtor may be sued in one action, since they are liable for the same debt, and are, within the meaning of the section, bound upon the same instrument.[1]

§ 307. * 410. **When Liability arises from same Instrument.** — A surety or guarantor may be joined as a co-defendant with his principal if the contract be in such a form and of such a nature that his *liability arises from the same instrument.* A lease made between the lessor of the first part, and the lessee A. of the second part, and B. of the third part, contained the usual clauses of demise to A. and covenants on his part to pay rent, etc., and also a covenant, on the part of B., whereby "he did, in consideration of the premises and of the sum of one dollar, guarantee unto the lessor the payment of the aforesaid rent, and the faithful performance of the covenants in said lease contained." The instrument was signed and sealed by all the parties. The New York Court of Appeals held that the lessor might, by virtue of the section under consideration, maintain an action against A. and B. to recover a sum due for rent. The case was distinguished from the others cited above, in reference to ordinary guaranties, since the parties to this lease were made liable by the same instrument.[2] I cannot refrain from expressing the opinion

not be joined as parties defendant; but that question is not directly before us, and we pass it by for that reason. In this State from its earliest judicial history the makers and indorsers of negotiable promissory notes have been joined as parties defendant, and no question as to the correctness of the practice has ever been suggested. For this reason alone we feel constrained to give the statute a construction it has tacitly borne for so many years. . . . The demurrer was properly overruled."

See also Gilmore *v.* Skookum Box Factory (1899), 20 Wash. 703, 56 Pac. 934, where it was held that under Bal. Code, § 4836, providing that persons severally liable upon the same promissory note may all, or any of them, be included in the same action, a complaint declaring against the maker of a note on his written undertaking, and also against another party on a verbal promise to pay the same note, is not demurrable on the ground of improperly uniting two causes of action.]

[1] Tucker *v.* Shiner, 24 Iowa, 334; Mix *v.* Fairchild, 12 Iowa, 351; Marvin *v.* Adamson, 11 Iowa, 371; Peddicord *v.* Whittam, 9 Iowa, 471.

[2] Carman *v.* Plass, 23 N. Y. 286, 287. Where an administrator in the course of his administration gave two bonds with different sureties, but the undertaking and the liabilities of the sureties being the same in each, it was held, in California, that all the sureties on both bonds could be sued in one action under the special provision of the code in that State. Powell *v.* Powell, 48 Cal. 234; [Stoner *v.* Keith County (1896), 48 Neb. 279, 67 N. W. 311. "It is further claimed that there was a misjoinder of parties; that the sureties on the first bond should not have joined in an action with those who signed the second. Under the view that the default of the treasurer occurred after the execution of the second bond,

that this is a distinction without a difference. Believing that the decision of the court was right, it is impossible to discriminate the cases of ordinary guaranties from it by any valid and substantial reasons. By permitting parties to a contract resembling this lease to be joined in a single action, and refusing to admit the same form of suit against a principal debtor and his guarantor, whose undertaking is perhaps indorsed upon the same writing, the courts in fact make the nature of their obligation to depend upon the position of the written matter on the paper, and not upon the terms and nature of their agreements. The rules of procedure, as established by the reformed system, were never designed to be controlled by such considerations. The judicial decisions which illustrate the second class of provisions quoted at the commencement of this section have already been cited and discussed in section sixth, and need not be repeated here.

SECTION NINTH.

BRINGING IN NEW PARTIES: INTERVENING.

§ 308. *411. **Two Types of Code Provisions herein.** As the equitable theory of parties was adopted in the new procedure, we should naturally expect some provision for changing them, either by addition or diminution. In accordance with this expectation, the codes all contain sections prescribing rules more or less elaborate and explicit for the guidance of the courts in this respect. They follow two different types. The one is the mere statement in a statutory form of the doctrine as to bringing in new parties which had long prevailed in courts of equity, and to it is added a provision which permits a summary interpleader to be ordered by the court, upon motion, in certain specified cases, thus avoiding the delay and trouble of a formal interpleader suit. The New York code adopted this type, and it has been followed, sometimes with slight variations, but often with literal exactness, by most of the State codes and practice acts. The other type is entirely different. It discards entirely all the ancient notions; it goes far beyond the concessions made by the equity courts; it creates,

the sureties on both bonds were properly joined as parties defendants. They were each and all liable for the failure of the principal to faithfully perform the duties of his office."]

under the title "Intervention," or "Intervening," a new division of the procedure. The fundamental notion is, that the person ultimately and really interested in the result of a litigation — the person who will be entitled to the final benefit of the recovery — may at any time, at any stage, intervene and be made a party, so that the whole possible controversy shall be ended in one action and by a single judgment. The States which have adopted this type to its fullest extent are Iowa and California, and their example has been followed in a number of others.

§ 309. *412. **Statutory Provisions of First Form.** The provisions which follow the first form, as thus described, are all represented by the sections contained in the New York code: "The court may determine any controversy between the parties before it, where it can be done without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in.

"And when in an action for the recovery of real or personal property a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

"A defendant against whom an action is pending upon a contract, or for specific real or personal property, may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in the court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order." [1]

[1] [The present New York statute reads as follows: Code Civ. Pro., § 452: "The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment." Code Civ. Pro., § 820: "A defendant against whom an

§ 310. * 413. **Statutory Provision of Second Form.** The second form of the statutory provision creating and regulating the subject of "Intervention" is as follows: "Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, either before or after issue has been joined in the cause, and before the trial commences. The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained, he shall pay all costs of the intervention. The intervention shall be by petition, which must set forth the facts on which it rests; and all the pleadings therein shall

action to recover upon a contract, or an action of ejectment, or an action to recover a chattel, is pending, may, at any time before answer, upon proof, by affidavit, that a person, not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property, or its value, to such person as the court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability as asserted against him by different claimants, or that he has some interest in the subject-matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The court may, in its discretion, make such order, upon such terms as to costs and payments into court of the amount of the debt, or part thereof, or delivery of the possession of the property, or its value or part thereof, as may be just, and thereupon the entire controversy may be determined in the action."] Ohio, §§ 40-43; California, §§ 386, 389; Nebraska, §§ 46-48; North Carolina, § 65; Nevada, § 17; [Arizona, Rev. St., 1901, § 1308; Arkansas, Sand. & Hill's Dig., §§ 5635-5637; Colorado, §§ 16-18; Connecticut, Gen. St., 1902, §§ 621, 1019; Idaho, Code Civ. Pro., 1901, §§ 3175, 3176, 3178; Indiana, Burns' St., §§ 273, 274; Iowa, Code, 1897, §§ 3466, 3487; Kansas, Gen. St., 1901, §§ 4469-4471; Kentucky, Code, 1895, §§ 28, 29; Missouri, Rev. St., 1899, § 543; Montana, §§ 588, 591; North Dakota, Rev. Codes, 1899, §§ 5238, 5240; Ohio, Bates' St., §§ 5013, 5014, 5016; Oklahoma, St., 1893, §§ 3913-3915; Oregon, Hill's Laws, §§ 40, 41; South Carolina, Code, 1893, § 143; South Dakota, Ann. St., 1901, §§ 6085, 6087; Utah, Rev. St., 1898, §§ 2924, 2926; Washington, Bal. Code, §§ 4840, 4842; Wisconsin, St., 1898, § 2610; Wyoming, Rev. St., 1899, §§ 3487, 3488, 3490.] Several of these sections differ somewhat from the language of the New York code quoted in the text, but the differences are not material; they relate entirely to details of practice, and do not enlarge nor restrict the power conferred upon the courts. See People *v.* Albany & Vt. R. Co., 77 N. Y. 232; Chapman *v.* Forbes, 123 N. Y. 532, 539; Ladd *v.* Stevenson, 112 N. Y. 325; Johnston *v.* Donvan, 106 N. Y. 267.

be governed by the same principles and rules as obtain in other pleadings." [1]

§ 311. * 414. **Three Transactions herein. First of said Transactions. Moving Party.** The several clauses thus quoted at large relate to and establish three entirely different transactions in the conduct of an action. Not a little confusion has arisen from a neglect to keep these three subjects separate; the requisites of the one have been confounded with those of another, and thus mistakes have followed which a little care in examining the statute would have obviated. The three transactions referred to are the following: The first is provided for in all the codes, and is the brief enactment of a familiar rule in equity. It is the bringing in additional parties by the court when a complete determination of the controversy cannot be had without their presence. This act plainly contemplates the fact that there are already parties before the court, defendants against whom the plaintiff has a cause of action, and is entitled to some relief. The enlarging the number of parties, under such circumstances, is clearly not the same thing as the commencing a new action because the plaintiff has failed to make out any cause of action against those

[1] Code of Iowa [1897, §§ 3594–3596], slightly changed in phraseology from the former revisions of the statutes; California, Code of 1872, § 387: "Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint." This provision is somewhat changed from the original form in the statutes of 1854, ch. 84, §§ 71–74. It is substantially the same as that in Iowa, except that the intervenor must obtain leave of the court to file his complaint, while in Iowa he files his petition as a matter of course at his own election.

[The provisions of the California statute respecting intervention are found in substantially similar form in Idaho, Code Civ. Pro., 1901, § 3177; Montana, § 589; North Dakota, Rev. Codes, 1899, § 5239; South Dakota, Ann. St., 1901, § 6086; Utah, Rev. St., 1898, § 2925; Washington, Bal. Code, § 4846; Colorado, §§ 22–24. The provisions of the Iowa statute are found in substantially similar form in Minnesota, Gen. St., 1894, § 5273; Nebraska, Comp. St., 1901, §§ 5638–5640; Nevada, Comp. Laws, 1900, § 3694. The Arizona statute reads as follows: "Any person who has an interest in the subject-matter of the suit which can be affected by the judgment, may, on leave of the court or judge, intervene in such suit or proceeding at any time before the trial." Rev. St., 1901, § 1278.]

whom he has already sued. By whose desire or on whose motion the additional parties shall be brought in, the section does not specify, but the terms are broad enough to include every case. In the majority of instances the plaintiff doubtless applies for the additional parties. Cases may and do arise in which the defendant, deeming it necessary to protect his own interests, makes the application. Finally, the court may, on its own motion, order in the persons whose presence it regards proper to a complete determination of the issues.

§ 312. * 415. **Second of said Transactions. Scope of Statutory Provision herein. Moving Party.** The second of these transactions, in the progress of an action, is the bringing in and making a party to the suit a third person upon his own application, — or, in the very appropriate language of certain codes, the Intervening of a third person. In respect to this proceeding there is the marked difference between the two types of statutory provisions already spoken of. Most of the codes, following that of New York, have legislated upon the subject with great caution, and have merely given a certain extension to the familiar common-law practice of permitting a landlord to come in and defend an action of ejectment in the place of his tenant. The provision itself is very brief, and by its terms is confined to actions for the recovery of real or personal property. Beyond a doubt it embraces all equitable actions in which the remedy is the recovery of real or personal property, and is not restricted to the legal actions which correspond to the ancient ejectment and replevin. This short and simple clause is the only one which authorizes a third person to be made a party upon his own motion.

§ 313. * 416. **Intervention in Iowa and California. Origin of.** Passing to the codes of Iowa and California, we see that Intervening rises at once into a proceeding of great importance. It may be resorted to in any and all actions, and at every stage in the action prior to the commencement of the trial. The intervenor may have an interest with the plaintiff, or with the defendant, or one special to himself and adverse to both of the original parties. He does not ask the privilege of intervening, and obtain that privilege by an order; he intervenes as a matter of right, by filing and serving his petition in the same manner as though he was commencing an ordinary action, and his rights are passed upon and disposed of, together with those of the plaintiff and

defendant, at the trial.[1] It is plain that this is a judicial proceeding utterly unknown before in our ordinary courts, entirely unlike anything which had been customary in the common law or equity tribunals of England or the United States. Indeed, it was confessedly borrowed from the procedure established by the code of Louisiana.

§ 314. *417. **Third of said Transactions. Interpleader. How Distinguished from other of said Transactions.** The third judicial transaction is the act of a defendant in procuring another person, not a party to the suit, to be substituted in place of himself as the party defendant, and himself to be thereby discharged from all liability in respect of the cause of action, — a special remedy long known in another form as an Interpleader. It should be carefully distinguished from each of the two former proceedings. Unlike the second, the stranger does not come in on his own motion; unlike the first, the application can only be made by a defendant. It is confined in its operation to three kinds of actions: those brought to recover money on a contract, either debt or damages, those brought to recover specific real property, and those brought to recover specific personal property. It is a substitute, by means of the summary mode of a motion and an order made thereon, for the ancient equitable action called the Bill of Interpleader. The consideration of this subject does not legitimately fall within the purposes of the present work; it does not involve the question who are and who are not proper

[1] [But see East Riverside Irrigation District *v.* Holcomb (1899), 126 Cal. 315, 58 Pac. 817. In this case third parties had been brought in and made defendants at the request of the original defendant and against the objection of the plaintiff. These third parties "set up new matters and causes of action not involved in the original suit — not defences to the action, and not available at all to the original defendant," and their right so to do was one of the questions passed upon by the Supreme Court. Among other things the Court said: "The principles which govern are, however, to a great extent those which apply to interventions and counter-claims and the bringing in of new parties and those which would apply to cross-bills under the old equity practice. The general rule is, that a plaintiff may select those whom he desires to make defendants, and that new parties brought in against his will cannot be allowed to set up against him defences and affirmative causes of action which the original defendant could not have set up; and this is especially so where the granting of the relief sought by the original complaint would not have prejudiced the other causes of action which the new parties seek to have adjudicated. Peculiar circumstances may make exceptions to the rule, but the general principle is as above stated." See also Clay County Land Co. *v.* Alcox (1902), 88 Minn. 4, 92 N. W. 464. See Vanmeter *v.* Fidelity Trust Co. (1899), 107 Ky. 108, 53 S. W. 10, in which Horn *v.* Volcano Water Co., 13 Cal. 62, is quoted and approved.]

parties, and there is no possible reason for its being discussed in this connection except that the statutory provision which regulates it is immediately associated with other clauses which do relate to parties.[1] The two other judicial proceedings will now be examined with the aid of such judicial decisions as have explained their scope and effect.

§ 315. *418. **I. Bringing in Additional Parties. When the Court must act.** The issues between the original parties are to be determined, if that can be done without prejudice to the rights of others, or by saving the rights of others; if this be possible, the cause should be adjudicated as it was presented for decision.[2]

[1] [See the following recent cases respecting Interpleader: Hirsch *v.* Mayer (1901), 165 N. Y. 236, 59 N. E. 89; E. G. L. Co. *v.* McKeige (1893), 139 N. Y. 237, 34 N. E. 898; First Nat. Bank *v.* Beebe (1900), 62 O. St. 41, 56 N. E. 485; Johnston *v.* Oliver (1894), 51 O. St. 6, 36 N. E. 458; Brownwell & Wright Car Co. *v.* Barnard (1897), 139 Mo. 142, 40 S. W. 762; Scott-Force Hat Co. *v.* Hombs (1894), 127 Mo. 392, 30 S. W. 183; Roselle *v.* Farmers' Bank (1893), 119 Mo. 84, 24 S. W. 744; McFadden *v.* Swinerton (1900), 36 Ore. 336, 59 Pac. 816; North Pacific Lumber Co. *v.* Lang (1895), 28 Ore. 246, 42 Pac. 799; Austin *v.* March (1902), 86 Minn. 232, 90 N. W. 384; John R. Davis Lumber Co. *v.* The First National Bank of Milwaukee (1894), 87 Wis. 435, 58 N. W. 743; Jaques *v.* Dawes (1902), — Neb. —, 92 N. W. 570; Hartford Life & Annuity Ins. Co. *v.* Cummings (1897), 50 Neb. 236, 69 N. W. 782; Daulton *v.* Stuart (1902), 30 Wash. 562, 70 Pac. 1096; Walker *v.* Bamberger (1898), 17 Utah, 239, 54 Pac. 108; Hockaday *v.* Drye (1898), 7 Okla. 288, 54 Pac. 495.]

[2] [In Clay County Land Co. *v.* Alcox (1902), 88 Minn. 4, 92 N. W. 464, plaintiff commenced an action against Alcox for the restitution of its offices and to restrain him from using them. "The answer denied the allegations of the complaint and alleged that the appellant commenced the action in the name of the land company without authority for his own benefit. It then alleged that the respondent and appellant were co-partners under the firm name of the Clay County Land Company, for the purpose of buying and selling real estate; that the prosecution of the business resulted in a profit of $7,500, one half of which belonged to the respondent, but that the appellant had retained the whole thereof, and refused to account for and pay over the same. The answer prayed that the appellant be made a party to the action, that a receiver be appointed for the co-partnership business, and that an accounting be had by the court, or under its direction." Alcox procured an order from the court "on appellant to show cause why he should not be made a party plaintiff to the action and reply to the respondent's answer therein." Appellant moved to dismiss the order on the ground that he was a resident of another county and that the court was without jurisdiction to make him a party plaintiff. The trial court denied this motion of dismissal and made an order requiring appellant to reply to the "answer of the respondent within twenty days, and in default of such reply, that judgment for the relief demanded in the answer be rendered against him as if he had been made a party to the action in the first instance." The only question considered by the Supreme Court in reversing the case was "whether the trial court erred in making its order compelling the appellant to appear as a plaintiff in the action and reply to the respondent's answer under penalty of having judgment entered against him for the relief demanded in the answer." In disposing of the question the court said: "It is not a question of jurisdiction of the court to make the order, as counsel seem to treat it, but whether it was error to make it in view of

If a complete determination of the controversy cannot be had without the presence of other parties, the court *must* cause them to be brought in. The force and effect of the whole provision depend upon the interpretation given to the clause, "when a complete determination of the controversy cannot be had without the presence of other parties." To use the language of an eminent judge which has been repeatedly approved by other courts in different States, this clearly means, "When there are other persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined. Doubtless there are many other cases in which a defendant may require other parties to be brought in, so that the judgment of the court in the action may protect him against the claims of such other parties; but this is his own privilege and he may

the facts of this particular case. We are of the opinion that it was, and that the error was one which deprived the appellant of his legal right to have any transitory action which the respondent might bring against him tried in the district court of the county in which he resided, unless the place of trial was changed by the court for cause. . . . The statute now provides that whenever the plaintiff or defendant, or in case of counterclaim, or a demand for affirmative relief, in any action shall discover that any party ought, in order to a full determination of such action, to have been made a party plaintiff or defendant therein, the court, if satisfied that such is the case, shall make its order bringing in such new party, and require him to answer the complaint, or reply to the answer, as the case may be. That is, it is only when the bringing in of other parties is necessary to a full determination of the controversy between the original parties tendered by the complaint, answer, or counterclaim that the court can compel them to come into the action as parties plaintiffs or defendants. Now, the defendant's so-called counterclaim in this action tenders no issue between the original parties to the action for a full determination of which it is necessary that appellant should be made a party plaintiff. It is simply an allegation of a cause of action wholly distinct from the cause of action alleged in the complaint, and with which the plaintiff has no connection. We have here a case where the defendant denied all of the allegations of the complaint, and alleged that the appellant commenced the action in the name of the land company without authority. This did not make it necessary to bring in the appellant as a party in order to secure a full determination of the controversy between the plaintiff and the defendant, for, if his answer was true, he was entitled to a judgment against the plaintiff on the merits. But the respondent, conceiving that he had an independent cause of action against the appellant, alleges it in his answer, and makes it the basis of the order compelling the appellant to reply to the answer and litigate the action with him in the county of Clay. In this way the original action is converted into one by the respondent against the appellant, the former being in fact the plaintiff and the latter defendant, whereby the appellant is deprived of his legal right to a trial thereof in the county where he resides. It needs no argument to support the conclusion that the statute authorizes nothing of the kind, and that there has been a miscarriage of justice in this case. We therefore hold that the order of the district court making the appellant a party and requiring him to reply to the answer was reversible error, and that the action should have been dismissed as to him." See to the same effect East Riverside Irrigation District *v.* Holcomb (1899), 126 Cal. 315, 58 Pac. 817.]

waive it."[1] The distinction between the two conditions here spoken of is plain. In the first, the rights of the parties to the record are so bound up with those of others, that they cannot be ascertained and fixed without at the same time ascertaining and fixing the rights of the others also, and to do this, these others must of course be before the court. In the second, the issues between the parties to the record can be decided, but the relations of the defendant towards third persons are of such a nature that they will be affected by the decision, and it would be better and safer for him if these persons should be brought in so that his relations might be defined and protected in the single judgment. Such a proceeding is not, however, absolutely necessary to the determination of the controversy, and the defendant may waive his claim to the additional parties; it is, in fact, a privilege, not an absolute necessity. The circumstances and relations to which I allude were aptly described and the rule concerning them accurately stated by another judge: "There are cases in which it is proper and necessary to make a person defendant upon the ground of avoiding a multiplicity of suits. His rights may not be directly affected by the decree, but it may occur that if the plaintiff succeeds, the defendant will thereby acquire the right to call upon the party omitted or not joined, either to reimburse him or reinstate him in the position lost by the plaintiff's success. And if so, the person consequently liable to be thus affected should be before the court that his liability may be adjudicated by one proceeding."[2]

§ 316. *419. **Same Subject.** If the case comes within the first described condition, that is, if there are other persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, then the

[1] McMahon *v.* Allen, 12 How. Pr. 39, 45, per Woodruff J.; affirmed, 3 Abb. Pr. 89; approved, Chapman *v.* Forbes, 123 N. Y. 532, 538.

[2] Camp *v.* McGillicuddy, 10 Iowa, 201, per Wright C. J., citing 1 Dan. Ch. Pr. 329; Story's Eq. Pl. § 173; Wiser *v.* Blachly, 1 Johns. Ch. 437. See also Forepaugh *v.* Appold, 17 B. Mon. 632; Baas *v.* Chicago & N. W. Ry. Co., 39 Wis. 296; Oro Fino, &c. Min. Co. *v.* Cullen, 1 Idaho, 113; Clark *v.* Stanton, 24 Minn. 232; Penfield *v.* Wheeler, 27 id. 358; Judy *v.* Farmers' & Traders' Bank, 70 Mo. 407; Southal *v.* Shields, 81 N. C. 28; Isler *v.* Koonce, 83 id. 55; Hodges *v.* Kimball, 49 Iowa, 577; Prouty *v.* Lake Shore & M. S. R. Co., 85 N. Y. 272; Dows *v.* Kidder, 84 id. 121; New York Milk Pan Co. *v.* Remington Works, 25 Hun, 475; Abbott *v.* Jewett, 25 id. 603; Delancy *v.* Murphy, 24 id. 503; Dubbers *v.* Goux, 51 Cal. 153; Robinson *v.* Gleason, 53 id. 38; Pfister *v.* Wade, 56 id. 43; Derham *v.* Lee, 87 N. Y. 599.

statute is peremptory; the court must cause such persons to be brought in; it is not a matter of discretion, but of absolute judicial duty.[1] The enforcement of this duty does not rest entirely upon the parties to the record. If they should neglect to raise the question, and to apply for the proper order, the court, upon its own motion, will supply the omission, and will either directly bring in the new parties or remand the cause in order that the plaintiff may bring them in.[2] The fact that the necessary party is a non-resident of the State does not change the rule; he must still be brought in.[3] The addition of the necessary party may be made at any stage of the cause.[4] The action of the court may consist in requiring necessary defendants to be served with process, who had been named on the record, but not brought in by actual service or appearance.[5]

§ 317. *420. **Same Subject. Limitations herein.** This peremptory duty does not arise unless the conditions of the statute are fully met, and the court will not order in new parties defendant, against the will of the plaintiff, unless they are actually necessary in the sense already defined.[6] Thus, in an action

[1] Davis *v.* Mayor, etc. of N. Y., 2 Duer, 663; 3 Duer, 119; Shaver *v.* Brainard, 29 Barb. 25; Sturtevant *v.* Brewer, 9 Abb. Pr. 414; Mitchell *v.* O'Neale, 4 Nev. 504; Jones *v.* Vantress, 23 Ind. 533; Johnson *v.* Chandler, 15 B. Mon. 584, 589; Johnston *v.* Neville, 68 N. C. 177; Whitted *v.* Nash, 66 N. C. 590; [Eureka *v.* Gates, (1898), 120 Cal. 54, 52 Pac. 125. In this case the court said: "The rule is not questioned that, under our practice, when new parties are necessary for the determination of the issues raised by a cross complaint they may and should be brought in." See also Chalmers *v.* Trent (1894), 11 Utah, 88, 39 Pac. 488. For valuable and interesting case in this connection see Steinbach *v.* Prudential Ins. Co. (1902), 172 N. Y. 471, 65 N. E. 281. See also dissenting opinion in this case. Hannegan *v.* Roth (1896), 12 Wash. 695, 44 Pac. 256. In Emerson *v.* Schwindt (1900), 108 Wis. 167, 84 N. W. 186, the court said: "But the statute also provides that, 'when a complete determination of the controversy cannot be had without the presence of other parties . . . the court shall order them to be brought in,' sec. 2610. This language seems to be mandatory." See also Wheeler *v.* Lack (1900), 37 Ore. 238, 61 Pac. 849, in which the text is freely quoted. For an interesting case quoting the text see Robinson *v.* Kind (1896), 23 Nev. 330, 47 Pac. 1; Wilkins *v.* Lee (1894), 42 S. C. 31, 19 S. E. 1016.]

[2] Jones *v.* Vantress, 23 Ind. 533; Mitchell *v.* O'Neale, 4 Nev. 504; Young *v.* Garlington, 31 S. C. 290.

[3] Sturtevant *v.* Brewer, 9 Abb. 414; s. c. on app., 4 Bosw. 628.

[4] Attorney-General *v.* Mayor, etc. of N. Y., 3 Duer, 119; [National Savings Bank *v.* Cable (1900), 73 Conn. 568, 48 Atl. 428.]

[5] Powell *v.* Finch, 5 Duer, 666. [For valuable discussion respecting the proper practice when an order has been made allowing additional persons to be made parties to a cause, see White *v.* Johnson (1895), 27 Ore. 282, 40 Pac. 511.]

[6] [Northwestern Telephone Co. *v.* Railway Co. (1900), 9 N. D. 339, 83 N. W. 215. See Bauer *v.* Dewey (1901), 166 N. Y. 402, 60 N. E. 30, in which it is said the court has no authority under section 452 of the Code of Civil Procedure to compel

against the indorsers of a note, the plaintiff will not be compelled to bring in the maker as a co-defendant.[1] Nor is a new party to be ordered in merely for the purpose of settling matters between him and the defendant in which the plaintiff has no interest.[2] The statute will not permit the plaintiff to add a new defendant *without whose presence he could have no recovery* since he would have no cause of action. Such a proceeding would in effect be the commencing a new action, and the statutory provision assumes that in the pending action a right to obtain a recovery is set up as against the original defendants.[3] The plaintiff cannot be allowed, under the color of bringing in additional parties, to commence a new action when he would have failed entirely in the former one because he had not set up a good cause of action.

§ 318. * 421. **Examples and Illustrations. Pleadings. Rule in Indiana in Reference to Assignors.** I add a few examples of cases where parties have been brought in; they are designed merely as illustrations. Additional parties have been ordered in, in an action for the specific performance of a contract executed by three when two only were at first made defendants;[4] in an action for an accounting between two of a larger number of tenants in common of a mine, the complete adjustment of the account requiring that all the others should be added;[5] in a similar action for an accounting between partners in a mining venture, and for a winding up of the concern;[6] in an action upon a promissory note given for the purchase price of land in which the vendor and holder of the note sought to enforce his lien, the heirs of the deceased vendee, to whom the land had descended, were made

the plaintiff in an action in which a money judgment only is sought and in which the title to no real, specific or tangible personal property is involved, to bring in as a defendant a third party on his own application.]

[1] Sawyer *v.* Chambers, 11 Abb. Pr. 110.

[2] Frear *v.* Bryan, 12 Ind. 343, 345. See Carr *v.* Collins, 27 Ind. 306; Fagan *v.* Barnes, 14 Fla. 53, 56, 58; Peck *v.* Ward, 3 Duer, 647; Fischer *v.* Holmes, 123 Ind. 525; Pollard *v.* Lathrop, 12 Colo. 174; White's Bk of Buffalo *v.* Farthing, 101 N. Y. 344, 348; Chapman *v.* Forbes, 123 N. Y. 532. It is said in this last case (p. 538) that the decisions of the New York courts have been quite uniform in holding that the section of the code (§ 452, C. C. P.) referred to parties in what, under the old practice, would have been suits in equity, and that it was never intended to make it incumbent upon a plaintiff in an action at law to sue any other than the parties he should choose; citing Webster *v.* Bond, 9 Hun, 437; People *v.* Albany & Vt. R. Co., 15 Hun, 126.

[3] McMahon *v.* Allen, 18 How. Pr. 39; affirmed, 3 Abb. Pr. 89.

[4] Powell *v.* Finch, 5 Duer, 666. See Johnston *v.* Neville, 68 N. C. 177.

[5] Mitchell *v.* O'Neale, 4 Nev. 504.

[6] Settembre *v.* Putnam, 30 Cal. 490.

defendants;[1] in proceedings in aid of an execution the judgment debtor is a necessary party, and will be brought in.[2] Under the requirements of the Indiana code in reference to assignors of things in action when transferred without indorsement, if the assignor dies, the assignee must make his personal representative a defendant in the action, or must show that there is none.[3] After new parties have been brought in, the pleadings must be made to show that they are proper. When new defendants have been added on the application of the plaintiff, but the complaint, which stated no cause of action against them originally, had not been amended so as to supply this defect, it must be dismissed as against such defendants at the trial, and judgment thereon rendered in their favor.[4]

§ 319. *422. **Author's Suggestions herein.** I cannot pass from this subject without adding certain remarks which are suggested by it, and which concern the practical administration of justice. The clause of the codes under examination is expressed in the most general terms, containing no exception nor limitation. Whenever a necessary party has been omitted by the pleader, the court has the power in any stage of the cause to remedy the defect by ordering him to be brought in, and the case to stand over until that is done.[5] It is almost universally the fact that an objection for the nonjoinder of parties is really technical, that is, it does not go to the entire merits of the controversy. A cause of action is generally set forth against those, or in favor of those, who are actually made parties; and the only error consists, not in stating the cause of action incorrectly, but in omitting some of the persons who are or rather *may be* beneficially or injuriously affected by it. If it be the true purpose and design of courts to administer justice between litigants, and to ascertain and enforce their rights and obligations, then it would seem to be the primary duty of the judges to decide every cause as far

[1] Jones *v.* Vantress, 23 Ind. 533.

[2] Wall *v.* Whisler, 14 Ind. 228.

[3] St. John *v.* Hardwick, 11 Ind. 251. See Dart *v.* McQuilty, 6 Ind. 391; Bray *v.* Black, 57 Ind. 417. [In Kyes *v.* Wilcox (1900), 13 S. D. 228, 83 N. W. 93, the allegations of the answer disclosed that the presence of a third party was necessary to a complete determination of the controversy. The plaintiff's motion to require defendant to make his answer more definite and certain by alleging the name of such third party was sustained.]

[4] Smith *v.* Weage, 21 Wis. 440. See also Blakely *v.* Frazier, 20 S. C. 144.

[5] [Mills *v.* Callahan (1900), 126 N. C. 756, 36 S. E. 164; Dobson *v.* Southern Ry. Co. (1901), 129 N. C. 289, 40 S. E. 42; Finch *v.* Gregg (1900), 126 N. C. 176, 35 S. E. 251.]

as possible upon the merits, and not upon some technical point which puts no question at rest, but simply renders it necessary to commence a new suit. Most emphatically does this seem to be their duty when the statute has provided a mode for accomplishing this result, and has even required in peremptory terms that this mode shall be pursued. Whenever the objection that there is a defect of necessary or proper parties is raised, it is always possible for the court in a summary manner to order them in, and to retain the cause for that purpose, and to decide the issues upon the merits, when the required addition has been effected. Not only is this course possible, but it is actually enjoined upon the courts by the codes. And yet this most beneficial provision of the statutes is to a great extent a dead letter. I believe there is hardly another section of the codes so well calculated, if it were observed in its spirit and letter, to prevent the success of mere technicalities and to promote justice among suitors by procuring the decision of causes upon their merits. In marked contrast with the judicial practice which prevails to so great an extent in the States which have adopted the reformed American procedure, is a provision of the new system of practice recently approved by the British Parliament, which declares that under no circumstances shall an action be dismissed, and the plaintiff turned out of court, because he has committed an error in the selection of parties, either by uniting too many or too few, but that in every instance the court shall make the proper amendment, and by striking out or bringing in, shall shape the action into a proper form and condition for a decision of its issues upon the merits.[1] Although our codes do not contain such a provision in express terms, they do contain all that is necessary for the adoption and enforcement of the same general rule of procedure by the courts. The New York Court of Appeals has recently made a decision which is in close agreement with the foregoing views. It holds that if the plaintiff does not bring in the necessary parties after an objection properly made, the complaint may, in the discretion of the court, be dismissed, but without prejudice to a new action. An unqualified judgment of dismissal in such a case is erroneous. But the complaint should not be dismissed even without prejudice, and the plaintiff thus put to a new action, when the same end can be

[1] Supreme Court of Judicature Act; Schedule, § 9.

reached by allowing the cause to stand over in order that the plaintiff may add the necessary parties.[1]

§ 320. * 423. **II. Intervention. Need not be Necessary Party. Discretion of Court. Time of Application.** I proceed first to examine the force and effect of that provision which is found in most of the codes. In order that a person may avail himself of the permission given by it, and may make himself a party to an action, he need not be a necessary party.[2] The granting of such an application lies in the discretion of the court, and it should not be permitted if the applicant is already a plaintiff in another suit in which he may obtain all the relief he asks.[3] The application must be made before judgment, if made at all.[4]

§ 321. * 424. **Statutory Provision Limited. Illustrations.** The occasions on which a third person may intervene in a pending action are very few. The scope of the provision is exceedingly limited; it has been said that its operation is confined to those cases in which a bill of interpleader would have been permitted, under the former practice, to accomplish the same end.[5] It is certain that the right to intervene can only be exercised in actions for the recovery of real or personal property.[6] It does

[1] Sherman *v.* Parish, 53 N. Y. 483, 490, 491. [See the important case of Steinbach *v.* Prudential Ins. Co. (1902), 172 N. Y. 471, 65 N. E. 281, the facts of which are set out in note to § * 287. In this case the court said: "The personal representatives of Fehrman were necessary parties, and the court should have dismissed the complaint unless within a reasonable time they were brought in, not necessarily for the protection of the defendant as it had neglected its rights, but for their own protection, as well as the seemly and orderly administration of justice." See, however, the vigorous dissenting opinion in this case by Haight J. concurred in by O'Brien and Martin JJ. In Hannegan *v.* Roth (1896), 12 Wash. 695, 44 Pac. 256, the court said: "While a court will not proceed to final judgment in the absence of a necessary party, it will not dismiss the action on account of the nonjoinder of such party, but will retain it until all necessary parties are brought in, after which it will proceed to judgment on the merits." Citing § * 292 and * 293 of the text.]

[2] Carter *v.* Mills, 30 Mo. 432.

[3] Scheidt *v.* Sturgis, 10 Bosw. 606. That the granting of the application is discretionary, see Colgrove *v.* Koonce, 76 N. C. 363. [McNamara *v.* Crystal Mining Co. (1900), 23 Wash. 26, 62 Pac. 81.]

[4] Carswell *v.* Neville, 12 How. Pr. 445; Meadows *v.* Goff (Ky. 1890), 14 S. W. Rep. 535; Chapman *v.* Forbes, 123 N. Y. 532, 540. [Safely *v.* Caldwell (1895), 17 Mont. 184, 42 Pac. 766; Dupont *v.* Amos (1896), 97 Ia. 484, 66 N. W. 774; Keehn *v.* Keehn (1902), 115 Ia. 467, 88 N. W. 957; Owens *v.* Colgan (1893), 97 Cal. 454, 32 Pac. 519; Clarke *v.* Baird (1893), 98 Cal. 642, 33 Pac. 756; Hibernia Savings and Loan Society *v.* Churchill (1900), 128 Cal. 633, 61 Pac. 278; McConniff *v.* Van Dusen (1898), 57 Neb. 49, 77 N. W. 348; Deere *v.* Eagle Mfg. Co. (1896), 49 Neb. 385, 68 N. W. 504.]

[5] Hornby *v.* Gordon, 9 Bosw. 656. The following cases are illustrations of such intervention: Sims *v.* Goethe, 82 N. C. 268; Peck *v.* Parchin, 52 Iowa, 46; People *v.* Albany & Vt. R. Co., 77 N. Y. 232; Conant *v.* Frary, 49 Ind. 530.

[6] Kelsey *v.* Murray, 28 How. Pr. 243;

not exist, therefore, in an action to recover money; as, for example, in a suit for wharfage, persons claiming to be owners of the wharf were not permitted to intervene;[1] nor in an action in the nature of a creditor's suit, to reach a surplus of money in a certain person's hands;[2] nor in an action to dissolve a partnership, and for an accounting;[3] nor in any action on contract for the recovery of debt or damages.[4] In an action to recover possession of goods, on account of the vendee's fraud, third persons, claiming to have purchased them from him, cannot intervene.[5]

18 Abb. Pr. 294; Tallman *v.* Hollister, 9 How. Pr. 508; Judd *v.* Young, 7 How. Pr. 79.

[1] Kelsey *v.* Murray, 18 Abb. Pr. 294.

[2] Tallman *v.* Hollister, 9 How. Pr. 508.

[3] Dayton *v.* Wilkes, 5 Bosw. 655.

[4] Judd *v.* Young, 7 How. Pr. 79.

[5] Hornby *v.* Gordon, 9 Bosw. 656.

[For additional cases in which intervention was not permitted, see the following: Murray *v.* Polglase (1899), 23 Mont. 401, 59 Pac. 439 (by one who had not filed adverse claim under the statute to mining claim, though he claimed an interest in the premises adverse to both plaintiff and defendant); Dietrich *v.* Steam Dredge (1894), 14 Mont. 261, 36 Pac. 81 (by a stranger to a suit commenced, and who had not obtained leave of court or made any showing by complaint, but who upon his own motion appeared and demurred to the complaint); Denver Power & Irrigation Co. *v.* Denver, etc. Co. (1902), — Col. —, 69 Pac. 568 (by a party who had no interest in the subject-matter of dispute between litigants); Ball *v.* Cedar Valley Creamery Co. (1896), 98 Ia. 184, 67 N. W. 232 (by one claiming an interest in property about to be sold under an execution issued upon a judgment); Bank of Commerce *v.* Timbrell (1900), 113 Iowa, 713, 84 N. W. 519 (by one to whom an absolute assignment had been made; he must be substituted as plaintiff); Hoppe *v.* Fountain (1894), 104 Cal. 94, 37 Pac. 894 (by parties holding title not subject to a mortgage in an action brought to foreclose the mortgage); Goodrich *v.* Williamson (1901), 10 Okla. 588, 63 Pac. 974 (by a general creditor of a husband claiming that the promissory note sued upon was executed by the wife in fraud of the creditors of the husband of whom the intervenor was one, the latter asking that the proceeds of the note be awarded to it); Bray *v.* Booker (1897), 6 N. D. 526, 72 N. W. 933 (by a bank, who was the creditor of the vendor, in a suit by the vendor against the vendee to enforce a vendor's lien for the unpaid purchase price, the vendee having agreed to pay a portion of the purchase price to the bank); McNamara *v.* Crystal Mining Co. (1900), 23 Wash. 26, 62 Pac. 81; Dickson *v.* Dows (1902), 11 N. D. 404, 92 N. W. 798; Churchill *v.* Stephenson (1896), 14 Wash. 620, 45 Pac. 28 (by a mere general or contract creditor in an action against an administrator for the recovery of real estate); Haines *v.* Stewart (1902), — Neb. —, 91 N. W. 539 (by one who merely claims to be the owner of attached property for the purpose of having his ownership determined in the attachment suit); Omaha S. R. Co. *v.* Beeson (1893), 36 Neb. 361, 54 N. W. 557 (must have some interest in the subject of controversy. A mere contingent liability to answer over to the defendant, without any privity with the plaintiff, is not sufficient); Stanley *v.* Foote *et al.* (1900), 9 Wyo. 335, 63 Pac. 940 (by a claimant to money garnished, or property attached in an action between other parties, for the purpose of having his rights thereto determined); Urlan *v.* Weeth (1902), — Neb. —, 89 N. W. 427 (by one alleging that he was the son of the mortgagor, in a mortgage foreclosure suit, that the premises mortgaged constituted a homestead, that the mortgagor was dead and the intervenor was seized in his own right of the real estate described in his petition, and asking that his interest in the homestead be determined. The

This ruling, however, is not based upon the nature of the suit itself, but upon the absence of any rights in the proposed intervenors.

§ 322. *425. **Additional Illustrations.** The following are some instances in which an intervention has been permitted. In an action for the partition of lands, any person having an interest in the land may intervene; but when the partition is among the heirs and devisees of a deceased owner, a judgment creditor of such decedent has no such interest nor right.[1] In an action to recover land, a landlord may intervene when his tenant only has been made a defendant;[2] and in an action to recover the possession of goods taken on execution, the execution creditor may intervene.[3] In a suit to compel the specific performance of a contract to convey land against the vendor alone, a third person alleging title in himself to the same land from the same vendor, prior and paramount to that of the plaintiff, was allowed to intervene and to defend. It was said that the intervenor need not be a necessary party, but should be permitted to come in if the judgment as between the original parties would cast a cloud upon his own title.[4] Under the former practice, no intervention was ever permitted in actions at law, except that in ejectment the landlord might make himself a defendant in place of his tenant.[5]

court said: "The matters set up in the petition for intervention of Herman Ruhl are not determined or in any way affected by the decree in this case. They were not necessary to a proper determination of the matters presented in the issues herein, and the motion to strike the petition of intervention from the files was correctly sustained;" Moline, Milburn & Stoddard Co. *v.* Hamilton (1898), 56 Neb. 132, 76 N. W. 455 (by a third person who filed a petition of intervention in a replevin case, in effect nothing but a general denial, the court said: "The first requisite of an intervention is that the intervenor show that he claims an interest in the subject-matter of the litigation"); Bohart *v.* Buckingham (1901), 62 Kan. 658, 64 Pac. 627; Gammage *v.* Powell (1897), 101 Ga. 540, 28 S. E. 969.]

[1] Waring *v.* Waring, 3 Abb. Pr. 246. See Baker *v.* Riley, 16 Ind. 479, which holds that a person claiming title to the whole land should not be permitted to intervene in a partition suit.

[2] Godfrey *v.* Townsend, 8 How. Pr. 398.

[3] Conklin *v.* Bishop, 3 Duer, 646. Intervention in attachment proceedings by a person claiming an interest in the property: Blair *v.* Puryear, 87 N. C. 101.

[4] Carter *v.* Mills, 30 Mo. 432. In Summers *v.* Hutson, 48 Ind. 228, a third person was permitted to intervene in an action upon a promissory note, to make himself a defendant, to set up in his answer facts showing that he was the real party in interest, and the equitable owner of the note, and the one solely entitled to its proceeds, and to recover thereon as against the maker, who was the original defendant. This is certainly identical with the system which prevails in Iowa and California. This intervention was permitted under the general provision of § 18, that "any person may be made a defendant who has an interest in the controversy adverse to the plaintiff."

[5] Hornby *v.* Gordon, 9 Bosw. 656; Godfrey *v.* Townsend, 8 How. Pr. 398.

[Mooney *v.* N. Y. El. R. Co. (1900)

§ 323. *426. **The Iowa and California System of Intervening. Illustrative Examples.** The peculiarities of this proceeding, the

163 N. Y. 242, 57 N. E. 496, was an action by a property owner against a railroad to restrain its operation, by injunction, and for damages. Pending the action plaintiff conveyed the premises to one Cohen, who in turn conveyed to one Scallion. In plaintiff's deed to Cohen the former "reserved the easements of light, air, and access as taken and used by the defendants, and all the claims for damages for such taking and use, both as to the fee and rental value, past, present and future;" and in Cohen's deed to Scallion the same reservations were made. At the trial defendants moved to dismiss the complaint on the ground that plaintiff was not then the owner of the fee or of any part thereof, or entitled to any relief by injunction. The court reserving its decision upon this motion, an adjournment was moved on behalf of the defendants until all the parties in interest were properly before the court "by an application on the part of the plaintiff for leave to serve a supplemental summons and complaint, bringing in his grantees as parties plaintiff, with leave to the defendants to answer the supplemental complaint." The court not passing upon this motion at the time, thereupon Cohen and Scallion requested to be made parties plaintiffs and consented to submit their rights to the court. This request was granted, and an order made that the pleadings and proceedings be amended accordingly. The defendants were "allowed on the trial to make any defence that they may be advised, with the same force and effect as if a supplemental complaint and answer had been made and served," and for that purpose "the cause was postponed for two weeks." The trial court awarded a money judgment to Mooney, and also to Cohen and Scallion, each in a different amount; and also awarded an injunction to be operative upon certain conditions named. The Appellate Division reversed the judgment. The question presented by the record in the Court of Appeals was the power of the trial judge, at the trial, to bring in Cohen and Scallion as parties. In reversing the case the Court of Appeals, among other things, said: "There are various ways in which it is competent for the court of original jurisdiction to bring in new parties, and the particular course that it may decide to adopt generally presents a question of choice or discretion not open to discussion in this court. The facts which rendered the presence of the new parties necessary in order to permit a final adjudication of the controversy were patent and undisputed. They were evidenced by the two conveyances made subsequent to the commencement of the action, and the defendants were permitted by the court to raise any question growing out of these new facts that they could raise in any form or in any manner. The original plaintiff, by his counsel, suggested one method of bringing in the new parties, while the defendants' counsel suggested another method. The defendants' method was to put the plaintiff to his application at a Special Term to amend the process and the pleadings and to serve a supplemental complaint with the right to the defendants to serve a supplemental answer. The learned trial judge doubtless had the power to compel the plaintiff to resort to that method, dilatory as it was, but he decided to make them parties on their own application and to let the cause proceed as if everything had been done that the defendants' counsel asked. The contention of the learned counsel for the defendants is that the judge had no power to do that. In this we think he is mistaken. By the provisions of the Code extensive powers in this respect are conferred upon the court of original jurisdiction." The court after quoting the provisions of the statute continued as follows: "In view of these broad provisions of the statute, it cannot be said that the trial court was without power to bring in, as parties plaintiff, those persons who had become interested in the realty during the pendency of the suit. The manner in which the power was exercised is a question of discretion and not of law. The court had the power to order and direct that the grantees of the premises, pending the action, should be made parties by amendment of the pleading or *otherwise* as the case requires. . . . The only question

extent of its innovations upon all prior methods, and its usefulness in procuring controversies to be decided on their merits in a

is whether a court of equity may, upon the trial, admit new parties to the record when they ask to be heard and when their presence is necessary for a complete determination of the controversy. When all the parties are before the court, as in this case, we entertain no doubt with respect to the power to order the amendment in the manner and upon the conditions that it did. It was an exercise of discretion by the trial judge in furtherance of justice, and no rule of practice or principle of law was violated. We think there was power in the court to order the amendment as it did, and hence the order appealed from should be reversed and the judgment of the Special Term affirmed with costs."

See also the following cases in which intervention was allowed: Majors *v.* Taussig (1894), 20 Colo. 44, 36 Pac. 816 (by stockholders to defend an action upon a note fraudulently executed by the officers, the company refusing to defend); Wood *v.* Denver City Water Co. (1894), 20 Colo. 253, 38 Pac. 739 (by residents supplied by one water company, in action brought by another company to enjoin the former and claiming an exclusive privilege to supply water to the inhabitants of the town); Maddox *v.* Teague (1896), 18 Mont. 593, 47 Pac. 209 (by joint mortgagee in an action against a sheriff on his official bond by the other mortgagee for failure to pay over the proceeds of a sale of the mortgaged property in satisfaction of his claim, which was alone sufficient to exhaust the penalty of the bond); Dunn *v.* Nat. Bank (1898), 11 S. D. 305, 77 N. W. 111 (by payee named in a certificate of deposit and claiming ownership thereof in an action thereon by the holder, who was alleged to have obtained it through fraud); Cooper *v.* Mohler (1898), 104 Iowa, 301, 73 N. W. 828 (by a third party, the owner of one of the notes secured by a mortgage which plaintiff is seeking to foreclose, he having an interest in determining the priorities of the various claims secured by the mortgage); A. E. Johnson Co. *v.* White (1899), 78 Minn. 48, 80 N. W. 838 (by one partner where the other partner was sued upon notes executed by him alone and the two partners joined in intervention complaint alleging the partnership, that the notes were given for partnership debt and setting up counter-claims against plaintiff to them as partners); *Ex parte* Kenmore Shoe Co. (1897), 50 S. C. 140, 27 S. E. 682 (by a party seeking to establish an equitable lien over the fund sought to be distributed in the principal case); McEldowney *v.* Madden (1899), 124 Cal. 108, 56 Pac. 783 (by a subsequent attaching creditor who has levied upon property levied upon in a prior action to defeat the lien of the prior levy); Rice *v.* Dorrian (1893), 57 Ark. 541, 22 S. W. 213 (by an attaching creditor, in a prior attachment, to show that the prior order of attachment was wrongfully issued); State *ex rel. v.* Mack (1902), 26 Nev. 85, 69 Pac. 862 (where a corporation, of which the district judge was a stockholder, brought mandamus to compel him to pass upon a claim against an insolvent estate, another claimant has sufficient interest to intervene by asking that he be compelled to call another judge); Muhlenberg *v.* Tacoma (1901), 25 Wash. 36, 64 Pac. 925 (by the receiver of an insolvent bank in an action by the trustee of a pledgee of such bank, instituted for the purpose of establishing the validity of certain city warrants, etc.); Gund *v.* Parke (1896), 15 Wash. 393, 46 Pac. 408 (by a wife for the purpose of having any judgment that may be rendered against her husband adjudged not a community debt and that it should not be satisfied out of the community property, in an action on the husband's promissory note); Pitman *v.* Ireland (1902), 64 Neb. 675, 90 N. W. 540 (by a mortgagor who has conveyed lands by an unconditional deed of general warranty for the purpose of pleading usury in an action to foreclose the mortgage); State *ex rel. v.* Holmes (1900), 60 Neb. 39, 82 N. W. 109 (by the shareholders of a corporation for the purpose of protecting their own interests, where the officers of the corporation fail and refuse to protect and conserve the corporate property); to the same effect is Fitzwater *v.* Bank (1901), 62 Kan. 163, 61 Pac. 684; McCon-

single action, will be best shown by detailing the facts of one or

niff *v.* Van Dusen (1898), 57 Neb. 49, 77 N. W. 348 (by a person claiming ownership of property in litigation). "That any person who can by proper averments show that he has an interest in the matter in litigation may, without leave of court, become a party to the suit and obtain an adjudication of his claim," see the two following cases: Spalding *v.* Murphy (1901), 63 Neb. 401, 88 N. W. 489; Greenwood *v.* Ingersoll (1901), 61 Neb. 785, 86 N. W. 476 (by a chattel mortgagee in proceedings in garnishment instituted by judgment creditors of mortgagor to appropriate the proceeds of the mortgaged property to the payment of the judgments); Deere *v.* Eagle Mfg. Co. (1896), 49 Neb. 385, 68 N. W. 504 (by a second attaching creditor to have his lien adjudged superior to that of plaintiff); Joshua Hendy, etc. Works *v.* Dillon (1901), 135 Cal. 9, 66 Pac. 960 (by a third party claiming ownership of the property sought to be recovered in an action of replevin, said third party's title being pleaded in the answer of the defendant, who averred his willingness to surrender the property to the owner, and the third party himself alleging "that he was the owner of the said property and entitled to the exclusive possession thereof," and asking judgment awarding him the possession of the same); German Savings Bank *v.* Citizens Nat. Bank (1897), 101 Iowa, 530, 70 N. W. 769; Smith *v.* City of St. Paul (1896), 65 Minn. 295, 68 N. W. 32.

We quote from the opinion of the court in the case last above cited as follows: "The city of St. Paul had taken by condemnation proceedings a tract of land for the purpose of opening a street, the compensation or damages awarded being one gross sum for the entire tract. The plaintiff brought this action against the city to recover the amount of the award, alleging that she was the owner of the entire tract. The St. Paul Trust Co. and Mrs. Sache interposed 'complaints in intervention,' alleging that they respectively owned certain portions of the tract, and hence were severally entitled to a part of the award. To these complaints the plaintiff demurred on the ground that the facts stated did not constitute a ground of intervention. This appeal is from an order overruling the demurrers.

"The contention of the plaintiff is that these parties had no right to intervene, under G. S. 1894, § 5273, for the reason that they 'would neither gain nor lose by the direct legal operation and effect of the judgment;' that any interest they might have in the property, or any claim they might have against the city, would be wholly unaffected by the result of a suit between the city and the plaintiff. Lewis *v.* Harwood, 28 Minn. 428, 10 N. W. 586. If the action had been brought by plaintiff to recover an ordinary debt alleged to be due her from the city, or if the intervenors had to rely exclusively upon the statute for their right to come into the action, the plaintiff's contention might be difficult to answer. But compulsory interpleading and voluntary intervention in an action originally between other parties were always known and recognized as ancillary remedies by means of which courts were enabled more conveniently and perfectly to adjudicate upon the ultimate rights of the parties in the subject-matter involved in the litigation, and thus award full and final relief in the further judicial proceedings to which these remedies were auxiliary. It is not to be supposed that the statute in relation to interpleader and intervention was intended to abolish those ancillary remedies in cases where they were previously authorized, and to limit them exclusively to cases falling strictly within the terms of the statute.

"Condemnation proceedings under the city charter are in rem against the land. The award becomes a fund standing in the place of the land, and whoever owns the land is entitled to the award. If the award is paid over to one as owner who is not the true owner, he will be liable to the true owner in an action for money had and received. Hence, if the whole of the award should be paid over to the plaintiff, and the fact should be that she was not entitled to the whole of it, but that the intervenors were severally entitled to a part of it, they could maintain actions against her to recover their shares. The fact that they might, at their election,

two cases in which it has been resorted to.[1] An action in the usual form was brought by A., the payee of two promissory notes

have a remedy against the city would not deprive them of this right of action. If this is so, why may they not intervene in this action, in order to have the award apportioned, and to recover their share? Why should they have to wait until the money was paid over to the plaintiff, and then sue her? Where the duty is devolved on the court or other tribunal before which the condemnation proceedings were had, to distribute or apportion the award among those entitled to it, there is no question of the right of any claimant to appear and assert his right to it, or of the court or other tribunal to require any such claimant to appear and establish his claim. . . . Doubtless the city might, in a proper case, require the plaintiff and other claimants to interplead; but if it appeared that a third party claimed a portion of the award, the court would, in our opinion, have the power to require such person to be brought in as a party to the action, in order that there might be a full and final adjudication of the rights of all parties in the fund; and, if such a person can be thus brought in, there is no reason why he may not be allowed to come in voluntarily."

Citizens' Nat. Bank *v.* City Nat. Bank (1900), 111 Iowa, 211, 82 N. W. 464; Valley Bank *v.* Wolf (1897), 101 Iowa, 51, 69 N. W. 1131; Enger *v.* Lofland (1896), 100 Iowa, 303, 69 N. W. 526; Palmer *v.* Bank of Zumbrota (1896), 65 Minn. 90, 67 N. W. 893.]

[1] [Dennis *v.* Kolm (1901), 131 Cal. 91, 63 Pac. 141. We quote from this case as follows: "This action was brought to recover for goods, wares, and merchandise, alleged to have been sold to the defendants as copartners under the firm name of 'Kolm Bros.' One Perkins had in his hands about eight hundred and seventy dollars, which plaintiff claimed to be the money of H. Kolm, who was alleged to be one of the partners. Plaintiff had the eight hundred and seventy dollars attached in this action as the property of H. Kolm. Bertha Kolm, a sister, filed a complaint in intervention in which she denied that the money so attached was the property of H. Kolm or of 'Kolm Bros.,' and alleged that the same was her property, and asked that she be adjudged to be the owner thereof. A demurrer was interposed by plaintiff to the complaint in intervention, overruled, and plaintiff filed an answer to said complaint. The respondent H. Kolm filed an answer to the complaint of plaintiff, in which, among other things, he denied that he ever was, at any time, a member of the firm of 'Kolm Bros.,' or that he was in any way indebted to the plaintiff. The case was tried before a jury, and verdicts rendered for the respondent H. Kolm and the intervenor Bertha Kolm. Upon these verdicts judgment was entered. The appeal is from the judgment and an order denying plaintiff's motion for a new trial. It is claimed that the court erred in overruling the demurrer to the complaint in intervention, for the reason that the said complaint does not state facts showing that the intervenor has any interest in the matter in controversy, or that the decision would in any way affect her rights. It is provided in the Code of Civil Procedure, section 387; 'Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both.' In this case the intervenor claimed the money in the hands of Perkins, as the proceeds of a note and mortgage that had been assigned to her by respondent H. Kolm. She alleged that 'Kolm Bros.' were at no time the owners of said note or mortgage or of the money in the hands of Perkins, but that she was the owner of the same. If she could show that H. Kolm was not one of the copartners of the firm of 'Kolm Bros.,' then he was not indebted to plaintiff. If plaintiff was not a creditor of H. Kolm at any time, then he could not attack the transfer of the note and mortgage made by Kolm to the intervenor. We think the intervenor had such interest as would entitle her to intervene under the statute. It was said by this court in Coffey *v.* Greenfield, 55 Cal. 382, in speaking of the interest which entitles a party to intervene: 'And the Code does not attempt to specify

made by B., in which B. made no defence. At this stage of the cause C. filed a petition of intervention, alleging the following facts: Before the giving of these notes, B. was indebted in the amount thereof to one D., and was not indebted at all to the plaintiff; that the plaintiff A. caused B. to execute and deliver to him these notes, and the consideration thereof was B.'s said indebtedness to D.; that A. had no authority to take these notes in his own name, but they should have been given in the name of D.; that D. is dead, and the intervenor C. is his administrator; that the notes belong really to the estate of D., and the plaintiff has no interest in them, except that the legal title is in him. The petition prayed that the intervenor might become a party plaintiff, and that judgment might be rendered in his favor as administrator for the amount of the notes against B., the maker thereof. To this petition the original plaintiff A. demurred, and the Supreme Court of Iowa held that the case was a proper one, within the system established in that State, for an intervention, and that upon the facts alleged in the petition the intervenor was entitled to judgment.[1] In another case, A., claiming to be

what or how great this interest shall be, in order to give a right to intervene. Any interest is sufficient. The fact that the intervenor may or may not protect his interest in some other way is not material. If he "has an interest in the matter in litigation or in the success of either of the parties" he has a right to intervene.' The provisions of our statute are taken from the Code Procedure of Louisiana, and the practice in that State is to allow a party to intervene whose property has been seized or attacked in the suit. (Pomeroy in Remedies and Remedial Rights, sec. 427; Field *v.* Harrison, 20 La. Ann. 411; Yale *v.* Hoopes, 16 La. Ann. 311; Letchford *v.* Jacobs, 17 La. Ann. 79)." The section cited from Remedies and Remedial Rights appears in Code Remedies as § *429.]

[1] Taylor *v.* Adair, 22 Iowa, 279. [The following quotation from Taylor *v.* Adair appeared as § 427 in the text of the last edition: "To the lawyer not thoroughly conversant with the sweeping and radical changes in procedure and practice made by the Revision, the proposition that such an intervention as that sought in the present instance is allowable, would be not a little startling. . . . A design to avoid needless multiplicity of actions is everywhere apparent in the present system of procedure. Consonant with the other provisions of this system are those governing and regulating the rights of third parties to intervene in a pending action. Applying the section of the code (§ 2683) to the case in hand, we first inquire whether C., as the administrator of D., has 'an interest in the matter in litigation.' What was the matter in litigation? Clearly the debt which B. owed. We say the debt rather than the note, for the debt is the substance of which the note is simply a memorandum or visible evidence. Now this debt is alleged, and on the record admitted, to be owing by B. to D., and not to the plaintiff. If D. or his administrator had possession of the notes, though they are made payable to the plaintiff A., he might, on showing his ownership, sue thereon in his own name. So, although the plaintiff A. might sue in his own name on the notes, they being made payable to him, yet if they were in reality the property of D., the maker might avail himself of any defence

assignee of a note and mortgage executed to B. as the payee and mortgagee, commenced an ordinary action for a foreclosure. Thereupon C. filed a petition of intervention as administrator of B., the mortgagee, in which he denied that the note and mortgage had ever been assigned to A., denied that the latter had any interest or right therein, and averred that they were assets of the estate of his intestate B., and prayed for judgment in his own favor of foreclosure and sale against the mortgagor and other defendants. Upon a demurrer to this petition, the Supreme Court of California held that the intervention was entirely within the intent and the letter of the statute, and that the intervenor should have judgment.[1] Again, in an action commenced to fore-

he might have against D. These considerations are advanced to illustrate how thoroughly the law penetrates beyond names and forms and externals into the very substance and kernel. Now, if the plaintiff succeeds, he recovers that which, on the assumption of the truth of the petition of intervention, belonged to another; that which D. or his representative may sue him for and compel him to pay. He may be insolvent. He may, if he recover the judgment, assign it. Why should the real owner of the debt not have the privilege of coming into court, and, on establishing as against the plaintiff the right to the debt, directly recover it in his own name? This avoids multiplicity of actions, consequent delay, and augmented costs. It may, as above suggested, be the only protection against the insolvency or fraud of the plaintiff. We are not prepared to admit the truth of the proposition advanced in support of the demurrer, that the interest of D. is of such a nature that it could be asserted only in a court of equity. Nor are we prepared to admit the further proposition that in a legal action an intervenor's interest in the matter in litigation must be a legal interest, to entitle him to the benefit of the statute. We conclude by announcing it as the opinion of the court that this is a case in which the applicant has shown that he has 'an interest in the matter in litigation against both parties,' — a case in which he demands something adversely to both plaintiff and defendant. This interest is adverse to the plaintiff, as he claims against *him* the amount of the note and debt. His interest is adverse to the defendant, since he claims to recover against *him* a judgment for the amount of the note."] See Summers *v.* Hutson, 48 Ind. 228.

[1] Stich *v.* Dickinson, 38 Cal. 608. [The following quotation from Stich *v.* Dickinson appeared as § 428 in the text of the last edition: "The intervention in this case comes within the last category of either [that is, where his interest is adverse to both of the original parties]. The intervenor certainly has no interest in common either with the plaintiff or the defendant; but we think he has an interest in the matter in litigation adverse to both within the meaning of the section referred to. He has an interest against the pretension of the plaintiff to be owner of the note and mortgage, and to have a decree of foreclosure for his benefit, and against the defendant for the collection of the debt. The subject-matter of the litigation is the note and mortgage, and the right of the plaintiff to have a decree of foreclosure and sale. The intervenor claims as against the plaintiff that *he* and not the plaintiff is entitled to the decree of foreclosure; and as against the defendant, that the mortgage debt is due and unpaid, and that he is entitled to a foreclosure. In this case the intervenor claims the demand in suit, viz. the note and mortgage, and we can perceive no reason founded on the policy of the law which should preclude the settlement of the whole controversy in one action."]

close a mortgage given (together with a note) by a corporation which had become insolvent, certain judgment creditors of the company intervened, alleging fraud in the execution of the note and mortgage by the defendant, and that they were void as against its creditors; and praying that they might be adjudged void, and the action to foreclose be dismissed. The intervention of these judgment creditors was sustained, but it was held, at the same time, that simple contract creditors had no foundation for an intervention, since they could not dispute the mortgage.[1]

[1] Horn *v.* Volcano Water Co., 13 Cal. 62. [The following quotation from Horn *v.* Volcano Water Co. appeared as § 429 in the text of the last edition: "The petition of the creditor R. does not disclose any right on his part to intervene; it shows that he was a simple contract creditor, holding obligations against the company, but it does not show that any portion of them are secured by any lien on the mortgaged premises. His intervention is only an attempt of one creditor to prevent another creditor from obtaining judgment against the common debtor, — a proceeding which can find no support either in principle or authority. The interest mentioned in the statute which entitles a person to intervene in a suit between other parties, *must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.* The provisions of our statute are taken substantially from the Code of Procedure of Louisiana, which declares that 'in order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit;' and the Supreme Court of that State, in passing upon the term 'interest,' thus used, held this language: 'This we suppose must be a direct interest by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties; otherwise the strange anomaly would be introduced into our jurisprudence of suffering an accumulation of suits in all instances where doubts might be entertained or enter into the imagination of subsequent plaintiffs, that a defendant against whom a previous action was under prosecution might not have property sufficient to discharge all his debts. For as the first judgment obtained might give a preference to the person who should obtain it, all subsequent suitors down to the last would have an indirect interest in defeating the action of the first.' To authorize an intervention, therefore, the interest must be that created by a claim to the demand or some part thereof in suit, or a claim to or lien upon the property or some part thereof which is the subject of litigation. No such claim or lien is asserted in the petition of R., and his right to intervene in consequence thereof fails. The petition of S. and others stands upon a different footing. It shows that they were judgment creditors having liens by their several judgments upon the mortgaged premises at the time of the institution of the suit. As such, they were subsequent incumbrancers and necessary parties to a complete adjustment of all the interests in the mortgaged premises, though not indispensable parties to a decree determining the rights of the other parties as between themselves. For such adjustment the court would have been justified in ordering them to be brought in, either upon their own petition, as in the present case, or by an amendment to the complaint."]

See also Lewis *v.* Harwood, 28 Minn. 428; Yetzer *v.* Young (S. D. 1892), 52 N. W. Rep. 1054; McClurg *v.* State Bindery Co. (S. D. 1892), 53 N. W. Rep. 428; Gale *v.* Shillock (Dak., Oct. 1886), 30 N. W. Rep. 138; Smith *v.* Gale, 12 Supr. Ct. Rep. 674; Limberg *v.* Higginbotham, 11 Colo. 316; Curtis *v.* Lathrop, 12 Colo. 169; Daniels *v.* Clark, 38 Iowa, 556; Cottle *v.* Cole, 20 Iowa, 481.

§ 324. *430. **Author's Statement of the Doctrine.** The doctrine stated by Mr. Justice Field [in Horne *v.* Volcano Water Co.] is clearly the correct interpretation of the provisions contained in the California and the Iowa codes, and the opinion of Mr. Justice Dillon [in Taylor *v.* Adair] is in complete harmony with it. The cases cited above all fall within this doctrine. In each the intervenors had a direct interest, either in prosecuting the action and obtaining the benefit of the recovery, or in defending the action and entirely defeating the recovery. If the intervenor claims to be the only one entitled to the relief, if he asserts that the ultimate cause of action is vested in him and not in the original plaintiff, then his interest is adverse to both of the parties. The doctrine may be expressed in the following manner: The intervenor's interest must be such, that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought; or if the action had first been brought against him as the defendant, he would have been able to defeat the recovery in part at least. His interest may be either legal or equitable. If equitable, it must be of such a character as would be the foundation for a recovery or for a defence, as the case might be, in an independent action in which he was an original party. As the new system permits legal and equitable causes of action or defences to be united by those who are made the parties to an ordinary suit, for the same reason either or both may be relied upon by an intervenor. In short, the same rules govern his rights which govern those who originally sue or defend.[1] The proceeding by intervention is not an anomalous one, differing from other judicial controversies, after it has been once commenced. It is, in fact, the grafting of one action upon another, and the trying of the combined issues at one trial, and the determining them by one judgment. In this aspect of the proceeding it is both plain and reasonable that the intervenor should not be required to apply for permission to come in. He brings himself into court, and

[1] [See Wall *v.* Mines (1900), 130 Cal. 27, 62 Pac. 386, in which the court say: "The intervention may be adverse to both plaintiff and defendant. Where it is adverse to either, such party becomes defendant, and the intervenor plaintiff in the intervention, and such defendant then has all the rights to plead given the defendants in an ordinary action, and may file a cross complaint to the intervention under sec. 442."]

becomes a litigant party by filing and serving his petition, which is answered by the adversary parties — plaintiff or defendant, or both — in the same manner as though it was the pleading of a plaintiff: the issues are thus framed, — issues upon the plaintiff's petition and the intervenor's petition, — and the trial of the whole is had at one hearing. If the intervenor fails on this trial, a judgment for costs is of course rendered against him; if he succeeds, a judgment is given in his favor according to the facts and circumstances of the case.[1]

§ 325. *431. **Concluding Remarks.** This is certainly a great innovation upon the procedure which has hitherto prevailed in courts of law and of equity. It is, however, a method based upon the very principles which lie at the foundation of the entire reformed American system. The only possible objection is the multiplication of issues to be decided in the one cause, and the confusion alleged to result therefrom. This objection is not real: it is the stock argument which was constantly urged in favor of retaining the common-law system of special pleading, and was repudiated when the codes were adopted by the American States, and has been at last utterly repudiated in England. Complicated issues of fact are daily tried by juries, and complicated equities are easily adjusted by courts. The description

[1] Poehlmann *v.* Kennedy, 48 Cal. 201; Brooks *v.* Hager, 5 Cal. 281, 282; Sargent *v.* Wilson, 5 Cal. 504, 507; Moss *v.* Warner, 10 Cal. 296, 297; People *v.* Talmage, 6 Cal. 256, 258; County of Yuba *v.* Adams & Co., 7 Cal. 35; Davis *v.* Eppinger, 18 Cal. 378, 380; Dixey *v.* Pollock, 8 Cal. 570; Speyer *v.* Ihmels, 21 Cal. 280, 287; Coghill *v.* Marks, 29 Cal. 673. *Contra* to these cases, see the well-considered opinion of Clark J. in Lewis *v.* Harwood, 28 Minn. 428. Dutil *v.* Pacheco, 21 Cal. 438, 442; Coster *v.* Brown, 23 Cal. 142, 143; Gradwohl *v.* Harris, 29 Cal. 150, 154; People *v.* Sexton, 37 Cal. 532, 534; Joliet Iron, &c. Co. *v.* Chicago C. & W. R. Co., 51 Iowa, 300; Switz *v.* Black, 45 Iowa, 597; Ingle *v.* Jones, 43 Iowa, 286; Harwood *v.* Quinby, 44 Iowa, 385; Henry *v.* Cass Cy. Mill, &c. Co., 42 id. 33; Coburn *v.* Smart, 53 Cal. 742; Rosecrans *v.* Ellsworth, 52 Cal. 509; Porter *v.* Garrissino, 51 Cal. 559. See also Martin *v.* Thompson, 63 Cal. 3; Loughborough *v.* McNevin, 74 Cal. 250; Robinson *v.* Crescent City Mill, &c. Co., 93 Cal. 316; Kansas & C. P. Ry. Co. *v.* Fitzgerald, 33 Neb. 137; Welborn *v.* Eskey, 25 Neb. 193; McClurg *v.* State Bindery Co. (S. D. 1892), 53 N. W. 428; Gale *v.* Shillock (Dak., Oct. 1886), 30 N. W. 138; Smith *v.* Gale, 12 Supr. Ct. Rep. 674; Yetzer *v.* Young (S. D. 1892), 52 N. W. 1054; Dunham *v.* Greenbaum, 56 Iowa, 303; Lewis *v.* Harwood, 28 Minn. 428; Teachout *v.* Des Moines B. G. S. Ry. Co., 75 Iowa, 722; Van Gorden *v.* Ormsby, 55 Iowa, 657; Goetzman *v.* Whitaker, 81 Iowa, 527. Further illustrations: Des Moines Ins. Co. *v.* Lent, 75 Iowa, 522; Wohlwend *v.* Case Threshing-Mach. Co., 42 Minn. 500; Dennis *v.* Spencer, 45 Minn. 250; Pence *v.* Sweeney (Idaho, 1891), 28 Pac. Rep. 413; Curtis *v.* Lathrop, 12 Colo. 169; Limberg *v.* Higginbotham, 11 Colo. 316; Bennett *v.* Whitcomb, 25 Minn. 148; Thompson *v.* Huron Lumber Co., 4 Wash. 600.

which I have here given of the enlarged power of intervention admitted by the codes of California and of Iowa may, by introducing its methods to the profession of other States, procure its general adoption wherever the new procedure is established. Courts and legislatures of the several States may well borrow the improvements which have been made in other commonwealths; and thus, by a comparison of methods, the common system may become perfected and unified.[1]

[1] See *ante*, § *413, and note.

CHAPTER THIRD.

THE AFFIRMATIVE SUBJECT-MATTER OF THE ACTION: THE FORMAL STATEMENT OF THE CAUSE OF ACTION BY THE PLAINTIFF.

SECTION FIRST.

THE STATUTORY PROVISIONS.

§ 326. * 432. **Introduction.** I here collect all the provisions of the various codes which relate in a general manner to the plaintiff's complaint or petition, and which contain the rules applicable to the theory of pleading as a whole: those which prescribe the mode of alleging certain particular classes of facts, or regulate the joinder of causes of action, or define the nature and uses of the reply, will be quoted in subsequent portions of the chapter, in immediate connection with the several subjects to which they refer. The important clauses which announce the fundamental and essential principles and doctrines of the reformed system in regard to all pleadings, and which determine the form and substance of the one by which the plaintiff sets forth the grounds of his claim for judicial relief, are nearly the same in the different State codes. With the few variations in the language, which will be pointed out, there is no substantial difference; and the system of pleading, as found in the statute, is absolutely the same wherever the reform prevails. The following are all the provisions which it is necessary to quote in order to exhibit the simple and natural methods introduced by the new procedure.

§ 327. * 433. **Statutory Provisions as to Complaint.** "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."[1] "The first pleading

[1] Kansas, § 85; Nebraska, § 90; North Carolina, § 91. The corresponding provision of the Iowa code is more detailed: "§ 2644. All technical forms of action and pleading, all common counts, general issues, and all fictions, are abolished; and hereafter the forms of pleading in civil actions, and the rules by which their suffi-

on the part of the plaintiff is the complaint." [1] "The only plead-

ciency is to be determined, are those prescribed in this code."

[*Arkansas*, Sand. & Hill's Dig., § 5710.

California, § 42, reading as follows: "The forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code."

Colorado, § 47, reading as follows: "The mode of pleading in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be as prescribed in this act, and not otherwise."

Connecticut, Gen. St., 1902, § 607, reading as follows: "There shall be but one form of civil action, and the pleadings therein shall be as follows."

Idaho, Code Civ. Pro., 1901, § 3201, same as California, *supra*.

Indiana, Burns' St., 1901, § 339, reading as follows: "All the distinct forms of pleading heretofore existing, inconsistent with the provisions of this act, are hereby abolished; and hereafter the forms of pleadings in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are modified as prescribed by this act."

Kentucky, Code, 1895, § 88, reading as follows: "The forms of pleadings, and the rules by which their sufficiency is to be determined, are those prescribed by this code."

Minnesota, St., 1894, § 5228, reading as follows: "The forms of proceedings in civil actions, and the rules by which the sufficiency of pleadings is to be determined, shall be regulated by statute."

Missouri, Rev. St., 1899, § 591, reading as follows: "The forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings are [*sic*] to be determined, are, except as otherwise specially provided by law, prescribed by this article."

Montana, Code, 1895, § 661, reading as follows: "The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings are [*sic*] to be determined, are those prescribed in this code."

Nevada, Comp. Laws, 1900, § 3132, reading as follows: "All the forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this act."

New York, Code Civ. Pro., § 518, reading as follows: "This chapter prescribes the form of pleadings in an action, and the rules by which the sufficiency thereof is determined, except where special provision is otherwise made by law."

North Carolina, § 91, same as California, *supra*.

North Dakota, Rev. Codes, 1899, § 5265.

Ohio, Bates' St., 1903, § 5054, reading as follows: "The forms of pleading in civil actions in courts of record, and the rules by which their sufficiency shall be determined, are those prescribed in this chapter."

Oklahoma, St., 1893, § 3963, reading as follows: "The rules of pleading heretofore existing in civil actions are abolished; and hereafter, the forms of pleadings in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code."

Oregon, Hill's Laws, § 63, containing the words "in actions at law" after the word existing in the form given in the text.

South Carolina, Code, 1893, § 161, reading as follows: "There shall be no other forms of pleading in civil actions in courts of record in this State, and no other rules by which the sufficiency of the pleadings is to be determined, than those prescribed by this code of procedure."

South Dakota, Ann. St., 1901, § 6111.

Utah, Rev. St., 1898, § 2957, same as California, *supra*.

Washington, Bal. code, § 4903, substantially same as Indiana, *supra*.

Wisconsin, St., 1898, § 2644, reading as follows: "The forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings are [*sic*] determined are those prescribed by this chapter."

Wyoming, Rev. St., 1899, § 3530, same as Ohio, *supra*.

[1] New York, § 141 (478); California, § 425; Oregon, § 64; North Carolina, § 92.

[Arkansas, Sand. & Hill's Dig., § 5715; Connecticut, Gen. St., 1902, § 607; Idaho, Code Civ. Pro., 1901, § 3203; Indiana,

ings allowed are, 1, the petition by the plaintiff; 2, the answer or demurrer by the defendant; 3, the demurrer or reply by the plaintiff; 4, the demurrer to the reply by the defendant." [1] "The

Burns' St., 1901, § 341; Minnesota, St., 1894, § 5230; Missouri, Rev. St., 1899, § 592; Montana, Code, 1895, § 670; North Dakota, Rev. Codes, 1899, § 5266; Ohio, Bates' St., 1903, § 5057; South Carolina, Code, 1893, § 162; South Dakota, Ann. St., 1901, § 6112; Washington, Bal. Code, § 4905; Wisconsin, St., 1898, § 2645; Wyoming, Rev. St., 1899, § 3533.]

[1] Kansas, § 86; Nebraska, § 91.

[*Arizona*, Rev. St., 1901, § 1275, reading as follows: "The pleadings in all civil suits in courts of record shall be by complaint and answer."

Arkansas, Sand. & Hill's Dig., § 5711, allowing (1) complaint, (2) demurrer or answer by defendant, (3) demurrer or reply by plaintiff.

California, § 422, allowing, on part of plaintiff, (1) complaint, (2) demurrer to answer, and on part of defendant, (1) demurrer to complaint, (2) answer, to which were added by the commissioners' amendment of 1901, on the part of plaintiff, (3) demurrer to cross-complaint, (4) answer to cross-complaint, and on part of defendant, (3) cross-complaint, (4) demurrer to answer to cross-complaint. But see Lewis *v.* Dunn (1901), 134 Cal. 291, as to unconstitutionality of this amendment.

Colorado, Code, 1890, § 48.

Idaho, Code Civ. Pro., 1901, § 3202, allowing, on part of plaintiff, (1) complaint, (2) demurrer to answer, and on part of defendant, (1) demurrer to complaint, (2) answer.

Indiana, Burns' St., 1901, § 340, allowing (1) complaint by plaintiff, (2) demurrer and answer by defendant, (3) demurrer and reply by plaintiff.

Iowa, Code, 1897, § 3557, allowing (1) petition of plaintiff, (2) motion, demurrer or answer of defendant, (3) motion, demurrer or reply of plaintiff, (4) motion or demurrer of defendant.

Kentucky, Code, 1895, § 89, allowing "(1) petitions, answers and replies, and such additional pleadings, by way of rejoinder and rebutter, as may be necessary to form a material issue of fact, (2) demurrers."

Minnesota, St., 1894, § 5229, substantially the same as Indiana, *supra*.

Missouri, Rev. St., 1899, §§ 592, 596, 607.

Montana, Code, 1895, § 662.

Nevada, Comp. Laws, 1900, § 3133, allowing, on part of plaintiff, complaint and demurrer to answer, and on part of defendant, demurrer and answer.

New York, Code Civ. Pro., §§ 478, 487, 493, 514, *supra*.

North Carolina, §§ 92, 94, 105, 107, allowing complaint, demurrer and reply on part of plaintiff, and answer and demurrer on part of defendant.

North Dakota, Rev. Codes, 1899, §§ 5266, 5267, 5277, 5279.

Ohio, Bates' St., 1903, § 5055, providing that the answer may be styled a cross-petition when affirmative relief is demanded.

Oklahoma, St., 1893, § 3964.

Oregon, Hill's Laws, § 64, allowing on the part of the plaintiff, (1) complaint, (2) demurrer, or (3) reply; and on part of the defendant, (1) demurrer, or (2) answer.

South Carolina, Code, 1893, §§ 162, 164, 174, 176.

South Dakota, Ann. St., 1901, §§ 6112, 6114, 6124, 6126.

Utah, Rev. St., 1898, § 2958.

Washington, Bal. Code, § 4904.

Wisconsin, St., 1898, §§ 2645, 2648, 2661, 2663.

Wyoming, Rev. St., 1899, § 3532, allowing (1) petition, (2) demurrer, (3) answer, which, when affirmative relief is demanded therein, may be styled cross-petition, (4) reply.

Supplemental Pleadings.

But supplemental pleadings may be filed alleging facts occurring after the filing of the original pleadings, in aid of the original pleadings: Ellis *v.* City of Indianapolis (1897), 148 Ind. 70, 47 N. E. 218; Swedish Am. Nat. Bank *v.* Dickinson Co. (1896), 6 N. D. 222, 69 N. W. 455; Barker *v.* Prizer (1897), 150 Ind. 4, 48 N. E. 4; Kirby *v.* Muench (1900), 12 S. D. 616, 82 N. W. 93; Zalesky *v.* Home Ins. Co. (1897), 102 Ia. 613, 71 N. W. 566; Foote

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 a recovery of money be demanded, the amount thereof shall be stated." [1] "The defendant may demur to the complaint when it

v. Burlington Gaslight Co. (1897), 103 Ia. 576, 72 N. W. 755; Christie *v.* Iowa Life Ins. Co. (1900), 111 Ia. 177, 82 N. W. 499; Lathrop *v.* Dearing (1894), 59 Minn. 234, 61 N. W. 24; Malmsten *v.* Berryhill (1895), 63 Minn. 1, 65 N. W. 88; Guptill *v.* City of Red Wing (1899), 76 Minn. 129, 78 N. W. 970; Bomar *v.* Means (1896), 47 S. C. 190, 25 S. E. 60; Wade *v.* Gould (1899), 8 Okla. 690, 59 Pac. 11; Childs *v.* Kansas City, etc. R. R. Co. (1893), 117 Mo. 414, 23 S. W. 373; Barnard *v.* Gantz (1893), 140 N. Y. 249, 35 N. E. 430; Bank of Chadron *v.* Anderson (1895), 6 Wyo. 518, 48 Pac. 197; Williams *v.* Eikenbary (1893), 36 Neb. 478, 54 N. W. 852; Chapman *v.* Jones (1897), 149 Ind. 434, 47 N. E. 1065.

But if a party has no cause of action at the time of the commencement of the action, he cannot maintain it by means of a supplemental complaint: Hill *v.* Den (1898), 121 Cal. 42, 53 Pac. 642; Gordon *v.* City of San Diego (1895), 108 Cal. 264, 41 Pac. 301.

Permission to file supplemental pleadings is within the discretion of the court: Jacob *v.* Lorenz (1893), 98 Cal. 332, 33 Pac. 119; Allen *v.* City of Davenport (1901), 115 Ia. 20, 87 N. W. 743; Schouweiler *v.* Hough (1895), 7 S. D. 163, 63 N. W. 776; Fitzgerald's Estate *v.* Union Bank (1902), — Neb. —, 90 N. W. 994.

A supplemental complaint, without an original complaint upon which to stand, cannot be the foundation of an action: Ellis *v.* City of Indianapolis (1897), 148 Ind. 70, 47 N. E. 218.

"It seems to us that 'a plea since the last continuance' is not what would strictly be termed an amendment, but more in the nature of a supplemental pleading — something more than was pleaded before. Such pleas must be made by leave of court, that is, they must have the sanction of the court, and the opposing party must have an opportunity to be heard. This is and should be so whether it is a matter of discretion with the court or a right the party has to insist on its being filed as a matter of law. . . . To entitle the defendant as a matter of law to file such a plea, it must appear from the petition that the facts stated, if true, would be a good defence and a bar to the plaintiff's action. . . . But if the petition does not set forth facts which, if true, would be a bar to plaintiff's recovery, then the court is not bound to allow the plea to be filed:" Balk *v.* Harris (1902), 130 N. C. 381, 41 S. E. 940.]

[1] Kansas, § 87 (petition); Nebraska, § 92 (petition); Oregon, § 65 (complaint); North Carolina, § 93 (complaint). In Ohio, Kansas, and Nebraska, the second subdivision reads, "A statement of the facts constituting, etc., in ordinary and concise language."

[*Arizona*, Rev. St., 1901, § 1289, reading as follows: "The complaint shall set forth clearly the names of the parties, a concise statement of the cause of action, without any distinction between suits at law and in equity, and shall also state the nature of the relief which he demands."

Arkansas, Sand. & Hill's Dig., § 5715, reading as follows: "The complaint must contain: (1) The style of the court in which the action is brought; (2) The style of the action, consisting of the names of all the parties thereto, distinguishing them as plaintiffs and defendants, followed by the words 'complaint at law,' if the proceedings are at law, and by the words 'complaint in equity,' if the proceedings are equitable; (3) A statement in ordi-

shall appear on 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 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." [1] "When

nary and concise language, without repetition, of the facts constituting the plaintiff's cause of action; (4) A demand of the relief to which the plaintiff considers himself entitled."

California, § 426 (complaint), substantially as set out in the text.

Colorado, Code, 1890, § 49 (complaint).

Connecticut, Gen. St., 1902, § 614 (complaint), reading as follows: "All pleadings shall contain a plain and concise statement of the material facts on which the pleader relies, but not of the evidence by which they are proved, such statement being divided into paragraphs numbered consecutively, each containing, as nearly as may be, a separate allegation."

Idaho, Code Civ. Pro., 1901, § 3204 (complaint), substantially as set out in the text.

Indiana, Burns' St., 1901, § 341 (complaint), the second subdivision reading, "A statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

Iowa, Code, 1897, § 3559 (petition), substantially identical with the provisions in Arkansas.

Kentucky, Code, 1895, § 90, reading as follows: "The petition must state facts which constitute a cause of action in favor of the plaintiff against the defendant, and must demand the specific relief to which the plaintiff considers himself entitled; and may contain a general prayer for any other relief to which the plaintiff may appear to be entitled."

Minnesota, St., 1894, § 5231 (complaint).

Missouri, Rev. St., 1899, § 592 (petition).

Montana, Code, 1895, § 671 (complaint).

Nevada, Comp. Laws, 1900, § 3134 (complaint).

New York, Code Civ. Pro., § 481 (complaint), the second clause quoted under (3) in the text being absent.

North Carolina, § 93 (complaint), adding to subdivision 2 the words, "and each material allegation shall be distinctly numbered."]

North Dakota, Rev. Codes, 1899, § 5266 (complaint).

Ohio, Bates' St., 1903 (petition), § 5056, 5057, reading as follows: § 5056: "Every pleading must contain the name of the court and the county in which the action is brought, and the names of the parties, followed by the name of the pleading." § 5057: "The first pleading shall be the petition by the plaintiff, which must contain: (1) A statement of the facts constituting the cause of action in ordinary and concise language. (2) A demand for the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount shall be stated; and if interest is claimed, the time for which interest is to be computed shall also be stated."

Oklahoma, St., 1893, § 3965, adding to the first subdivision as given in the text, the words, "followed by the word 'petition.'"

South Carolina, Code, 1893, § 163 (complaint), omitting the second clause quoted under (3) in the text.

Utah, Rev. St., 1898, § 2960 (complaint).

Washington, Bal. Code, § 4906 (complaint).

Wisconsin, St., 1898, § 2646 (complaint).

Wyoming, Rev. St., 1899, § 3533, adding the same words as in the Oklahoma statute, *supra*.

[1] Kansas, § 89; Nebraska, § 94; California, § 430 (adding, "7, that the complaint is ambiguous, unintelligible, or uncertain"); North Carolina, § 95. In Iowa, the first four subdivisions of § 2648

any of the matters enumerated do not appear upon the face of the complaint, the objection may be taken by answer. If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." [1]

are the same as those given in the text, and the section then proceeds: "or, 5, that the facts stated in the petition do not entitle the plaintiff to the relief demanded; or, 6, that the petition on the face thereof shows that the claim is barred by the statute of limitations; or fails to show it to be in writing when it should be so evidenced; or, if founded on an account or writing as evidence of indebtedness, and neither such account or writing, or a copy thereof, is incorporated with, or attached to, such pleading, or a sufficient reason stated for not doing so."

[*Arizona*, Rev. St., 1901, § 1351, adding "(7). That the cause of action is barred by limitation."

Arkansas, Sand. & Hill's Dig., § 5717, omitting the fifth ground given in the text.

California, § 430, the commissioners' amendment of 1901 adding to subdivision 5 the words, "or not separately stated."

Colorado, Code, 1890, § 50, adding the words "or misjoinder" after the word "defect" in subdivision 4, and adding "7, that the complaint is ambiguous, unintelligible and uncertain."

Idaho, Code Civ. Pro., 1901, § 3206, identical with the provisions of the Colorado Code.

Indiana, Burns' St., 1901, § 342.

Kentucky, Code, 1895, § 92, adding the words "in this State" after the word "pending" in subdivision 3, and omitting subdivision 5.

Minnesota, St., 1894, § 5232.

Missouri, Rev. St. 1899, § 598, adding the words "in this state" at the end of subdivision 3, and adding "7, that a party plaintiff or defendant is not a necessary party to a complete determination of the action."

Montana, Code, 1895, § 680, identical with the provisions in Colorado.

Nevada, Comp. Laws, 1900, § 3135, identical with the provisions in Colorado.

New York, Code Civ. Pro., § 488, omitting from subdivision 1 the words "or the subject of the action," and making that a separate ground in subdivision 2, adding two subdivisions in place of subdivision 4, as follows: "5. That there is a misjoinder of parties plaintiff. 6. That there is a defect of parties, plaintiff or defendant."

North Dakota, Rev. Codes, 1899, § 5268.

Ohio, Bates' St., 1903, § 5061, substantially the same as New York, except that ground 5 reads "That there is a misjoinder of parties plaintiff or defendant," and adding "8. That separate causes of action against several defendants are improperly joined. 9. That the action was not brought within the time limited for the commencement of such actions."

Oklahoma, St., 1893, § 3967.

Oregon, Hill's Laws, § 67, adding, "7. That the action has not been commenced within the time limited by this Code."

South Carolina, Code, 1893, § 165.

South Dakota, Ann. St., 1901, § 6115.

Utah, Rev. St., 1898, § 2962, identical with the Colorado statute.

Washington, Bal. Code, § 4907, adding, "7. That the action has not been commenced within the time limited by law."

Wisconsin, St., 1898, § 2649, identical with the statute of Washington.

Wyoming, Rev. St., 1899, § 3535, adding two subdivisions in place of subdivision 4, as follows: "4. That there is a misjoinder of parties plaintiff. 5. That there is a defect of parties, plaintiff or defendant," and adding another subdivision, as follows: "7. That separate causes of action against several defendants are improperly joined."

[1] New York, §§ 147 (498), 148 (499); Kansas, § 91; Nebraska, § 96; California, §§ 433, 434; Oregon, §§ 69, 70; North Carolina, §§ 98, 99. The Iowa Code, § 2650, after the same provision as that in the text, adds, "If the facts stated by the

§ 328. * 434. **Statutory Provisions Applicable to all Pleadings.** The foregoing provisions describe the complaint or petition: the following clauses — some of which, however, are not found in all the codes — comprise the general rules applicable to all pleadings, which regulate their form and contents, and determine their sufficiency, — the general principles, in short, which characterize the system of pleading provided for by the reformed procedure: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."[1] "If irrelevant or redundant matter be inserted in a pleading, it may be struck out on

petition do not entitle the plaintiff to any relief whatever, advantage may be taken of it by motion in arrest of judgment before judgment is entered."

[*Arizona*, Rev. St., 1901, § 1353.

Arkansas, Sand. & Hill's Dig., § 5720, adding the words "over the subject of the action" after the word "court."

Colorado, Code, 1890, §§ 54, 55.

Idaho, Code Civ. Pro., 1901, §§ 3209, 3210.

Indiana, Burns' St., 1901, § 346, adding the words "over the subject of the action" after the word "court," and adding the following clause: "Provided, however, That the objection that the action was brought in the wrong county, if not taken by answer or demurrer, shall be deemed to have been waived."

Kentucky, Code, 1895, §§ 92, 93, adding the words "of the subject of the action" after the word "court," and providing that a neglect to raise the questions seasonably subjects the party to the payment of costs.

Minnesota, St. 1894, §§ 5234, 5235.

Missouri, Rev. St., 1899, § 602, adding the words "over the subject-matter of the action" after the word "court."

Montana, Code, 1895, §§ 684, 685.

Nevada, Comp. Laws, 1900, §§ 3139, 3140.

North Dakota, Rev. Codes, 1899, §§ 5271, 5272.

Ohio, Bates' St., 1903, § 5063.

Oklahoma, St., 1893, § 3969.

South Carolina, Code, 1893, §§ 168, 169.

South Dakota, Ann. St., 1901, §§ 6118, 6119.

Utah, Rev. St., 1898, §§ 2966, 2967.

Washington, Bal. Code, §§ 4909, 4911, in slightly different form.

Wisconsin, St., 1898, §§ 2653, 2654.

Wyoming, Rev. St., 1899, § 3537.]

[1] New York, § 159 (519); Kansas, § 115; Nebraska, § 121; California, § 452; Oregon, § 83; North Carolina, § 119.

[*Arkansas*, Sand. & Hill's Dig., § 5754.

Colorado, Code, 1890, § 77.

Idaho, Code Civ. Pro., 1901, § 3223.

Indiana, Burns' St., 1901, § 379, adding the following: "but when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment."

Iowa, Code, 1897, § 3446, reading as follows: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

Minnesota, St., 1894, § 5247.

Missouri, Rev. St., 1899, § 629.

Montana, Code, 1895, § 740.

Nevada, Comp. Laws, 1900, § 3165.

North Dakota, Rev. Codes, 1899, § 5283.

Ohio, Bates' St., 1903, § 5096.

Oklahoma, St., 1893, § 3993.

South Carolina, Code, 1893, § 180.

South Dakota, Ann. St., 1901, § 6130.

Utah, Rev. St., 1898, § 2986.

Washington, Bal. Code, § 4931.

Wisconsin, St., 1898, § 2668.

Wyoming, Rev. St., 1899, § 3570.]

motion of any person aggrieved thereby; and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment." [1] "All fictions in pleading are abolished." [2] "A material allegation in a pleading is one essential to the claim or defence,

[1] Kansas, § 119; Nebraska, § 125; California, § 453 (altered verbally); Oregon, § 84; North Carolina, § 120.

[*Arkansas*, Sand. & Hill's Dig., § 5755, containing first clause only.

Colorado, Code, 1890, § 60, containing the provisions quoted in the text, together with considerable other matter.

Idaho, Code Civ. Pro., 1901, § 3224, reading as follows: "Sham and irrelevant answers and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose."

Indiana, Burns' St., 1901, § 385, reading in part as follows: "All surplusage, tautology, and irrelevant matter shall be set aside and struck out of any pleading, when pointed out by the party aggrieved," and also § 379, quoted on page 436, *supra*.

Iowa, Code, 1897, § 3618, almost identical with the Idaho statute, quoted *supra*, and also § 3630, very similar to the second clause quoted in the text.

Kentucky, Code, 1895, § 121, reading as follows: "Irrelevant or redundant matter in a pleading shall be stricken out, upon or without motion, at the cost of the party whose pleading contains it."

Minnesota, St., 1894, § 5248, slightly varied from the form given in the text.

Missouri, Rev. St., 1899, § 612, slightly varied from the form given in the text.

Montana, Code, 1895, § 742, almost identical with the Idaho statute.

Nebraska, Code, 1901, § 125, slightly varied from the form given in the text.

Nevada, Comp. Laws, 1900, § 3152, reading as follows: "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out by the court, on motion of any person aggrieved thereby."

New York, Code Civ. Pro., §§ 545, 546, substantially similar to the statute quoted in the text, but somewhat more specific.

North Dakota, Rev. Codes, 1899, § 5284.

Ohio, Bates' St., 1903, §§ 5087, 5088, substantially similar to the statute quoted in the text, but somewhat more specific.

Oklahoma, St., 1893, § 3997.

South Carolina, Code, 1893, § 181.

South Dakota, Ann. St., 1901, § 6131.

Utah, Rev. St., 1898, § 2987, very similar to the Idaho statute.

Washington, Bal. Code, § 4932, adding to the statute given in the text "or may dismiss the same."

Wisconsin, St., 1898, § 2683, substantially similar to the statute given in the text, but somewhat more specific.

Wyoming, Rev. St., 1899, §§ 3561, 3562, identical with the Ohio statute.]

[2] Kansas, § 116.

[*Idaho*, Const., Art. 5, sec. 1, providing that "Feigned issues are prohibited."

Indiana, Burns' St., 1901, § 381.

Iowa, Code, 1897, § 3557.

Missouri, Rev. St., 1899, § 610, providing that "No allegation shall be made in a pleading which the law does not require to be proved, and only the substantial facts necessary to constitute the cause of action or defence shall be stated."

Nebraska, Code, 1901, § 4, identical with Ohio statute.

North Carolina, § 15, providing that "Feigned issues are abolished."]

North Dakota, Rev. Codes, 1899, § 5183, providing that "Feigned issues are abolished."

Ohio, Bates' St., 1903, § 4973, providing that "There can be no feigned issue."

Oklahoma, St., 1893, § 3884, identical with Ohio statute.

South Carolina, Code, 1893, § 92, providing that "Feigned issues shall not be allowed."

South Dakota, Ann. St., 1901, § 6032, identical with the North Dakota statute.

Wisconsin, St., 1898, § 2841, stating that "Feigned issues have been abolished."

Wyoming, Rev. St., 1899, § 3445, identical with Ohio statute.

which could not be struck from the pleading without leaving it insufficient. Neither presumptions of law nor matters of which judicial notice is taken need be stated in the pleading." [1] The following special provision, which is found only in a portion of the codes, and is not impliedly contained in the general principles common to them all, is quoted because of its practical importance as a rule of procedure in those States whose legislation has adopted it: "If the action, counter-claim, or set-off be founded on an account, or on a note, bill, or other written instrument, as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading. If not so attached and filed, the reason thereof must be shown in the pleading." [2]

[1] Kansas, §§ 129, 130; Nebraska, §§ 135, 136; California, § 463 (first clause only); Oregon, § 93 (the first clause only).

[*Arkansas*, Sand. & Hill's Dig., §§ 5762, 5751.

Colorado, Code, 1890, § 72, first clause only.

Idaho, Code Civ. Pro., 1901, § 3234, first clause only.

Indiana, Burns' St., 1901, § 377, last clause only.

Kentucky, Code, 1895, § 127, providing that "A material allegation is one which is necessary for the statement or support of a cause of action or defence," and § 119, providing that "neither the evidence relied on by a party, nor presumptions of law, nor facts of which judicial notice is taken, excepting private statutes, shall be stated in a pleading."

Missouri, Rev. St., 1899, § 631, second clause only.

Montana, Code, 1895, § 756, first clause only.

Nevada, Comp. Laws, 1900, § 3161, first clause only.

Ohio, Bates' St., 1903, §§ 5082, 5083.

Oklahoma, St., 1893, §§ 4007, 4008.

Utah, Rev. St., 1898, § 2997, first clause only.

Washington, Bal. Code, § 4944.

Wyoming, Rev. St., 1899, §§ 3556, 3557.]

[2] Kansas, § 118; Nebraska, § 124.

[*Arkansas*, Sand. & Hill's Dig., § 5752, with slightly different wording.

Indiana, Burns' St., 1901, § 365, reading in part as follows: "When any pleading is founded upon a written instrument or on account, the original, or a copy thereof, must be filed with the pleading. . . . Such copy of a written instrument, when not copied in the pleadings, shall be taken as part of the record."

Iowa, Code, 1897, § 3561, giving as one ground for demurrer, "if founded on an account or writing as evidence of indebtedness, that neither such writing or account or copy thereof is incorporated into or attached to the pleading, or a sufficient reason stated for not doing so."

Kansas, Code, 1901, § 118, adding the following clause, "But if the action, counter-claim or set-off be founded upon a series of written instruments executed by the same person, it shall be sufficient to attach and file a copy of one only, and in succeeding causes of action or defences to set forth in general terms descriptions of the several instruments respectively."

Kentucky, Code, 1895, § 120, identical with the Arkansas statute.

Missouri, Rev. St., 1899, § 630, allowing a copy of an account to be attached, at pleader's option, in lieu of setting forth the items in the pleading.

Montana, Code, 1895, § 747, reading as follows: "Where a cause of action, defence or counter-claim is founded upon an instrument for the payment of money only, the party may set forth a copy of the instrument, and state that there is due him thereon, from the adverse party, a specified sum, which he claims. Such an allegation is equivalent to setting forth

§ 329. * 435. **Statutory Provisions Respecting Amendment.** Ample provision is made for the amendment of pleadings, either at the trial itself, or at any other time in the progress of the cause. The following sections are contained in all the codes, with some unimportant verbal variations in a few of them: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defence upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms

the instrument according to its legal effect."

New York, Code Civ. Pro., § 534, identical with Montana statute.

Ohio, Bates' St., 1903, § 5085, substantially the same as the provision quoted in the text, and § 5086, reading as follows: "In an action, counter-claim, or set-off, founded upon an account, or upon an instrument for the unconditional payment of money only, it shall be sufficient for a party to set forth a copy of the account or instrument, with all credits and the indorsements thereon, and to state that there is due to him, on such account or instrument, from the adverse party, a specified sum, which he claims, with interest; and when others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties, it shall be necessary to state the facts which fix their liability."

Oklahoma, St., 1893, § 4001, reading in part as follows: "In an action, counter-claim or set-off, founded upon an account, promissory note, bill of exchange or other instrument, for the unconditional payment of money only, it shall be sufficient for a party to give a copy of the account or instrument, with all credits, and the indorsements thereon, and to state that there is due him, on such account or instrument, from the adverse party, a specified sum, which he claims, with interest."

Oregon, Hill's Laws, § 83, allowing the pleader to set out the items of an account in the pleading, or to file a copy thereof, at his option.

Wisconsin, St., 1898, § 2675, reading as follows: "In an action, defence or counter-claim founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims."

Wyoming, Rev. St., 1899, § 3559.

In the following States the pleader may deliver a copy of an account to the adverse party within a designated period, in lieu of setting out the items in his pleading: *Idaho*, Code Civ. Pro., 1901, § 3225; *Nevada*, Comp. Laws, 1900, § 3151; *North Dakota*, Rev. Codes, 1899, § 5282; *South Carolina*, Code, 1893, § 179; *South Dakota*, Ann. St., 1901, § 6129; *Utah*, Rev. St., 1898, § 2988; *Arizona*, Rev. St., 1901, § 1287.]

For illustrations, see Evans *v.* Clermont, etc. Co., 51 Ind. 160; Excelsior Dr. Co. *v.* Brown, 38 id. 384; Etchison Ditching Ass'n *v.* Busenback, 39 id. 362; Dobson *v.* Duckpond D. Ass'n, 42 id. 312; Alspaugh *v.* Ben Franklin Dr. Ass'n, 51 id. 271; Montgomery *v.* Gorrell, 51 id. 309; Brown *v.* State, 44 id. 222; Mitchell *v.* Am. Ins. Co., 51 id. 396; Hinkle *v.* Margerum, 50 id. 240; Sanford *v.* Wood, 49 id. 165; Jagers *v.* Jagers, 49 id. 428; Hays *v.* Miller, 12 id. 187; Tyler *v.* Kent, 52 id. 583; Calvin *v.* Woolen, 66 id. 464 (neglect to file is cured by verdict); Ohio & Miss. Ry. Co. *v.* Nickless, 71 id. 271; Surginer *v.* Paddock, 31 Ark. 528; Hannibal & St. Jos. R. Co. *v.* Knudson, 62 Mo. 569.

as shall be just."[1] "When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."[2] "Where, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof."[3] Any pleading may be amended once by the party filing or serving it, as a matter of course, and without costs, and without prejudice to proceedings already had: such amendment must be made within specified times, which differ in the various codes; but will not be permitted if it appear to be merely for purposes of delay.[4] In

[1] New York, § 169 (539); Kansas, § 133; Nebraska, § 138; California, § 469; Oregon, § 94; North Carolina, § 128.

[Arkansas, Sand. & Hill's Dig., § 5764; Idaho, Code Civ. Pro., 1901, § 3237; Indiana, Burns' St., 1901, § 394; Iowa, Code, 1897, § 3597; Kentucky, Code, 1895, § 129; Minnesota, St., 1894, § 5262; Missouri, Rev. St., 1899, § 655; Montana, Code, 1895, § 770; North Dakota, Rev. Codes, 1899, § 5293; Ohio, Bates' St., § 5294; Oklahoma, St., 1893, § 4011; South Carolina, Code, 1893, § 190; South Dakota, Ann. St., 1901, § 6140; Utah, Rev. St., 1898, § 3001; Washington, Bal. Code, § 4949; Wisconsin, St., 1898, § 2669; Wyoming, Rev. St., 1899, § 3736; Colorado, Code, 1890, § 78, in a different form.]

[2] New York, § 170 (540); Kansas, § 134; Nebraska, § 139; California, § 470; Oregon, § 95; North Carolina, § 129.

[Arkansas, Sand. & Hill's Dig., § 5765; Idaho, Code Civ. Pro., 1901, § 3238; Indiana, Burns' St., 1901, § 395; Iowa, Code, 1897, § 3598; Kentucky, Code, 1895, § 130; Minnesota, St., 1894, § 5263; Missouri, Rev. St., 1899, § 656; Montana, Code, 1895, § 771; North Dakota, Rev. Codes, 1899, § 5294; Ohio, Bates' St., § 5295; Oklahoma, St., 1893, § 4012; South Carolina, Code, 1893, § 191; South Dakota, Ann. St., 1901, § 6141; Utah, Rev. St., 1898, § 3002; Washington, Bal. Code, § 4950; Wisconsin, St., 1898, § 2670; Wyoming, Rev. St., 1899, § 3737.]

[3] New York, § 171 (541); Kansas, § 135; Nebraska, § 140; California, § 471; Oregon, § 96; North Carolina, § 130.

[Arkansas, Sand. & Hill's Dig., § 5766; Idaho, Code Civ. Pro., 1901, § 3239; Indiana, Burns' St., 1901, § 396; Iowa, Code, 1897, § 3599; Kentucky, Code, 1895, § 131; Minnesota, St., 1894, § 5264; Montana, Code, 1895, § 772; North Dakota, Rev. Codes, 1899, § 5295; Ohio, Bates' St., § 5296; Oklahoma, St., 1893, § 4013; South Carolina, Code, 1893, § 192; South Dakota, Ann. St., 1901, § 6142; Utah, Rev. St., 1898, § 3003; Washington, Bal. Code, § 4951; Wisconsin, St., 1898, § 2671; Wyoming, Rev. St., 1899, § 3738.]

[4] New York, § 172 (542, 543, 497); Kansas, § 136; Nebraska, § 141; California, § 472; Oregon, § 97; North Carolina, § 131.

[Arizona, Rev. St., 1901, § 1288; Arkansas, Sand. & Hill's Dig., § 5767; Colorado, Code, 1890, § 73; Connecticut, Gen. St., 1902, § 639; Idaho, Code Civ. Pro., 1901, § 3240; Indiana, Burns' St., 1901, § 397; Iowa, Code, 1897, § 3560; Kentucky, Code, 1895, § 132; Minnesota, St., 1894, § 5265; Missouri, Rev. St., 1899, § 661; Montana, Code, 1895, § 773; Nevada, Comp. Laws, 1900, § 3162; North Dakota, Rev. Codes, 1899, § 5296; Ohio, Bates' St., § 5111; Oklahoma, St., 1893, § 4014; South Carolina, Code, 1893, § 193; South Dakota, Ann. St., 1901, § 6143; Utah, Rev. St., 1898, § 3004; Wisconsin, St., 1898, § 2685; Wyoming, Rev. St., 1899, § 3585.]

These provisions are substantially the

addition to this privilege of voluntary amendment accorded to the parties, the court itself may, on motion, amend a pleading, or permit it to be amended, at any stage of the cause, before and in most of the States, after the judgment, on such terms as may be proper. This authority is conferred in very broad terms, with the limitation, however, that the cause of action or defence shall not be substantially changed.[1] Finally, all the codes contain the following most righteous provision, which, as appears by their reported decisions, is treated by the courts of some States as though it were a legislative command binding upon them: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."[2]

same, except in respect to the time within which the amendment can be made; they all permit one such amendment by the party of his own pleading, as a matter of course.

[1] New York, § 173 (723); California, § 473; North Carolina, § 132.

[Arizona, Rev. St., 1901, § 1288, at any stage of the action; Arkansas, Sand. & Hill's Dig., § 5769, at any time; Colorado, Code, 1890, § 75, without limitation as to time; Connecticut, Gen. St., 1902, § 639, — at any time, § 645, — after default before final judgment, § 646, — from contract to tort, and *vice versa*, § 647, — from equitable to legal cause, and *vice versa*; Idaho, Code Civ. Pro., 1901, § 3241, without limitation as to time; Indiana, Burns' St., 1901, § 399, at any time; Iowa, Code, 1897, § 3600, at any time; Kansas, Code, 1901, § 139, before or after judgment; Kentucky, Code, 1895, § 134, at any time; Minnesota, St., 1894, § 5266, before or after judgment; Missouri, Rev. St., 1899, § 657, at any time before final judgment, § 660, — after final judgment; Montana, Code, 1895, § 774, without limitation as to time; Nebraska, Code, 1901, § 144, either before or after judgment; Nevada, Comp. Laws, 1900, § 3163, without limitation as to time; North Dakota, Rev. Codes, 1899, § 5297, before or after judgment; Ohio, Bates' St., § 5114, before or after judgment; Oklahoma, St., 1893, § 4017, before or after judgment; Oregon, Hill's Laws, § 101, at any time before trial, § 102, — allowing court to enlarge time limited by code; South Carolina, Code, 1893, § 194, before or after judgment; South Dakota, Ann. St., 1901, § 6144, before or after judgment; Utah, Rev. St., 1898, § 3005, without limitation as to time; Washington, Bal. Code, § 4953, without limitation as to time; Wyoming, Rev. St., 1899, § 3588, before or after judgment; Wisconsin, St., 1898, § 2830, at any stage of the action, before or after judgment.]

The following is the clause as found in all the codes substantially, and exactly in most of them. The court may at any time "amend any pleading or proceeding by adding or striking out the name of any party; or by correcting a mistake in the name of any party, or a mistake in any other respect; or by inserting allegations material to the case; or, when the amendment does not substantially change the claim or defence, by conforming the pleading or proceeding to the facts proved."

[2] Nebraska, § 145; Kansas, § 140; Oregon, § 104; North Carolina, § 135.

[Arizona, Rev. St., 1901, § 1293; Arkansas, Sand. & Hill's St., § 5772; California, § 475, somewhat more specific; Colorado, Code, 1890, § 78; Idaho, Code Civ. Pro., 1901, § 3243; Indiana, Burns' St., 1901, § 401; Iowa, Code, 1897, § 3601; Kentucky, Code, 1895, § 134; Minnesota, St., 1894, § 5269; Missouri, Rev. St.,

§ 330. *436. **Order of Proposed Treatment.** In the important discussions based upon the foregoing statutory provisions, which will form the substance of the present chapter, the natural and scientific order of treatment would undoubtedly lead me first to develop the general and essential principles upon which the whole reformed theory of pleading is based, and afterwards to apply these principles in determining the rules that regulate the matter and form of the plaintiff's complaint or petition. Scientific method must, however, be sometimes abandoned from considerations of convenience and expediency; and such a course seems to be proper in this instance. In attempting to obtain a correct notion of the essential principles and doctrines of the new system, it will be necessary to fix the meaning of certain terms and phrases used in all the codes; and it so happens, from the course of judicial decisions involving the question, that these very terms and phrases can be most advantageously examined, and most easily interpreted, in connection with the particular subject of "The Joinder of Causes of Action." The entire discussion will, therefore, be rendered simpler, and useless repetition will be avoided, by adopting the arrangement thus suggested. In pursuing this plan, the subject-matter of the chapter will be separated into the following general divisions: (1) The joinder of different causes of action in one proceeding; (2) the essential principles which lie at the foundation of the reformed system of pleading; (3) the general doctrines and practical rules deduced from these principles, which determine and regulate both the external form and the substance of the plaintiff's complaint or petition.

1899, § 659; Montana, Code, 1895, § 778; Nevada, Comp. Laws, 1900, § 3166; New York, Code Civ. Pro., § 721, enumerating twelve classes of defects which shall not effect the judgment; North Dakota, Rev. Codes, 1899, § 5300; Ohio, Bates' St., § 5115; Oklahoma, St., 1893, § 4018; South Carolina, Code, 1893, § 197; South Dakota, Ann. St., 1901, § 6147; Utah, Rev. St., 1898, § 3008; Washington, Bal. Code, § 4957; Wisconsin, St., 1898, § 2829; Wyoming, Rev. St., 1899, § 3589.]

The foregoing are all the general provisions relating to the plaintiff's pleading, or to the theory of pleading as a whole: those relating to the defendant's pleading, to the reply, and to the joinder of causes of action, are given hereafter. In a few of the codes, especially in those of Iowa, Indiana, and Missouri, there are certain special clauses prescribing what may be proved under the answer of denial, and what must be pleaded as new matter, or referring to some mere points of detail: as these clauses are all embraced by implication in the more general provisions common to all the codes, and thus make no change in the law of the States where they are found, they are surplusage, and I have not quoted them. Strunk *v.* Smith, 36 Wis. 631.

SECTION SECOND.

JOINDER OF CAUSES OF ACTION.

§ 331. * 437. **Subdivisions for Discussion herein.** The discussion of this important subject will be separated into the following subdivisions: I. The statutory provisions found in the various State codes. II. The forms and modes in which a misjoinder may occur, and the manner in which it must be objected to and corrected. III. The legal import of the term "cause of action," and the case discussed in which only a single cause of action is stated, although several different remedies, or kinds of relief, are demanded. IV. The legal import of the term "transaction;" discussion of the case of "causes of action arising out of the same transaction, or transactions connected with the same subject of action." V. Instances in which the proper joinder of causes of action is connected with the proper joinder of defendants; discussion of the provision that all the causes of action must affect all of the parties. VI. Instances in which all the causes of action are against the single defendant, or against all the defendants alike; and the only question is, whether the case falls within any one of the several specified classes, except the first which embraces those arising out of the same transaction, etc. These subdivisions, I think, entirely exhaust the particular subject-matter to which this section is devoted.

I. *The Statutory Provisions.*

§ 332. * 438. **Language of the Codes herein.** The provision, which is found substantially the same — with very slight modifications, if any — in most of the codes, is as follows: "The plaintiff may unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both,[1] when they all arise out of, 1. The same transaction, or transactions connected with the same subject of

[1] [Preferred Accident Ins. Co. *v.* Stone (1899), 61 Kan. 48, 58 Pac. 986; Haskell Co. Bank *v.* Bank of Santa Fé (1893), 51 Kan. 39, 32 Pac. 624. But see Pietsch *v.* Krause (1903), 116 Wis. 344, 93 N. W. 9; Reeg *v.* Adams (1902), 113 Wis. 175, 87 N. W. 1067; Swihart *v.* Harless (1896), 93 Wis. 211, 67 N. W. 413; Blakely *v.* Smock (1897), 96 Wis. 611, 71 N. W. 1052; Lane *v.* Dowd (1903), 172 Mo. 167, 72 S. W. 632; Plankinton *v.* Hildebrand (1895), 89 Wis. 209, 61 N. W. 839.]

action; 2. Contract, express or implied; or, 3. Injuries, with or without force, to person and 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.[1]

"But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.[2]

[1] [Bosworth *v.* Allen (1901), 168 N. Y. 157, 61 N. E. 163. "The cause of action to set aside the contract may properly be united with the cause of action to compel an accounting for the injurious results of the arrangement of which it is a part, since both causes of action were founded upon claims against trustees, arising by operation of law."]

[2] [State *v.* Krause (1897), 58 Kan. 651, 50 Pac. 882 (cause of action on one bond of county treasurer cannot be joined with cause of action on another bond where sureties are different); Barry *v.* Wachosky (1899), 57 Neb. 534, 77 N. W. 1080. The facts in this case were as follows: James M. Barry, J. M. Brannan, and C. D. Ryan made their non-negotiable promissory note, and delivered the same to D. F. Clarke, who was payee of the same. The latter, before maturity of the note, seems to have sold and delivered it to the plaintiff, and before doing so "wrote his name across the back of the note, and over that he recited in writing that he guaranteed the payment of the note." Wachosky brought suit on the note making Barry, Brannan, Ryan, and Clarke defendants. In the opinion the court, among other things, said: "In the case at bar Clarke did write over his signature on this note a guaranty of payment, and by so doing he became liable to Wachosky as a guarantor of this note. But the makers of the note were not parties to this contract of guaranty. . . . Wachosky has, perhaps, two causes of action. One cause of action is on the note and against the makers thereof. The other cause of action is against Clarke on his guaranty of payment. These two causes of action cannot be united, for the obvious reason that each one does not affect all the parties to the action." Plankinton *v.* Hildebrand (1895), 89 Wis. 209, 61 N. W. 839; Gunderson *v.* Thomas (1894), 87 Wis. 406, 58 N. W. 750; A. T. & S. F. Rld. Co. *v.* Commr's of Sumner Co. (1893), 51 Kan. 617, 33 Pac. 312; Draper *v.* Brown (1902), 115 Wis. 361, 91 N. W. 1001; Stewart *v.* Rusengren (1902), — Neb. —, 92 N. W. 586; Hughes *v.* Hunner (1895), 91 Wis. 116, 64 N. W. 887; Blakely *v.* Smock (1897), 96 Wis. 611, 71 N. W. 1052; Egaard *v.* Dahlke (1901), 109 Wis. 366, 85 N. W. 369; Hilton *v.* Hilton's Adm'r (1901), — Ky. —, 62 S. W. 6; Clayton *v.* City of Henderson (1898), 103 Ky. 228, 44 S. W. 667; Thelin *v.* Stewart (1893), 100 Cal. 372, 34 Pac. 861; Jamison *v.* Culligan (1899), 151 Mo. 410, 52 S. W. 224; Kruczinski *v.* Neuendorf, 99 Wis. 264, 74 N. W. 974; Anderson *v.* Scandia Bank (1893), 53 Minn. 191, 54 N. W. 1062; Carrier *v.* Bernstein (1898), 104 Ia. 572, 73 N. W. 1076; McDonald *v.* Second Nat. Bank (1898), 106 Ia. 517, 76 N. W. 1011 (where the misjoinder resulted from the causes of action being triable in different counties); Morton *v.* Western Union Tel. Co. (1902), 130 N. C. 299, 41 S. E. 484; Plankinton *v.* Hildebrand (1895), 89 Wis. 209, 61 N. W. 839; Budde *v.* Rebenack (1896), 137 Mo. 179, 38 S. W. 910; Estep *v.* Hammons (1898), 104 Ky. 144, 46 S. W. 715; Hawarden *v.* The Youghiogheny & Lehigh Coal Co. (1901), 111 Wis. 545, 87 N. W. 472.]

"In actions to foreclose mortgages, the court shall have power to adjudge and direct payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant, or obligation, of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises, against such other person, and may enforce such judgment as in other cases." [1]

[1] [*Arizona.* "Only such causes of action may be joined as are capable of the same character of relief. Actions ex contractu shall not be joined with actions ex delicto. In actions ex delicto there shall not be joined actions to recover for injuries to the person, to property, or to character; but they shall be sued for separately." Rev. St., 1901, § 1291.

Arkansas. "Several causes of action may be united in the same complaint, where each affects all the parties to the action, may be brought in the same county, be prosecuted by the same kind of proceedings, and all belong to one of the following classes: (1) Claims arising out of contract, express or implied; (2) Claims for the recovery of specific real property, and the rents, profits, and damages for withholding the same; (3) Claims for the recovery of specific personal property, and damages for the taking or withholding the same; (4) Claims for partition of real or personal property, or both; (5) Claims arising from injuries to character; (6) Claims arising from injuries to person and property; (7) Claims against a trustee by virtue of a contract or by operation of law." Sand. & Hill's Dig., § 5703.

California. "The plaintiff may unite several causes of action in the same complaint, where they all arise out of: [(1) A single act committed by the defendant, or several such acts constituting but a single transaction]. (1) [2] Contracts, express or implied; (2) [3] Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; (3) [4] Claims to recover specific personal property, with or without damages for the withholding thereof; (4) [5] Claims against a trustee by virtue of a contract or by operation of law; (5) [6] Injuries to character; (6) [7] Injuries to person; (7) [8] Injuries to property. The causes of action so united must all [, except in the cases mentioned in subdivision one,] belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person." The portions inclosed in brackets are the portions added by the Commissioners' Amendment of 1901. See Lewis *v.* Dunne (1901), 134 Cal. 291, sustaining technical objections to the constitutionality of the amended code. Code Civ. Pro., § 427. The paragraph of the text relative to foreclosure suits is found in different form in § 726.

Colorado. "The plaintiff may unite several causes of action in the same complaint, when they all arise out of any one of the following named classes: *Provided,* They affect all of the same parties, both plaintiff and defendant, and affect them in the same character and capacity; *and provided,* they do not require different places of trial, to wit: *Class First* — Actions to recover specific real property, whether the same be claimed by virtue of superiority of title or by superiority of possessory right, or on account of unlawful detainer or forcible entry; and with such claims may be united any and all

§ 333. *439. **Features Common to many Codes. States in which these Features are wanting.** The scheme contained in all these codes is marked by certain common features, which should

claims for damages, for rents in arrear, for profits during any unlawful occupation thereof, and for any waste committed thereon. *Provided*, That all such claims arise from the same property for the recovery of which the suit is brought. *Class Second* — Action to recover specific personal property with which may be joined any and all claims for damages for the unlawful detention of the same, or for the forcible taking of the same, including, in proper cases, claims for exemplary damages, and in case the property cannot be recovered in specie, damages for the unlawful conversion thereof. *Class Third* — All actions sounding only in damages, whether the same be for breach of contract, sealed or parol, express or implied, or for injuries to property, person or character, or for any two or more of these causes, and in all cases it shall be necessary to state separately in the complaint the different causes for which the action is brought, and in all cases equitable relief may be granted." § 70. For provisions relative to foreclosure suits, see § 252.

Connecticut. "In every civil action not brought before a justice of the peace, the plaintiff may include in his complaint both legal and equitable rights and causes of action, and demand both legal and equitable remedies; but where several causes of action are united in the same complaint they must all be brought to recover either (1) upon contract, express or implied; or (2) for injuries, with or without force, to person and property, or either, including a conversion of property to defendant's use; or (3) for injuries to character; or (4) upon claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or (5) upon claims to recover personal property specifically, with or without damages for the withholding thereof; or (6) claims arising by virtue of a contract or by operation of law, in favor of or against a party, in some representative or fiduciary capacity; or (7) upon claims, whether in contract, or tort, or both, arising out of the same transaction or transactions connected with the same subject of action. The several causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages or liens, must affect all the parties to the action, and not require different places of trial, and must be separately stated; and in all cases where several causes of action are joined in the same complaint, or as matter of counter-claim or set-off, in the answer, if it appear to the court that they cannot all be conveniently heard together, the court may order separate trials of any such causes of action, or may direct that any one or more of them be expunged from the complaint or answer." Gen. St., 1902, § 613.

Georgia. "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." Code, 1895, § 4944.

Idaho. Identical with the provisions of the California Code without the portions added by the Commissioners' Amendment of 1901. Code Civ. Pro., 1901, § 3205. For provisions relative to foreclosure suits see § 3331.

Indiana. "The plaintiff may unite several causes of action in the same complaint, when they are included in either of the following classes: *First.* Money demands on contract. *Second.* Injuries to property. *Third.* Injuries to person or character. *Fourth.* Claims to recover the possession of personal property, with or without damages for the withholding thereof, and for injuries to the property withheld. *Fifth.* Claims to recover the possession of real property, with or without damages, rents and profits for the withholding thereof, and for waste or damage done to the land; to make partition of and to determine and quiet the title to real property. *Sixth.* Claims to enforce the specific performance of contracts, and to avoid contracts for fraud

be noticed; namely, the express provision for the uniting of legal and equitable causes of action, and the exceedingly general and

or mistakes. *Seventh.* Claims to foreclose mortgages; to enforce or discharge specific liens; to recover personal judgment upon the debt secured by such mortgage or lien; to subject to sale real property upon demands against decedents' estates, when such property has passed to heirs, devisees, or their assigns; to marshal assets; and to substitute one person to the rights of another; and all other causes of action arising out of a contract or a duty, and not falling within either of the foregoing classes. But causes of action so joined must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered." Burns' St., 1901, § 279.

Iowa. "Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, if held by the same party, and against the same party, in the same rights, and if action on all may be brought and tried in that county, may be joined in the same petition; but the court may direct all or any portion of the issues joined to be tried separately, and may determine the order thereof." Code, 1897, § 3545.

Kansas. The enumeration of classes is identical with that given in the text, followed by this clause: "But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens." Code, § 83, Gen. St., 1901, § 4517.

Kentucky. Identical, with very slight verbal changes, with the Arkansas statute, exclusive of subdivision 7. Code, 1895, § 83.

Minnesota. Identical with the provisions of the text, except that, in the second paragraph, the words "except in actions for the foreclosure of mortgages" are omitted. St., 1894, § 5260. Third paragraph wanting.

Missouri. The enumeration of classes is identical with that given in the text except the seventh class, which is as follows: "Claims by or against a party in some representative or fiduciary capacity, by virtue of a contract or by operation of law," followed by this clause: "But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished." Rev. St., 1899, § 593.

Montana. Identical with the provisions of the California Code without the portions added by the Commissioners' Amendment of 1901, except that the second paragraph reads as follows: "The causes of action so united must all appear on the face of the complaint to belong," etc., the remainder being identical with the California provision. Code, 1895, § 672.

Nebraska. The enumeration of classes is identical with that given in the text, except that the order of classes 5 and 6 is reversed, the enumeration being followed by this clause: "The causes of action so united, must affect all the parties to the action, and not require different places of trial." Code, 1901, §§ 87, 88.

Nevada. Identical with the provisions of the California Code, without the portions added by the Commissioners' Amendment of 1901, with very slight verbal changes. Comp. Laws, 1900, § 3159.

New York. "The plaintiff may unite, in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows: (1) Upon contract, express or implied; (2) For personal injuries, except libel, slander, criminal conversation, or seduction; (3) For libel or slander; (4) For injuries to real property; (5) Real property, in ejectment, with or without damages for the withholding thereof; (6) For injuries to personal property; (7) Chattels, with or without damages for the taking or detention thereof; (8) Upon claims against a trustee, by virtue of a contract, or by operation of law; (9) Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included

vague clause permitting the union of causes of action arising out of the same transaction, or transactions connected with the same

within one of the foregoing subdivisions of this section; (10) For penalties incurred under the fisheries, game and forest laws. But it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial." Code Civ. Pro., § 484, as amended Laws, 1877, c. 416, and Laws, 1900, c. 590.

North Carolina. Identical with the provisions given in the text. § 126.

North Dakota. Identical with the provisions given in the text, except that the words "or waste committed thereon" are added to the fifth subdivision. Rev. Codes, 1899, § 5291.

Ohio. "The plaintiff may unite several causes of action in the same petition, whether they are such as have heretofore been denominated legal or equitable, or both, when they are included in either of the following classes: (1) The same transaction; (2) Transactions connected with the same subject of action; (3) Contracts, express or implied; (4) Injuries to person and property, or to either; (5) Injuries to character; (6) Claims to recover the possession of personal property, with or without damages for the withholding thereof; (7) Claims to recover real property, with or without damages for the withholding thereof, the rents and profits of the same, and the partition thereof; (8) Claims to foreclose a mortgage given to secure the payment of money or to enforce a specific lien for money, and to recover a personal judgment for the debt secured by such mortgage or lien; (9) Claims against a trustee, by virtue of a contract, or by operation of law." Bates' St., 1903, § 5058.

Oklahoma. The enumeration of classes is identical with that of the text, except that the order of classes 5 and 6 is reversed, and the enumeration is followed by this clause: "But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens." St., 1893, § 3961.

Oregon. "The plaintiff may unite several causes of action in the same complaint when they all arise out of — (1) Contract, express or implied; (2) Injuries, with or without force, to the person; (3) Injuries, with or without force, to property; (4) Injuries to character; (5) Claims to recover real property, with or without damages for the withholding thereof; (6) Claims to recover personal property, with or without damages for the withholding thereof; (7) Claims against a trustee, by virtue of a contract or by operation of law. But the causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated." Hill's Laws, § 93.

South Carolina. Identical in all respects with all three paragraphs given in the text. Code, 1893, § 188.

South Dakota. Identical in all respects with the three paragraphs given in the text, except that to class 5 are added the words "or for waste committed thereon." Ann. St., 1901, § 6138.

Utah. Identical with the first two paragraphs of the text, except that to class 5 are added the words "or waste committed thereon." Paragraph three of text, respecting mortgage foreclosures, is wanting. Rev. St., 1898, § 2961.

Washington. The enumeration of classes is identical with the statute of Oregon, and is followed by this clause, "But the causes of action so united must affect all the parties to the action, and not require different places of trial, and must be separately stated." Bal. Code, § 4942.

Wisconsin. Identical with the first two paragraphs of the text, except that the words, "except in actions for the foreclosure of mortgages," are omitted from the second paragraph. St., 1898, § 2647.

Wyoming. The enumeration of classes is identical with that of the text, except that the order of classes 5 and 6 is reversed, the enumeration being followed

subject of action. In a few States these peculiar features are wanting; while the other classes of causes of action which may be joined are substantially the same as provided in the arrangement already given. This is the case in Kentucky, in Oregon, and in California.[1] It should be remembered that in Kentucky and in Oregon [also in Iowa and Arkansas] a slight distinction between legal and equitable proceedings is preserved; and this fact, doubtless, accounts for the form of the provision in the codes of those States. No such distinction remains in California, and, as has been seen in a former chapter, legal and equitable causes of action may be united, according to the established procedure in that State, notwithstanding the omission in the clause expressly regulating such joinder.

§ 334. *440. **Departures from Original Type.** In other States, the original type set forth in the New York code has been widely departed from. Thus, in Indiana, an attempt is made to enumerate and arrange the particular classes of equitable as well as legal causes of action which may be joined. In Iowa the departure from the common type and the changes of the common law are much wider, and more radical. The code of that State, as do the codes of Kentucky and of Oregon, retains some slight separation between legal and equitable actions, but permits all possible actions that are legal, or all that are equitable, to be united in one petition. The only requirement in reference to their nature is, that all causes of action so united must be in the same kind of proceedings; that is, all legal, or all equitable.

§ 335. *441. **Scope and Meaning of Statutory Provisions. Difficulties of Interpretation.** These various statutory provisions will be examined, and the judicial interpretation put upon them will be ascertained, in a subsequent portion of the present section. Their general scope and meaning, however, are very plain. Excepting in Iowa, a plaintiff may unite different causes of action in the one complaint or petition, under the following restrictions: They must affect all the parties; they must all be triable in the same county; and they must all belong to one of the various specified classes. The result is, that all the causes of action so

by this section, "The causes of action so united must not require different places of trial, and, except as otherwise provided, must affect all the parties to the action." Following this is a section relative to mortgage foreclosures in some respects similar to that given in the text. Rev. St., 1899, §§ 3493, 3494, 3495.]

[1] [Lamb *v.* Harbaugh (1895), 105 Cal. 680, 39 Pac. 56.]

united must be either upon contract, or for injuries to person or property, and the like, unless they all arise out of the same transaction, or transactions connected with the same subject of action. This latter exception does not, as has been seen, prevail in a few of the States; but, where it does prevail, the most incongruous and dissimilar causes of action may be joined, if they arise out of the same transaction, or transactions connected with the same subject of the action, within the meaning of that phrase.[1] It is evident that very little difficulty can arise in interpreting and applying most of the classes. The real doubts and uncertainties grow out of (1) the confounding the reliefs demanded by the plaintiff with the cause of action upon which such demand is based; and this confusion is more apt to exist in equity causes, and especially in those where legal relief is prayed for as well as equitable; (2) the clause permitting the joinder of causes of action arising out of the same transaction, etc. "Transaction" has had no technical legal meaning, and is a word of very vague import at best; but this vagueness is largely increased by the additional clause which permits causes of action arising out of transactions connected with the same subject of action to be united. These are the two chief, and almost only, sources of doubt in the practical construction of the passage in question. The first one — the liability of confounding the reliefs demanded with the causes of action — may, of course, be avoided by the exercise of care and discrimination: the second is much more embarrassing, and it is hardly possible that all doubt should ever be removed from the legal meaning of the language.

II. *The Forms and Modes in which a Misjoinder may occur, and the Manner in which it must be objected to and corrected.*

§ 336. *442. **Separate Statement of Different Causes of Action.** All of the codes require that the different causes of action should be separately stated. In other words, each must be set forth in a separate and distinct division of the complaint or

[1] [Pollock *v.* Association (1896), 48 S. C. 65, 25 S. E. 977, quoting the text. Willey *v.* Nichols (1898), 18 Wash. 528, 52 Pac. 237, to the effect that "an action against the principal and sureties upon an injunction bond for the penalty therein named and against the principal in a further sum for maliciously instituting the injunction proceeding for the purpose of harassing and injuring plaintiffs is demurrable on the ground of misjoinder of actions, one being based on contract, the other on tort."]

petition, in such a manner that each of these divisions might, if taken alone, be the substance of an independent action. In fact, the whole proceeding is the combining of several actions into one. At the common law, these separate divisions of the declaration were termed "counts;" and that word is still used by text-writers and judges, although, with one or two exceptions, it is not authorized by the codes; and it tends to produce confusion and misapprehension, since the common-law "count" was substantially a very different thing from the "cause of action" of the new procedure. In one or two States, the term "paragraph" is used to designate these primary divisions. The difficulty in the use of this term is that it is now very generally used in England, and in most of the States where the reformed system prevails, to designate the short sub-divisions, or allegations, of facts into which each cause of action is separated, according to a mode of pleading which has become very common. The term "cause of action" is perhaps as proper as any which can be used for the purpose. That such a separation should be made, and that each distinct cause of action should be stated in a single and independent division, so that the defendant may answer or demur to it without any confusion with others, is plainly indispensable to an orderly system of pleading, and is expressly required by all the codes;[1] and in some of the States the courts have strictly enforced the requirement, and have thereby done much to prevent the formal presentations of the issues to be tried from falling into that confused and bungling condition which exists to so great an extent in certain of the States.

§ 337. * 443. How Question of Misjoinder of Causes of Action is raised. Effect of Sustaining Demurrer upon this Ground. The special provisions respecting the manner of raising an objection to a misjoinder of causes of action, and the effect thereof, are as follows: In all the codes but two, it is prescribed that the defendant may demur to the complaint, or petition, if it shall appear on the face thereof that several causes of action have been improperly united; that, if the error does not so appear, the objection may be taken by the answer; and that, if not taken in either of these modes, it is waived.[2] The sustaining of a de-

[1] [Maisenbacker *v.* Society Concordia (1899), 71 Conn. 369, 42 Atl. 67.]

[2] See these provisions, collected in the text or notes, *supra*, § *433. These rules are identical with those which regulate the method of objecting to a defect of parties; and the decisions already cited (§§ *206, *207, *287), of course, apply to

murrer upon this ground is not fatal to the action in all the States. Several codes contain the very just provision, that, when such a demurrer is sustained, the court may simply order the action to be divided into as many as may be necessary for the proper hearing and determination of the causes of action set forth in the original pleading.[1] The plaintiff is thus not thrown out of court in respect of any of the causes of action alleged by him; he is merely required to separate the single cause into the number of independent suits which he should have originally brought.[2]

§ 338. *444. **Effect of Misjoinder in some States.** In one or two States a misjoinder is attended with even less serious consequences than this, the sole object of the statutory provision on the subject being to secure a trial of each cause of action before the proper tribunal. In Iowa there can be no misjoinder, properly so called, except by uniting a legal and an equitable cause of action. Still, if two legal causes are so utterly incongruous as to prevent a trial of them together, the court may order them to be tried separately. The clauses of the Iowa code are found in the foot-note.[3] The provisions of the Kentucky code, in reference to

the present subject-matter. If the objection appears on the face of the pleading, it *must* be raised by demurrer, and not by answer; and this is substantially the same as saying that it must always be raised by demurrer, because the misjoinder will *always* appear on the face of the pleading. See James *v.* Wilder, 25 Minn. 305; Mead *v.* Brown, 65 Mo. 552; Finley *v.* Hayes, 81 N. C. 368; Boon *v.* Carter, 19 Kans. 135; Keller *v.* Boatman, 49 Ind. 104; Rankin *v.* Collins, 50 id. 158; Hardy *v.* Miller, 11 Neb. 395.

[Gardner *v.* Gardner (1896), 23 Nev. 207, 45 Pac. 139; Smith *v.* Putnam (1900), 107 Wis. 155, 82 N. W. 1077; Porter *v.* Sherman County Banking Co (1893), 36 Neb. 271, 54 N. W. 424; Beale *v.* Barnett's Ad'm (1901), Ky., 64 S. W. 838; Murray *v.* Booker (1900), Ky., 58 S. W. 788; Sickman *v.* Wollett (1903), — Colo. —, 71 Pac. 1107; Ross *v.* Wait (1894), 4 S. D. 584, 57 N. W. 497; Corbett *v.* Wrenn (1894), 25 Ore. 305, 35 Pac. 658.]

[1] [Ohio, Bates' St., 1900, § 5065; Wisconsin, St., 1898, § 2686; North Carolina, Code, § 272;] New York, § 172 (497); Nebraska, § 97; Kansas, § 92; South Carolina, § 195. See Alexander *v.* Thacker, 30 Neb. 614.

[2] [Solomon *v.* Bates (1896), 118 N. C. 311, 24 S. E. 746: Where a demurrer for misjoinder of causes is well founded, the action should not be dismissed but simply divided (Code, § 272). But where there is a misjoinder both of causes and parties, the action cannot be divided under this section of the code: Cromartie *v.* Parker (1897), 121 N. C. 198, 28 S. E. 297; Morton *v.* Western Union Tel. Co. (1902), 130 N. C. 299, 41 S. E. 484. See also Matthews *v.* Bank (1901), 60 S. C. 183, 38 S. E. 437; Weeks *v.* McPhail (1901), 128 N. C. 134, 38 S. E. 292.

Gattis *v.* Kilgo (1899), 125 N. C. 133, 34 S. E. 246: Where a demurrer is sustained on the ground of misjoinder of causes of action, it is within the *discretion* of the judge to allow an amendment, and if such amendment is not made it becomes the *duty* of the judge to divide the action on the docket for separate trials.]

[3] [Iowa, Code of 1897, § 3546: "The plaintiff may at any time before the final submission of the case to the jury or to the court when the trial is by the court,

the remedy for a misjoinder, are similar to those of Iowa.[1] The practice in Indiana differs from that which prevails in the States generally, and also from that established in Iowa. A demurrer for misjoinder is permitted; but its effect can never be fatal to the action. In fact, the matter seems to be practically left in the discretion of the lower or trial court, and any disposition of the objection to a misjoinder made by it cannot be assigned as error so as to reverse a judgment on review. The sections of the Indiana code are quoted in the note.[2]

strike from his petition any cause of action or part thereof." § 3547: "The court, at any time before the answer is filed, upon motion of the defendant, shall strike out of the petition any cause or causes of action improperly joined with others." § 3548: "All objections to the misjoinder of causes of action shall be waived, unless made as provided in the last preceding section." § 3549: "When a motion is sustained on the ground of misjoinder of causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in his discretion, to file several petitions, each including such of said causes of action as may be joined, and an action shall be docketed for each of said petitions, and the causes shall be proceeded in without further service, the court fixing by order the time of pleading therein."]

This mode of procedure is simple, and eminently just, and sweeps away a mass of technical defences which still disfigure the pure ideal of the American system in many States. For a construction of these provisions, see Hinkle *v.* Davenport, 38 Iowa, 355, 358; Cobb *v.* Ill. Cent. R. Co., 38 Iowa, 601, 616; Grant *v.* McCarty, 38 Iowa, 468.

[But see McDonald *v.* Second Nat. Bank (1898), 106 Ia. 517, 76 N. W. 1011, where it was held that under Code, § 3545, providing that "Causes of action of whatever kind, . . . if action on all may be brought and tried in that county, may be joined in the same petition," there is a misjoinder of causes of action when foreclosure is sought in one petition of mortgages on two different pieces of land, securing the same debt, one piece of land being in the county of venue and the other in another county. See also Wedgewood *v.* Parr (1900), 112 Ia. 514, 84 N. W. 528, where it was held that where a petition claimed judgment on a note with interest and possession of wheat, there was a misjoinder of causes under the Code, § 4164, providing that, in actions of replevin, there could be no joinder of any cause of action not of the same kind.]

[1] [Kentucky, Code, §§ 84, 85, 86;] Sale *v.* Critchfield, 8 Bush, 636, 646. The defendant must move before answer that plaintiff elect between the causes of action, and strike out the others; if no such motion is made, the objection is waived. The same rule prevails as to the misjoinder of parties, which is never ground of demurrer; defendant must move to strike out the improper parties, or else waive all objection. Dean *v.* English, 18 B. Mon. 132; Yeates *v.* Walker, 1 Duv. 84.

[2] [Burns' Indiana St., 1901, § 342.] "The defendant may demur to the complaint when it appears upon the face thereof, . . . 6th, that several causes of action have been improperly joined. § 343. When a demurrer is sustained on the ground of several causes of action being improperly joined in the same complaint, the court shall order the misjoinder to be noted on the order-book, and cause as many separate actions to be docketed between the parties as there are causes decided by the court to be improperly joined, and each shall stand as a separate action, and the plaintiff shall thereupon file a separate complaint in each of the above cases, to which the defendant shall enter his appearance and plead and go to trial, or suffer a default, in the same manner as in the original action. § 344. No judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes

§ 339. *445. **Motion by Adverse Party Requiring Correction of Pleading.** There is another section found in all the codes, which has an important bearing upon the subject under consideration in some of its aspects, — that which permits the correction of pleadings at the instance of the adverse party on his motion by striking out irrelevant and redundant matter, and by requiring the pleading to be made more definite and certain by amendment where its allegations are so indefinite and uncertain that the precise nature of the charge or defence is not apparent.[1]

§ 340. *446. **Possible Forms of Misjoinder.** Three forms or modes of alleged misjoinder are possible, and they must be examined separately in respect to the manner in which the objection thereto should be taken. They are, (1) When different causes of action which may properly be united are alleged in the one complaint or petition not distinctly and separately as required by the statute, but combined and mingled together in a single statement. (2) When different causes of action which cannot properly be united are alleged in the one complaint or petition, and are separately and distinctly stated. (3) When different causes of action which cannot properly be united are alleged in the one complaint or petition not distinctly and separately, but combined and mingled together in a single statement.[2] These three cases will be examined in order.

§ 341. *447. **First Form of Misjoinder not Ground of Demurrer. Remedy is by Motion.** Although the sections of the codes, defining what causes of action may be united, all require in positive terms that when so joined each must be separately stated,[3] it is settled by the weight of authority, and seems to be the general rule, that a violation of this particular requirement is not a ground of demurrer. This conclusion is based upon the language

of action." "§ 346. Where any of the matters enumerated in § [342] do not appear on the face of the complaint, the objection (except for misjoinder of causes) may be taken by answer." It is plain from the foregoing that the practical effect of a successful demurrer is trivial. It compels the separation of the action, and the trial of two or more suits instead of one. No discretion is left to the court, as in New York, Iowa, and other States; the court *shall* cause the separate actions to be docketed. See Clark *v.* Lineberger, 44 Ind. 223, 227, that no objection can be raised on appeal.

[1] See *supra*, § *434.

[2] [Lewis *v.* Hinson (1902), 64 S. C. 571, 43 S. E. 15 (quoting the text).]

[3] [Not so in Connecticut. See Knapp *v.* Walker (1900), 73 Conn. 459, 47 Atl. 655.

And in South Carolina, by the act of 1898, it is not necessary, in an action *ex delicto*, to make use of separate allegations setting up actual and punitive damages: Machen *v.* Tel. Co. (1902), 63 S. C. 363, 41 S. E. 448.]

of the codes authorizing a demurrer for the reason that causes of action "are improperly united in the complaint or petition."[1] It is said that this expression only points to the case in which causes of action have been embraced in one pleading which could not properly be joined; while in the special case under consideration it is assumed that all the causes of action may be united, and the only error consists in the external form or manner of their joinder. The remedy is, therefore, not by a demurrer, but by a motion to make the pleading more definite and certain by separating and distinctly stating the different causes of action.[2] The

[1] [This ground for demurrer applies to the whole complaint, and not to one of several paragraphs: Gillenwaters *v.* Campbell (1895), 142 Ind. 529, 41 N. E. 1041.]

[2] Bass *v.* Comstock, 38 N. Y. 21; 36 How. Pr. 382, and cases cited; Wood *v.* Anthony, 9 How. Pr. 78; Hendry *v.* Hendry, 32 Ind. 349; Mulholland *v.* Rapp, 50 Mo. 42; Pickering *v.* Miss. Valley Nat. Tel. Co., 47 Mo. 457, 460; House *v.* Lowell, 45 Mo. 381. See Wiles *v.* Suydam, 6 N. Y. Sup. Ct. 292. A different rule formerly prevailed in Missouri, and it was held that the error was not only ground for a demurrer, but even *for a motion in arrest of judgment after verdict!* McCoy *v.* Yager, 34 Mo. 134; Clark's Adm. *v.* Han. & St. Jos. R. Co., 36 Mo. 202; Hoagland *v.* Han. & St. Jos. R. Co., 39 Mo. 451; Farmers' Bank *v.* Bayliss, 41 Mo. 274, 284, per Holmes J. These prior cases, however, are expressly overruled by the more recent decisions of the same court cited above. See also Freer *v.* Denton, 61 N. Y. 492; Sentinel Co. *v.* Thomson, 38 Wis. 489; Riemer *v.* Johnke, 37 id. 258; Hardy *v.* Miller, 11 Neb. 395; but see Watson *v.* San Francisco & H. B. R. Co., 50 Cal. 523. See, further, Townsend *v.* Bogert, 126 N. Y. 370; Ellsworth *v.* Rossiter, 46 Kan. 237; State *v.* Tittmann, 103 Mo. 553. The misjoinder is waived by going to trial without objection: Beers *v.* Kuehn (Wis., Jan. 10, 1893), 54 N. W. Rep. 109. If the plaintiff refuse to separate and distinctly state the different causes of action, it is proper to dismiss the suit, but without prejudice; so held in Eisenhouer *v.* Stein, 37 Kan. 281.

[City of St. Louis *v.* Weitzel (1895), 130 Mo. 600, 31 S. W. 1045; Marvin *v.* Yates (1901), 26 Wash. 50, 66 Pac. 131; Childs *v.* Kansas City, etc. R. R. Co. (1893), 117 Mo. 414, 23 S. W. 373; City Carpet Beating Works *v.* Jones (1894), 102 Cal. 506, 36 Pac. 841 (citing the text); Cargar *v.* Fee (1894), 140 Ind. 572, 39 N. E. 93; Kearney Stone Works *v.* McPherson (1894), 5 Wyo. 178, 38 Pac. 920; Richardson *v.* Carbon Hill Coal Co. (1895), 10 Wash. 648, 39 Pac. 95 (citing the text); A. T. & S. F. R. R. Co. *v.* Comm'rs of Sumner Co. (1893), 51 Kan. 617, 33 Pac. 312; Shrigley *v.* Black (1898), 59 Kan. 487, 53 Pac. 477; Fox *v.* Rogers (1899), 8 Idaho, 710, 59 Pac. 538.

See late case of Lane *v.* Dowd (1903), 172 Mo. 167, 72 S. W. 632, in which the court said: "There is a long and unbroken line of decisions drawing the distinction as to the method of taking advantage of a defective petition. If there are two causes of action that can be united in one petition, but are improperly joined in one count, this defect is reached by a motion, before the trial is begun, to elect upon which cause of action the plaintiff will proceed. If the petition contains two causes of action that are of such character that they cannot legally be joined in one action, then demurrer is the proper pleading to reach the irregularity. This is what the cases cited by appellant hold. Hence, as there is no dispute on that proposition, it is unnecessary to further refer to those cases."

But see Austin, Tomlinson, & Webster M. Co. *v.* Heiser (1894), 6 S. D. 429, 61 N. W. 445, citing the text; Brewer *v.* McCain (1895), 21 Colo. 382, 41 Pac. 822; Jackins *v.* Dickinson (1893), 39 S. C. 436, 17 S. E. 996; Ponca Mill Co. *v.* Mikesell (1898), 55 Neb. 98, 75 N. W. 46, the court

plaintiff can thus be compelled to amend his complaint or petition, and to state each cause of action by itself, so that the defendant may deal with it by answer or demurrer as the nature of the case demands. It seems to be the settled rule in California, however, that the defect may properly be taken advantage of by demurrer.[1]

§ 342. *448. **Remedy when Second Form of Misjoinder occurs.** When causes of action separately stated are improperly united in the same complaint or petition, the rule which prevails in all the States, except in the few whose special legislation has already been described, is the same as that which applies to the case of a defect of parties.[2] If the error appears on the face of the pleading, the defendant must demur, and cannot raise the objection by answer.[3] The statute adds, that, if the error do not thus appear on the face of the pleading, the defence may be presented by the answer. If the defendant omits to use either of these methods

saying: "Moreover, only one cause of action is in form stated. If two were in fact included in the averments, the remedy was by motion to strike out surplusage or to require the two causes to be separately stated. A demurrer does not reach the commingling of two causes of action in a single count, if they be, under the code, of such character that they may be joined." See also Chicago, R. I & Pac. Ry. Co. *v.* O'Neill (1899), 58 Neb. 239, 78 N. W. 521; Building & Loan Assn. *v.* Cameron (1896), 48 Neb. 124, 66 N. W. 1109; Ponca Mill Co. *v.* Mikesell (1898), 55 Neb. 98, 75 N. W. 46; Glover *v.* Remley (1898), 52 S. C. 492, 30 S. E. 405.

A motion to strike out surplusage would also be proper: Ponca Mill Co. *v.* Mikesell (1898), 55 Neb. 98, 75 N. W. 46. But a motion to compel plaintiff to elect on which to stand will not lie: Austin, etc. Co. *v.* Heiser (1894), 6 S. D. 429, 61 N. W. 445. Nor is it ground for dismissing the complaint that with one good cause of action others are mingled: Matthews *v.* Bank (1900), 60 S. C. 183, 38 S. E. 437.

Hayden *v.* Pearce (1898), 33 Ore. 89, 52 Pac. 1049. Where a misjoinder of causes of action appears on the face of the complaint, the plaintiff should be required to elect on which cause he will proceed; but when the defect is not apparent until the judgment is entered a writ of review will lie to correct the error. (Compare with Lane *v.* Dowd, *supra.*) See also Smith *v.* Day (1901), 39 Ore. 531, 65 Pac. 1055, where the court said that a non-suit should be granted for misjoinder of causes. Unless the proper objection is taken by motion, the defect of intermingled counts is waived: Smith *v.* Jones (1902), — S. D. —, 92 N. W. 1084.]

[1] Nevada Cy., etc. Canal Co. *v.* Kidd, 43 Cal. 180, 37 Cal. 282; Watson *v.* San Francisco & H. B. R. Co., 41 Cal. 17, 19; Buckingham *v.* Waters, 14 Cal. 146; White *v.* Cox, 46 Cal. 169. In Wright *v.* Conner, 34 Iowa, 240, 242, it was said: "If through bad pleading two or more distinct causes of action or defences are contained in one division of a petition or answer, which is called a count, a demurrer may be directed at one of them if insufficient at law." In strictness, the objecting party ought first to require, by motion, that the petition or answer be properly divided, or an election made between the causes of action or the defences; but, omitting this, he may demur.

[2] [Dudley *v.* Duval (1902), 29 Wash. 528, 70 Pac. 68; Lane *v.* Dowd (1903), 172 Mo. 167, 72 S. W. 632; see Bandmann *v.* Davis (1899), 23 Mont. 382, 59 Pac. 856.]

[3] [A demurrer for want of sufficient facts will not reach this objection. Marvin *v.* Yates (1901), 26 Wash. 50, 66 Pac. 131.]

properly, he is deemed to have waived the objection. The practical result is, that a demurrer must always be resorted to, or all objection to such misjoinder will be waived.[1] The demurrer may be by any of the defendants;[2] and it must be to the entire complaint or petition, and not to any cause or causes of action supposed to have been improperly joined.[3] To sustain a demurrer for this reason, however, the complaint must contain two or more good grounds of suit which cannot properly be joined in the same action. When a complaint, therefore, consists of two or more counts, and one sets forth a good cause of action, and another does not, although it attempts to do so, the pleading is not demurrable on the ground of a misjoinder, even though the causes of action could not have been united had they been sufficiently and properly alleged.[4]

§ 343. * 449. **Rule in Few States.** In a very few States, however, the practice is different, and a demurrer is not permitted as the remedy for a misjoinder. It is so in Kentucky. The defendant must move to strike out, or to compel the plaintiff to elect which cause of action he will proceed upon, and to dismiss the others; and a failure to make such motion is a complete waiver of the objection. The plaintiff may also at any time before trial withdraw any cause of action.[5] The sections of the Iowa code

[1] Blossom *v.* Barrett, 37 N. Y. 434, 436; Smith *v.* Orser, 43 Barb, 187, 193; Mead *v.* Bagnall, 15 Wis. 156; Jamison *v.* Copher, 35 Mo. 483, 487; Ashby *v.* Winston, 26 Mo. 210; Hibernia Sav. Soc. *v.* Ordway, 38 Cal. 679; Lawrence *v.* Montgomery, 37 Cal. 183. See also Field *v.* Hurst, 9 S. C. 277; Eversdon *v.* Mayhew, 85 Cal. 1; [Ross *v.* Jones (1896), 47 S. C. 211, 25 S. E. 59.]

[2] Ashby *v.* Winston, 26 Mo. 210. If A. and B. are sued together on several causes of action, the joinder of which would have been proper had the suit been against A. alone, A. may demur to the misjoinder of causes of action. Hoffman *v.* Wheelock, 62 Wis. 434.

[3] Bougher *v.* Scobey, 16 Ind. 151, 154; and must be on the specific ground of the misjoinder, — a demurrer for want of sufficient facts does not raise the objection: Cox *v.* West. Pac. R. Co., 47 Cal. 87, 89, 90; Remy *v.* Olds, 88 Cal. 537.

[4] Truesdell *v.* Rhodes, 26 Wis. 215, 219; Bassett *v.* Warner, 23 Wis. 673, 689, 690; Willard *v.* Reas, 26 Wis. 540, 544; Lee *v.* Simpson, 29 Wis. 333; Cox *v.* West. Pac. R. Co., 47 Cal. 87, 89, 90; Sullivan *v.* N. Y., N. H. & H. R. Co., 19 Blatchf. 388; Jenkins *v.* Thomason, 32 S. C. 254.

[5] Forkner *v.* Hart, Stanton's Code, p. 60; Wilson *v.* Thompson, id. p. 60; Hart *v.* Cundiff, id. p. 61; Hord *v.* Chandler, 13 B. Mon. 403; McKee *v.* Pope, 18 id. 548, 555; Bonney *v.* Reardin, 6 Bush, 34; Dragoo *v.* Levi, 2 Duv. 520; Chiles *v.* Drake, 2 Metc. (Ky.) 146; Hancock *v.* Johnson, 1 Metc. (Ky.) 242; Sale *v.* Crutchfield, 8 Bush, 636, 646; Hinkle *v.* Davenport, 38 Iowa, 355, 358; Cobb *v.* Ill. Cent. R. Co., 38 Iowa, 601, 616; Grant *v.* McCarty, 38 Iowa, 468. If the plaintiff refuse to elect, the court cannot therefore dismiss the action, but must make the election for him. Sheppard *v.* Stephens (Ky. 1887), 2 S. W. Rep. 548.

[Arkansas also follows this practice. Riley *v.* Norman, 39 Ark. 158. In For-

quoted in § 338 show that a similar practice exists in that State.

§ 344. *450. **Remedy when Third Case of Misjoinder occurs.** The third case presents some difficulties. When the complaint or petition contains causes of action which cannot properly be united, and they are mingled and combined in the same allegations, — in other words, the pleading *in form* sets forth but one cause of action, while in reality it embraces two or more which cannot be joined in any form, — is the defendant's remedy by demurrer, or by motion in the first instance that the pleading be made more definite and certain by separating the causes of action, and by demurrer when such separation has been accomplished? In Missouri it is definitely settled that the remedy is by demurrer.[1] That this is a proper practice is implied with more or less distinctness by decisions in several other States.[2]

§ 345. *451. **Author's Criticism and Suggestion herein.** There are grave difficulties attendant upon the adoption of such a rule, although it seems to be generally supported by the decided cases. When, upon sustaining a demurrer interposed upon the ground of a misjoinder of causes of action, the action itself is not defeated, but the causes of action improperly united are merely separated, and new actions corresponding with such division are proceeded with, it would seem to be a necessary prerequisite that the causes

dyce *v.* Nix (1893), 58 Ark. 136, 23 S. W. 967, the defendant demurred for misjoinder, but the court considered the demurrer as a motion to strike and as such passed upon its merits. See also Reynolds *v.* Roth (1895), 61 Ark. 317, 33 S. W. 105.]

[1] Mulholland *v.* Rapp, 50 Mo. 42; Ederlin *v.* Judge, 36 Mo. 350; Young *v.* Coleman, 43 Mo. 179, 184; Cheely's Adm. *v.* Wells, 33 Mo. 106, 109. And see Pickering *v.* Miss. Val. N. Tel. Co., 47 Mo. 457; House *v.* Lowell, 45 Mo. 381.

[2] Cary *v.* Wheeler, 14 Wis. 281; Burrows *v.* Holderman, 31 Ind. 412; Lane *v.* State, 27 id. 108, 112; Fritz *v.* Fritz, 23 id. 388, 390; Hibernia Sav. Soc. *v.* Ordway, 38 Cal. 679; Anderson *v.* Hill, 53 Barb. 238. See, however, Rogers *v.* Smith, 17 Ind. 323, per Perkins J., which seems to hold that the remedy should be by motion. That a demurrer is the proper remedy is distinctly held by these later cases: Goldberg *v.* Utley, 60 N. Y. 427, 429; Wiles *v.* Suydam, 64 id. 173; Liedersdorf *v.* Second Ward Bk., 50 Wis. 406; Anderson *v.* Scandia Bk. (Minn., May, 1893), 54 N. W. Rep. 1062; Lamming *v.* Galusha (N. Y. App. 1892), 31 N. E. Rep. 1024.

[Haskell County Bank *v.* Bank of Santa Fé (1893), 51 Kan. 39, 32 Pac. 624. See Lane *v.* Dowd (1903), 172 Mo. 167, 72 S. W. 632; Bandmann *v.* Davis (1899), 23 Mont. 382, 59 Pac. 856, in which the court said: "A motion to exclude evidence or an objection to receiving it, is not the remedy for the intermingling in one count of several causes of action; nor is there remedy other than demurrer, by which the complaint may be attacked upon the ground that causes of action are improperly united." Plankinton *v.* Hildebrand (1895), 89 Wis. 209, 61 N. W. 839.]

of action should have been separately and distinctly stated in the original pleading. To allow the demurrer to a complaint or petition in which several causes of action are mingled up, and to divide this mass of confused allegations into as many complaints as there are causes of action, would seem to be a work of great difficulty, if not of absolute impossibility. Again: it is always difficult if not impossible to determine with exactness whether a complaint or petition does contain two or more different causes of action when the allegations are thus combined into one statement. If the averments are found sufficient to express one cause of action, it may generally be said that the other averments are mere surplusage, which should be rejected on a motion made for that purpose, and not the material allegations which set forth a second cause of action. For these reasons, which are based chiefly upon notions of convenience, a demurrer does not seem to be an appropriate remedy until the causes of action have been separated, and it is known with certainty what and how many they are. In this case, therefore, the more convenient practice would seem to be a motion in the first instance to make the pleading more certain and definite by arranging it into distinct causes of action, or a motion to strike out the redundant matter and surplusage and thus reduce it to a single definite cause of action. The latter order would take the place of a demurrer; the former would be followed by a demurrer after the causes of action had been separated.[1]

III. *Meaning of the Term "Cause of Action;" Where one Cause of Action only is stated, although several Different Kinds of Relief are demanded.*

§ 346. * 452. **Confounding "Cause of Action" with "Remedy." Decisions herein. Definition Obtained by Analysis.** The cause of action is very often confounded with the remedy. This mistake or misconception is peculiarly apt to occur in cases where, under the code, the plaintiff seeks to obtain legal and equitable relief combined, the right to such relief springing from the same state of facts. To avoid this tendency to confusion, it is absolutely necessary to ascertain and fix with certainty the true mean-

[1] [Lewis *v.* Hinson (1902), 64 S. C. 571, 43 S. E. 15 (quoting the text); Cargar *v.* Fee (1894), 140 Ind. 572, 39 N. E. 93; Times Publishing Co. *v.* Everett (1894), 9 Wash. 518, 37 Pac. 695.]

ing of the term "cause of action." The American courts of the present day seem to avoid the announcement of any general principle, or the giving of any general definitions. While, therefore, they have repeatedly held that but one cause of action was stated in a case before them, and have carefully distinguished it in that instance from the reliefs demanded, they have not attempted to define the term "cause of action" in any general and abstract manner, so that this definition might be used as a test in all other cases. We shall obtain no direct help, therefore, from their decisions; but they will furnish examples and tests to determine whether any definition which may be framed is accurate. I shall, however, attempt a definition or description, basing it upon an analysis of the essential elements which enter into every judicial proceeding for the protection of a private right on the one side, and the enforcement of a private duty on the other. There are such elements or features which necessarily combine in every action; they are independent of any judicial recognition; they exist in the very nature of things; and, if we can by an accurate analysis discover these elements, we shall at once have obtained a correct notion of the term "cause of action."

§ 347. * 453. **Remedy. Elements of every Judicial Action. Elements Constituting Cause of Action.** Every action is brought in order to obtain some particular result which we term the *remedy*, which the code calls the "relief," and which, when granted, is summed up or embodied in the judgment of the court. This result is not the "cause of action" as that term is used in the codes. It is true this final result, or rather the desire of obtaining it, is the primary motive which acts upon the will of the plaintiff and impels him to commence the proceeding, and in the metaphysical sense it can properly be called the cause of this action, but it is certainly not so in the legal sense of the phrase. This final result is the "object of the action" as that term is frequently used in the codes and in modern legal terminology.[1] It was shown in the introduction that every remedial right arises out of an antecedent primary right and corresponding duty and a delict or breach of such primary right and duty by the person on whom the duty rests. Every judicial action must therefore involve

[1] ["Every action is brought in order to obtain some particular result which is termed the remedy. This final result is not 'the cause of action;' it is rather the 'object of the action.'" Wildman v. Wildman (1898), 70 Conn. 700, 41 Atl. 1.]

the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several States. They are the legal cause or foundation whence the right of action springs, this right of action being identical with the "remedial right" as designated in my analysis.[1] In accordance with the principles of pleading adopted in the new American system, the existence of a legal right in an abstract form is never alleged by the plaintiff; but, instead thereof, the facts from which that right arises are set forth, and the right itself is inferred therefrom. The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong.[2]

[1] [Jameson *v.* Bartlett (1902), 63 Neb. 638, 88 N. W. 860.]

[2] [*Meaning of "Cause of Action."*

"The question is not determined by the Code of Civil Procedure, for though in section 484 it prescribes what separate causes of action may be joined in the same complaint, it nowhere assumes to define what is a single cause of action:" Reilly *v.* Sicilian Asphalt Paving Co. (1902), 170 N. Y. 40, 62 N. E. 772.

"We are of the opinion that the cause of the action consists of the negligent act which produced the effect, rather than in the effect of the act in its application to different primary rights, and that the injury to the person and property as a result of the original cause gives rise to different items of damage:" King *v.* Chicago, M. & St. Paul Ry. Co. (1900), 80 Minn. 83, 82 N. W. 1113.

"Let us now see whether the plaintiffs have more than one cause of action arising out of the wrong of the defendant, and if not, what that cause of action is. The plaintiffs are the owners of a strip of land upon which the defendant has wrongfully entered and erected a wall which is a portion of her house. The facts alleged show one primary right of the plaintiffs and one wrong done by the defendant which involves that right. Therefore, the plaintiffs have stated but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. The relief prayed for, or to which they may be entitled, is no part of their cause of action (Pomeroy's Code Remedies, § *455):" Hahl *v.* Sugo (1901), 169 N. Y. 109, 62 N. E. 135. "In every cause of action there must exist a primary right, a corresponding primary duty, and a failure to perform that duty:" South Bend Chilled Plow Co. *v.* George C. Cribb Co. (1900), 105 Wis. 443, 81 N. W. 675.

"In applying the rule, some confusion has resulted from the neglect to define the

§ 348. * 454. **Cause of Action and Remedial Right Differentiated. Examples.** The cause of action thus defined is plainly different

terms 'cause of action' and 'action;' to which, therefore, our attention must be first directed. The latter term is very commonly confounded with the *suit* (litis) in which the action is enforced. But this is not the technical meaning of the term, according to which an action is simply the right or power to enforce an obligation. 'An action is nothing else than the right or power of prosecuting in a judicial proceeding *what is owed to one*,' — which is to say, an *obligation*. . . . The action therefore springs from the obligation, and hence the 'cause of action' is simply the obligation. . . . The 'cause of action' is therefore to be distinguished, also, from the 'remedy,' — which is simply the means by which the obligation or the corresponding action is effectuated, — and also from the 'relief' sought:" Frost *v.* Witter (1901), 132 Cal. 421, 64 Pac. 703. "It does not appear from the petition that the trustees have been in any way extravagant or negligent or dilatory in the performance of the duties of their office, or that they have violated any law or contract, or caused any injury, or done any wrong, or withheld any right, or that they have threatened or are about to do any such thing. At least, some one of these elements is essential to a cause of action:" Sands *v.* Gund (1903), — Neb. —, 93 N. W. 990. "As was said in Bruil *v.* Northwestern M. R. Ass'n, 72 Wis. 430, the words 'cause of action' . . . include the act or omission without which there would be no cause of action or right of recovery:" Hosley *v.* Wisconsin Odd Fellows Mutual Life Ins. Co. (1893), 86 Wis. 463, 57 N. W. 48. Threatt *v.* Mining Co. (1896), 49 S. C. 95, 26 S. E. 970.

"To borrow the phraseology of Mr. Pomeroy, the primary right, which the plaintiffs are seeking to enforce, is the right to have the assets of the estate of their alleged debtor applied to the payment of their claim, and the breach of this primary right in the modes stated in the complaint is the delict complained of. These two things, says Mr. Pomeroy, in his work on Remedies, according to the Code Pleading, at page 487, sec. 453 [*453], constitute the cause of action:" Sheppard *v.* Green (1896), 48 S. C. 165, 26 S. E. 224. Smith *v.* Smith (1897), 50 S. C. 54, 27 S. E. 545, quotes the author's Analysis of a cause of action with apparent approval. Broughel *v.* So. New Eng. Tel. Co. (1900), 72 Conn. 617, 45 Atl. 435. "A cause of action consists of a right belonging to the plaintiff, which has been violated by some wrongful act or omission of the defendant:" Goodrich *v.* Alfred (1899), 72 Conn. 257, 43 Atl. 1041. Wildman *v.* Wildman (1898), 70 Conn. 700, 41 Atl. 1, quotes from § *453 of the text and adds: "Stated in brief, a cause of action may be said to consist of a right belonging to the plaintiff and some wrongful act or omission done by the defendant, by which that right has been violated."

"It is said, though, that even if the amendment set forth a cause of action, it should have been stricken for the reason that it set forth a new and distinct cause of action. To determine this question it is necessary to ascertain what was the cause of action set forth in the original petition. If the right to recover the property in controversy upon the legal title was the cause of action originally set forth, then it would seem that the amendment did contain a new cause of action, for it was based upon an alleged right to recover the property upon an equitable title. It needs no argument to show that an equitable title is entirely separate and distinct from a legal title. To say, however, that the cause of action set forth in the original petition was the right to recover upon a legal title is giving the term 'cause of action' too restricted a meaning. The cause of action in such a case consists, not only of the right of the plaintiff but of the wrong of the defendant. The right of the plaintiff consists in being entitled to the possession of the property which is owned by him, and the wrong of the defendant consists in his withholding from the plaintiff that which is rightfully his. Under this view of the matter the cause of action set forth in the original petition was based upon two facts: ownership of the property by the plaintiff, and the wrongful withholding of possession by the defendants:" McCand-

from the remedial right, and from the remedy or relief itself. The remedial right is the consequence, the secondary right which springs into being from the breach of the plaintiff's primary right

less *v.* Inland Acid Co. (1902), 115 Ga. 968, 42 S. E. 449.

"A 'cause of action,' as the term is used in pleading, is not the name under which a state of facts may be classed, but it consists of the facts giving rise to the action. An action is a proceeding in court. Code, section 3424. The cause of action is the fact or the facts that 'justify it or show the right to maintain it.' Hence, when a material fact, necessary to a recovery, is omitted from a petition, we say it does not state a cause of action. In 5 Am. & Eng. Enc. Law, 776, it is said: 'The cause of action is the entire state of facts that gives rise to an enforceable claim. The phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment.' This definition is taken, substantially, from the case of Read *v.* Brown, 22 Q. B. Div. 128. In that case it is said that a cause of action is 'every fact which it would be necessary for plaintiff to prove, if traversed, in order to support his right to the judgment of the court.' It is then said: 'It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.' In Hutchinson *v.* Ainsworth, 73 Cal. 452 (15 Pac. Rep. 82), speaking of a cause of action with reference to the statute of limitations, it is said: 'The facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong, make up the cause of action.' See Bruil *v.* Association, 72 Wis. 430 (39 N. W. 529), and Rapalje & Lawrence, Law Dictionary, 180. Care should be taken not to confuse the term 'cause of action' as used abstractly and as used in pleading. In a general sense, the term means 'a claim which may be enforced.' Bucklin *v.* Ford, 5 Barb. 393. 'It is a right which a party has to institute and carry through an action.' Myer *v.* Van Collem, 28 Barb. 230. 'The right to prosecute an action with effect.' Douglas *v.* Forrest, 4 Bing. 704. Looking to these cases, it will be seen that the term 'cause of action' is used with no purpose to indicate a rule by which one cause of action may be distinguished from another, but merely with reference to the existence of a cause of action. We use expressions like these: 'A cause of action for negligence;' 'A cause of action for malicious prosecution;' 'A cause of action for desertion.' They indicate the subject or subject-matter of the action, but are meaningless as showing a particular cause of action. In Rodgers *v.* Association, 17 S. C. 406, are the following query and answer: 'What is a cause of action? We must keep in view the difference between the subject of the action and the cause of the action. The subject of the action was what was formerly understood as the subject matter of the action. . . . The cause of the action is the right claimed or wrong suffered by the plaintiff, on the one hand, and the duty or delict of the defendant, on the other; *and these appear by the facts of each separate case.* We have emphasized closing words to call especial attention to the rule when applied to a particular case:" Box *v.* Chicago, R. I. & P. Ry. Co. (1899), 107 Ia. 660, 78 N. W. 694.

"But neither the conception of the plaintiffs or defendant, nor the kind of relief prayed, while they may be considered, is conclusive upon the court as to what the cause of action is which the pleading sets up. That fact must be determined from the pleading itself. Upon a careful analysis of this complaint, we think it quite clear that the real cause of action stated is the violation by the trustee of his duty to the *cestuis que trustent* in indirectly buying for himself the trust property at the executor's sale:" French *v.* Woodruff (1898), 25 Colo. 339, 45 Pac. 416. "The foundation of the cause of action in both complaints is the transaction constituting the trust; the cause of action in both is the violation of that trust; and both are equitable in character:" Mullen *v.* McKim (1896), 22 Colo. 468, 45 Pac. 416.]

by the defendant's wrong, while the remedy is the consummation or satisfaction of this remedial right. From one cause of action, that is, from one primary right and one delict being a breach thereof, it is possible, and not at all uncommon, that two or more remedial rights may arise, and therefore two or more different kinds of relief answering to these separate remedial rights. This is especially so when one remedial right and corresponding relief are legal, and the other equitable; but it is not confined to such cases. One or two very familiar examples will sufficiently illustrate this statement, and will show the necessity as well as the ease of discriminating between the "cause of action" and the remedy. Let the facts which constitute the plaintiff's primary right be a contract duly entered into by which the defendant agreed to convey to the plaintiff a parcel of land, and full payment by the plaintiff of the stipulated price and performance of all other stipulations on his part. Let the delict be a refusal by the defendant to perform on his part. This is the cause of action, and it is plainly single. From it there arise two remedial rights and two corresponding kinds of relief; namely, the remedial right to a compensation in damages, with the relief of actual pecuniary damages; and the remedial right to an actual performance of the agreement, and the relief of an execution and delivery of the deed of conveyance. If the plaintiff in one action should state the foregoing facts constituting his cause of action, and should demand judgment in the alternative either for damages or for a specific performance, he would, as the analysis above given conclusively shows, have alleged but one cause of action, although the reliefs prayed for would be distinct, and would have belonged under the old system to different forums, — the common law and the equity courts. Again: let the plaintiff's primary right be the ownership and right to possession of a certain tract of land, and let the facts from which it arises be properly alleged; let the delict consist in the defendant's wrongful taking and retaining possession and user of such land for a specified period of time, and let the facts showing this wrong be properly averred in the same pleading. Evidently the plaintiff will have stated one single and very simple cause of action. The remedial rights arising therefrom, and the remedies themselves corresponding thereto, will be threefold, and all of them legal: namely, (1) the right to be restored to possession, with the actual relief of restored pos-

session; (2) the right to obtain compensation in damages for the wrongful withholding of the land, with the relief of actual pecuniary damages; and (3) the right to recover the rents and profits received by the defendant during the period of his possession, with the relief of an actual pecuniary sum in satisfaction therefor. Here, also, the single nature of the one cause of action plainly appears, and its evident distinction from the various remedial rights and actual remedies which do or may arise from it.[1]

§ 349. * 455. **Test in Determining whether Different Causes of Action have been stated. Caution in Applying Test.** The result of this analysis of the necessary elements which enter into every action is simple, easily to be understood, and yet exceedingly important; and the principle I have thus deduced will serve as an unerring test in determining whether different causes of action have been joined in a pleading, or whether one alone has been stated. If the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action, no matter how many forms and kinds of relief he may claim that he is entitled to, and may ask to recover; the relief is no part of the cause of action. In applying this test, however, it must be observed that the single primary right, and the single wrong, which, taken together, constitute the one cause of action, may each be very complicated. For example, the primary right of ownership includes not only the particular subordinate rights to use the thing owned in any manner permitted by the law, but also similar rights to the forbearance on the part of all mankind to molest the proprietor in such use. The facts which constitute the delict complained of may embrace not only the wrongful obtaining, and keeping possession, in such a case as the one last supposed, but also the procuring and holding deeds of conveyance, or other muniments of title, by which such possession is made possible, and to appear rightful. These suggestions are necessary to guard against the mistake of supposing that a distinct cause of action

[1] The fact that the codes generally seem to treat these different claims for relief as distinct causes of action does not affect the correctness of my analysis; they are plainly no more than separate reliefs or remedies based upon the same facts which constitute a single cause of action. See Larned *v.* Hudson, 57 N. Y. 151, which is based entirely upon the language of the statute.

[Christensen *v.* Hollingsworth (1898), 6 Idaho, 87, 53 Pac. 211; Vermont Loan & Trust Co. *v.* McGregor (1897), 5 Idaho, 320, 51 Pac. 102.]

will arise from each special subordinate right included in the general primary right held by the plaintiff, or from each particular act of wrong, which, in connection with others, may make up the composite but single delict complained of.[1]

[1] [*Different Kinds of Relief from one Cause of Action.*

"The first common ground of demurrer is that several causes of action are improperly united. A general rule governing such objections as this is that a complaint in equity is not multifarious which presents but one primary right for enforcement, or one subject of action for adjudication, though it may pray for many and various forms of relief, all germane to that single subject of the action, or to the vindication of that primary right:" Level Land Co. *v.* Sivyer (1901), 112 Wis. 442, 88 N. W. 317; Imperial Shale Brick Co. *v.* Jewett (1901), 169 N. Y. 143, 62 N. E. 167; Whitehead *v.* Sweet (1899), 126 Cal. 67, 58 Pac. 376. See also Washington National Bank *v.* Woodrum (1898), 60 Kan. 34, 55 Pac. 330; Sherrin *v.* Flinn (1900), 155 Ind. 422, 58 N. E. 549; Gunder *v.* Tibbits (1899), 153 Ind. 591, 55 N. E. 762; Darby *v.* M. K. & T. Ry. Co. (1900), 156 Mo. 391, 57 S. W. 550; Pryor *v.* Kansas City (1899), 153 Mo. 135, 54 S. W. 499; Rissler *v.* Ins. Co. (1899), 150 Mo. 366, 51 S. W. 755; Wheeler Savings Bank *v.* Tracey (1897), 141 Mo. 252, 42 S. W. 946; McIntosh *v.* Rankin (1896), 134 Mo. 340, 35 S. W. 995; Thompson *v.* Harris (1902), 64 Kan. 124, 67 Pac. 456; Sheppard *v.* Green (1896), 48 S. C. 165, 26 S. E. 224, quoting the text; Adkins *v.* Loucks (1900), 107 Wis. 587, 83 N. W. 934; Jordan *v.* Estate of Warner (1900), 107 Wis. 539; 83 N. W. 946; Foster *v.* Posson (1899), 105 Wis. 99, 81 N. W. 123; Perry *v.* Jefferies (1901), 61 S. C. 292, 39 S. E. 315; Matthews *v.* Bank (1901), 60 S. C. 183, 38 S. E. 437; Day *v.* Schneider (1896), 28 Ore. 457, 43 Pac. 650; Hough *v.* Hough (1894), 25 Ore. 218, 35 Pac. 249; Bostick *v.* Barnes (1900), 59 S. C. 22, 37 S. E. 24; Mew *v.* Railway Co. (1899), 55 S. C. 90, 32 S. E. 828; Sloan *v.* Railway Co. (1902), 64 S. C. 389, 42 S. E. 197; Farley *v.* Basket and Veneer Co. (1897), 51 S. C. 222, 28 S. E. 193; Jackins *v.* Dickinson (1893), 39 S. C. 436, 17 S. E. 996; Dawson *v.* Marsh (1902), 74 Conn. 498, 51 Atl. 529; Brockett *v.* Fair Haven & W. R. Co. (1900), 73 Conn. 428, 47 Atl. 763; Anglin *v.* Conley (1903), — Ky. —, 71 S. W. 926; Mitchell *v.* New Farmers' Bank's Trustee (1901), — Ky. —, 60 S. W. 375; Hueston *v.* Mississippi & Rum River Boom Co. (1899), 76 Minn. 251, 79 N. W. 92; Chicago, Rock Island, & P. Ry. Co. *v.* Haywood & Son (1897), 102 Ia. 392, 71 N. W. 358; Eagle Iron Works *v.* Railway Co. (1897), 101 Ia. 289, 70 N. W. 193; Glover *v.* Narey (1894), 92 Ia. 286, 60 N. W. 531; Baxter *v.* Camp (1898), 71 Conn. 245, 41 Atl. 803. But see Ramsdell *v.* Clark (1897), 20 Mont. 103, 49 Pac. 591; Craft Refrigerating Machine Co. *v.* Quinnipiac Brewing Co. (1893), 63 Conn. 551, 29 Atl. 76, in which the court said: "Separate counts are required for separate and distinct causes of action, but not for the presentation of separate and distinct claims for relief founded on the same cause of action or transaction."

See also Threatt *v.* Mining Co. (1896), 49 S. C. 95, 26 S. E. 970, from which the following is quoted: "The first and second grounds of appeal are intended to allege error in the refusal of the Circuit Judge to grant defendant's motion to require the plaintiff to elect which one of the several causes of action set out in the complaint he would go to trial upon. No doubt exists that the Circuit Judge met this issue squarely; he decided that the complaint stated but one cause of action. Was this error? . . . After all it resolves itself into a question of what the complaint actually alleges, whether it was one or several causes of action. Great care must always be observed to grasp the question, What right of the plaintiff has the defendant invaded? . . . What the plaintiff in the case at bar really seeks is to prevent the defendant, through its milling operations, from invading his right of property. The injury to his bottom land is one element in this invasion of his right of property; the injury to his right to water his stock in the stream is another element; the injury to pure air at his home is another element; the injury to his fishing privilege

§ 350. * 456. **Two or more Distinct Rights each Invaded by Distinct Wrongs, and two Rights Invaded by one and the same Wrong, or one Right Broken by two Separate Wrongs.** On the other hand, if the facts alleged in the pleading show that the plaintiff is possessed of two or more distinct and separate primary rights, each of which has been invaded, or that the defendant has committed two or more distinct and separate wrongs, it follows inevitably, from the foregoing principle, that the plaintiff has united two or more causes of action, although the remedial rights arising from each, and the corresponding reliefs, may be exactly of the same kind and nature. If two separate and distinct primary rights could be invaded by one and the same wrong, or if the single primary right should be invaded by two distinct and separate legal wrongs, in either case two causes of action would result; *a fortiori* must this be so when the two primary rights are each broken by a separate and distinct wrong.

§ 351. * 457. **General Principle Drawn from Analysis of Essential Elements of a Judicial Action.** The general principle which I have thus drawn from an analysis of the essential elements which make up a judicial action can be applied to all possible cases, and will furnish a sure and simple test by which to determine whether one or more causes of action have been embodied in any complaint or petition.[1] The demand for relief must be entirely disregarded;

in such stream is another element; the injury to the two neighborhood roads is another element; the injury to his ditches another element; and the injury to the air he breathes while in his bottom lands is another element. All these elements enter in to complete the alleged wrong to plaintiff by this defendant through his milling operations. The Circuit Judge evidently took this view of the complaint when he overruled this objection to it. We take the same view of this matter, and, therefore, overrule these two exceptions." Wildman *v.* Wildman (1898), 70 Conn. 700, 41 Atl. 1; South Bend Chilled Plow Co. *v.* George C. Cribb Co. (1900), 105 Wis. 443, 81 N. W. 839.]

[1] [***Test to determine whether Pleading states one, or more than one, Cause of Action.***

"The test to be applied in order to determine whether a complaint states more than one cause of action, is whether, looking at the whole pleading, there is more than one primary right presented thereby for vindication. There may be many minor subjects, and facts may be stated constituting independent grounds for relief, either as between the plaintiff and all the defendants, or the former and one of the latter, or between defendants, and there be still but a single primary purpose of the suit, with which all the other matters are so connected as to be reasonably considered germane thereto, — parts of one entire subject, presenting to the court but one primary ground for invoking its jurisdiction. That was the rule before the code, and it was preserved thereby in unmistakable language, as this court has said on many occasions:" Herman *v.* Felthousen (1902), 114 Wis. 423, 90 N. W. 432. See also Level Land Co. *v.* Sivyer (1901), 112 Wis. 442, 88 N. W. 317. "The infallible test, by which to determine whether a complaint states more than one cause of

whether single or complex, it forms no part of, and has no effect upon, the "cause of action." Rejecting, therefore, all those

action, is, Does it present more than one subject of action or primary right for adjudication? . . . If it stand that test, no matter how many incidental matters may be connected with the primary right, rendering other parties than the main defendant proper or necessary to the litigation for a complete settlement of the controversy as to plaintiff, or for the due protection of their rights as against him or between themselves, there is yet but one cause of action, and a demurrer upon the ground of the improper joinder of causes of action will not lie:" Adkins *v.* Loucks (1900), 107 Wis. 587, 83 N. W. 934.

"As has often been said by this court, the test of whether there is more than one cause of action stated in a complaint is not whether there are different kinds of relief prayed for or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication:" South Bend Chilled Plow Co. *v.* George C. Cribb Co. (1900), 105 Wis. 443, 81 N. W. 675. See also Zinc Carbonate Co. *v.* The First National Bank of Shullsburg (1899), 103 Wis. 125, 79 N. W. 229; Gager *v.* Marsden (1899), 101 Wis. 598, 77 N. W. 922. In Threatt *v.* Mining Co. (1896), 49 S. C. 95, 26 S. E. 970, it is said: "Great care must always be observed to grasp the question, What right of the plaintiff has the defendant invaded?"

The test prescribed in the text was adopted in the case of Reilly *v.* Sicilian Asphalt Paving Co. (1902), 170 N. Y. 40, 62 N. E. 772. In this case it was claimed by appellant "that while driving in Central Park in the city of New York both his person and his vehicle were injured in consequence of collision with a gravel heap placed on the road through the negligence of the defendant. Thereupon he brought an action against the defendant in the Court of Common Pleas to recover damages for the injury to his person. Subsequently he brought another action in one of the District Courts in the city of New York to recover for the injury to his vehicle. In this last action he obtained judgment, which was paid by the defendant. Thereafter the defendant set up by supplemental answer the judgment in the District Court suit, and its satisfaction as a bar to the further maintenance of the action in the Common Pleas." On the trial in the Supreme Court "it was held that the plaintiff's right of action was merged in the judgment recovered in the District Court and his complaint was dismissed. The judgment entered upon this direction was affirmed by the Appellate Division." The Court of Appeals, reversing the judgment appealed from, said: "The question now before us has been the subject of conflicting decisions in different jurisdictions. In England it has been held by the Court of Appeal, Lord Coleridge, Chief Justice, dissenting, that damages to person and to property, though occasioned by the same wrongful act, give rise to different causes of action (Brunsden *v.* Humphrey, L. R. [14 Q. B. D.] 141); while in Massachusetts, Minnesota, and Missouri the contrary doctrine has been declared (Doran *v.* Cohen, 147 Mass. 342; King *v.* Chicago, M. & St. P. Ry. Co., 82 N. W. Rep. 1113; Von Fragstein *v.* Windler, 2 Mo. App. 598). The argument of those courts which maintain that an injury to person and property creates but a single cause of action is that as the defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong, while that of the English court is that the negligent act of the defendant in itself constitutes no cause of action and becomes an actionable wrong only out of the damage which it causes. 'One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person' (Brunsden *v.* Humphrey, *supra*). I doubt whether either argument is conclusive. If, when one person was driving the vehicle of another, both the driver and the vehicle were injured, there could be no doubt that two causes of action would arise, one in favor of the person injured and the other in favor of the owner of the injured property. On the other hand, if

portions of the pleading which describe the remedy or relief demanded, the inquiry should be directed exclusively to the allega-

both the horse and the vehicle, being the property of the same person, were injured, there would be but a single cause of action for the damage to both. If, while injury to the horse and vehicle of a person gives rise to but a single cause of action, injury to the vehicle and its owner gives rise to two causes of action, it must be because there is an essential difference between an injury to the person and an injury to property that makes it impracticable or, at least, very inconvenient in the administration of justice to blend the two. We think there is such a distinction. . . . While some of the difficulties in the joinder of a claim for injury to the person and one for injury to the property in one cause of action are created by our statutory enactments, the history of the common law shows that the distinction between torts to the person and torts to property has always obtained. . . . Therefore, for reason of the great difference between the rules of law applicable to injuries of the person and those relating to injuries to property, we conclude that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action." To the same effect, see Watson *v.* Railway Co. (1894), 8 Tex. Civ. App. 144, 27 S. W. 924.

The author's test, however, was rejected in King *v.* Chicago, M. & St. P. Ry. Co. (1900), 80 Minn. 83, 82 N. W. 1113. In this case the facts were as follows: "Plaintiff, while riding in and driving his wagon across defendant's tracks, was run into by defendant's train. As a result, he was personally injured, and the wagon and horses and harness were damaged. Thereafter plaintiff brought an action against defendant to recover for the injuries suffered in his person, and secured a judgment for $1,000. While that action was still pending on appeal in this court . . . plaintiff commenced the present proceeding to recover the damage sustained by the injury to the horses, wagon, and harness, alleged to be $225. As a defence to this action, defendant pleaded the former judgment as a bar, and, by an amendment later, pleaded its full payment and satisfaction. Upon the trial below, judgment was rendered for the full amount, and defendant appeals." In the course of the opinion it is said: "The learned trial judge, in a carefully written memorandum, based his decision upon the proposition that at the common law every person was possessed of two distinct primary rights, — the right of personal security and the right of private property, — and that a distinct cause of action arose from an infringement of either. And, it is argued, these rights have been carried into our system of jurisprudence, and remedies provided for their preservation; that the constitution guarantees a certain remedy by the law for injuries thereto; that statutes have been enacted with the special purpose of keeping these rights separate and distinct, in order that the remedy for an infringement of each may be enforced without reference to the other, as the statute of limitations . . .; also, the statute providing what causes of actions survive. Counsel for respondent, taking this distribution of primary rights as a basis, have argued ably that it necessarily follows that the cause of action in this case did not consist of the act of negligence on the part of the defendant in injuring the plaintiff and his property, but the cause of action arose from the results of the act; that instantly upon the striking and throwing of plaintiff by the engine the cause of action arose for injury to his person, and another cause arose as soon as plaintiff's enjoyment of his property was interfered with. . . . We are of the opinion that the cause of the action consists of the negligent act which produced the effect, rather than in the effect of the act in its application to different primary rights, and that the injury to the person and property as a result of the original cause gives rise to different items of damage. . . . The views we have adopted seem to us more in harmony with the tendency towards simplicity and directness in the determination of controversial rights. That rule of construction should be adopted which will most speedily and economically bring litigation to an end, if at the same time it conserves the ends

tions of fact which set forth the primary right of the plaintiff and the wrong done by the defendant. If one such right alone, however comprehensive, is asserted, and if one such wrong alone, however complex, is complained of, but one cause of action is alleged.[1] If the examination discloses more than one distinct and independent primary right held by the plaintiff, and all of them invaded by the defendant, or more than one distinct and independent wrong done by the defendant to the plaintiff's primary right or rights, then the complaint or petition has united different causes of action, and the rules which control their joinder are brought into operation.[2]

of justice. There is nothing to be gained in splitting up the rights of an injured party as in this case, and much may be saved if one action is made to cover the subject." Judgment reversed. See also Foerst *v.* Kelso (1901), 131 Cal. 376, 63 Pac. 681; and Hanson *v.* Anderson (1895), 90 Wis. 195, 62 N. W. 1055.

[1] [*Splitting a "Cause of Action."*

"The rule is that a single or entire cause of action cannot be subdivided into several claims and separate actions maintained thereon. Secor *v.* Sturgis, 16 N. Y. 548; Nathans *v.* Hope, 77 N. Y. 420. As to this principle there is no dispute:" Reilly *v.* Sicilian Asphalt Paving Co. (1902), 170 N. Y. 40, 62 N. E. 772. See to same effect, Brunsden *v.* Humphrey (1884), L. R. [14 Q. B. D.] 141; King *v.* Chicago, M. & St. Paul Ry. Co. (1900), 80 Minn. 83, 82 N. W. 1113; Norvell *v.* Mecke (1900), 127 N. C. 401, 37 S. E. 452; Huffman *v.* Knight (1900), 36 Ore. 581, 60 Pac. 207; Achey *v.* Creech (1899), 21 Wash. 319, 58 Pac. 208; Hahl *v.* Sugo (1901), 169 N. Y. 109, 62 N. E. 135; Patnode *v.* Westenhaver (1902), 114 Wis. 460, 90 N. W. 467; Smelker *v.* Chicago & Northwestern R. Co. (1900), 106 Wis. 135, 81 N. W. 994; Richardson *v.* Opelt (1900), 60 Neb. 180, 82 N. W. 377; Donnell *v.* Wright (1899), 147 Mo. 639, 49 S. W. 874; Fort *v.* Penny (1898), 122 N. C. 230, 29 S. E. 362; Day *v.* Brenton (1897), 102 Ia. 482, 71 N. W. 538; Atlanta Elevator Co. *v.* Cotton Mills (1898), 106 Ga. 427, 32 S. E. 541; Little *v.* City of Portland (1894), 26 Ore. 235, 37 Pac. 911; Insurance Co. *v.* Bullene (1893), 51 Kan. 764, 33 Pac. 467; Hoffman *v.* Hoffman's Executor (1894), 126 Mo. 486, 29 S. W. 603; Wheeler Savings Bank *v.* Tracey (1897), 141 Mo. 252, 42 S. W. 946; Wildman *v.* Wildman (1898), 70 Conn. 700, 41 Atl. 1.]

[2] See Davenport *v.* Murray, 68 Mo. 198; Donovan *v.* Dunning, 69 id. 436; Young *v.* Young, 81 N. C. 91. As examples of only one cause of action, although several distinct reliefs are asked and obtained, see the following cases: People *v.* Tweed, 63 N. Y. 194, 5 Hun, 353; Haines *v.* Hollister, 64 N. Y. 1; Boardman *v.* Lake Shore & M. S. Ry. Co., 84 N. Y. 157; Tisdale *v.* Moore, 8 Hun, 19; Skidmore *v.* Collier, 8 id. 50; Walters *v.* Continental Ins. Co., 5 id. 343; Young *v.* Drake, 8 id. 61; Prentice *v.* Jansen, 7 id. 86; Van Wagenen *v.* Kemp, 7 id. 328; Williams *v.* Peabody, 8 id. 271; Board of Supervisors *v.* Walbridge, 38 Wis. 179; Liedersdorf *v.* Flint, 50 id. 401; Collins *v.* Cowen, 52 id. 634; Kahn *v.* Kahn, 15 Fla. 400; Donovan *v.* Dunning, 69 Mo. 436; Stewart *v.* Carter, 4 Neb. 564; Young *v.* Young, 81 N. C. 91; Barrett *v.* Watts, 13 S. C. 441. See also Westlake *v.* Farrow, 34 S. C. 270; Johnson *v.* Golder, 132 N. Y. 116; Tuers *v.* Tuers, 100 N. Y. 196; Trowbridge *v.* True, 52 Conn. 190; Louvall *v.* Gridley, 70 Cal. 507; Smiley *v.* Deweese, 1 Ind. App. 211; Louisville, St. L. & T. Ry. Co. *v.* Neafus (Ky. 1892), 18 S. W. Rep. 1030 (different elements of damage arising from single breach of contract); Grandona *v.* Lovdal, 70 Cal. 161 (prayer for abatement of nuisance and damages). In the following cases, also, it was held that but one cause of action was stated: Sayles

§ 352. * 458. **Cause of Action not to be confounded with Relief. Illustrative Cases.** Although the decisions do not attempt to furnish any general test by which one may determine the nature of a "cause of action," and whether a pleading contains one or more, they fully recognize the fact that the cause of action is not to be confounded with the relief, and that the demand for or the granting of many forms of remedy may be based upon a single cause of action. The following cases not only exhibit the proneness to confound the remedy with the cause of action, and the necessity of understanding the essential distinction between them, but they also illustrate, and fully sustain, the foregoing principles, which I have proposed as the test by which such distinction may be at once recognized: a complaint alleged that the plaintiff, being indebted to the defendant upon several promissory notes held by the latter, had assigned to it a bond and mortgage as collateral security; that the defendant had collected the amount due on the bond and mortgage, which was more than sufficient to pay all the notes in full; that a surplus was left remaining in its hands, and upon these facts demanded payment by the defendant of such balance, and surrender and cancellation of the notes so given by the plaintiff. To this complaint the defendant demurred, on the ground that causes of action had been improperly joined. The New York Court of Appeals held that there was no uniting at all of different causes of action, and that only a single one was stated, although two distinct reliefs were demanded.[1]

v. Bemis, 57 Wis. 315 (trespass on land, aggravated by injury to personal property); Whatling *v.* Nash, 41 Hun, 579 (same); Gilbert *v.* Pritchard, 41 Hun, 46 (trespass on land, aggravated by assault); Butler *v.* Kirby, 53 Wis. 188; Loveland *v.* Garner, 71 Cal. 541; Thames *v.* Jones, 97 N. C. 121; Welch *v.* Platt, 32 Hun, 194; Lehnen *v.* Purvis, 55 Hun, 535; United States L. Ins. Co. *v.* Jordan, 21 Abb. N. Cas. 330; Whitner *v.* Perhacs, 25 Abb. N. Cas. 130; Newcombe *v.* Chicago & N. W. Ry. Co. (N. Y. Supreme, Jan. 1890), 8 N. Y. Suppl. 366; Leary *v.* Melcher (N. Y. Supreme, May, 1891), 14 N. Y. Suppl. 689; Wickersham *v.* Crittenden, 93 Cal. 17; Whetstone *v.* Beloit Straw Board Co. (Wis. 1890), 45 N. W. 535 (damages for personal injuries, and cancellation of a release of the defendant for liability for the injuries); also Damon *v.* Damon, 28 Wis. 510; Moon *v.* McKnight, 54 Wis. 551. Several of these cases appear to consider the invasion of distinct rights of the plaintiff by one tortious act, or series of connected tortious acts, as constituting but one cause of action; thus making the latter consist in the delict alone. Compare *post*, p. 476, note 5. For an instance of two causes of action improperly mingled, see American Button-Hole, etc. Sew. Mach. Co. *v.* Thornton, 28 Minn. 418.

[1] Cahoon *v.* Bank of Utica, 7 N. Y. 486. The defendant insisted that a cause of action for the recovery of money was united with one equitable in its nature. The court said, per Johnson J. (p. 488):

§ 353. * 459. **Same Subject.** Actions brought to reform instruments in writing, such as policies of insurance and other contracts, mortgages, deeds of conveyance, and the like, and to enforce the same as reformed by judgments for the recovery of the money due on the contracts, or for the foreclosure of the mortgages, or for the recovery of possession of the land conveyed by the deeds, fall within the same general principle. One cause of action only is stated in such cases, however various may be the reliefs demanded and granted.[1] The principle also applies to

"The ground on which this case ought to be put is, that the complaint does not contain two causes of action. The claim is single. . . . The plaintiff now seeks an account of the proceeds of the mortgage and of their disposition, and to have the balance paid over, and the notes which are satisfied delivered up. It is no answer to say that the balance of moneys could have been recovered in an action for money had and received. It would none the less have been the proper foundation for a bill in equity. . . . It is only because there is no dispute about the amount due that there seems to be any room for mistake as to the character of the claim. If that remained to be ascertained, it would be the clearest possible case for an account; and yet this case is not clearer than the one before us. . . . It is, in short, a complaint by a debtor to have his obligation delivered up and cancelled, and an account of the securities pledged, and payment of the surplus. That a claim so simple in its character, so well recognized, and even familiar, under the old practice in chancery, should be seriously regarded as two distinct causes of action, requiring distinct modes of trial, and incapable of being joined in a single suit, is quite as surprising as the doctrine itself, if held to be well founded, would be inconvenient." See also Connor *v.* St. Anthony Bd. of Ed., 10 Minn. 439, 444; Sortore *v.* Scott, 6 Lans. 271, 275, 276; Reedy *v.* Smith, 42 Cal. 245, 250.

[1] Bidwell *v.* Astor Mut. Ins. Co., 16 N. Y. 263; N. Y. Ice Co. *v.* N. W. Ins. Co., 23 N. Y. 357; Guernsey *v.* Am. Ins. Co., 17 Minn. 104, 108 (actions to reform a policy of insurance, and to recover the amount due on it as reformed); Gooding *v.* McAllister, 9 How. Pr. 123 (action to reform a written contract, and to recover a money judgment upon it for the sum due when corrected); McCown *v.* Sims, 69 N. C. 159; Rigsbee *v.* Trees, 21 Ind. 227 (actions to reform a promissory note, and to recover the amount thus shown to be due. The decision in the latter case is referred, however, to the special provision of the Indiana code, § 72); Hunter *v.* McCoy, 14 Ind. 528; McClurg *v.* Phillips, 49 Mo. 315, 316 (actions to reform a mortgage, to foreclose as thus corrected, or to reform a deed and quiet the title thereunder). Walkup *v.* Zehring, 13 Iowa, 306 (action to correct mistakes in a series of title-deeds, to set aside another deed of the same land, and to quiet the plaintiff's title and possession). See, however, *per contra*, Harrison *v.* Juneau Bank, 17 Wis. 340, which was a suit to reform a contract, and to recover the money due upon it when corrected. Dixon C. J. said (p. 350): "The complaint contains two distinct causes of action, — the one equitable, the other legal, — which in strictness should have been separately stated. That for the reformation was equitable, and was for the court; the other, for the recovery of money, was legal, and was for the jury." The learned court has here fallen into the evident error of confounding the cause of action with the relief; and its decision is in direct conflict with the doctrine established by the numerous authorities quoted above and below, which involve similar facts and the same principle. The doctrine of this case has become established in Wisconsin; a union of equitable and legal causes of action is hardly permitted in that State.

[Christensen *v.* Hollingsworth (1898), 6 Idaho, 87, 53 Pac. 211; Vermont Loan & Trust Co. *v.* McGregor (1897), 5 Idaho,

actions brought against a fraudulent grantor or assignor and his grantees or assignees to set aside the transfers, although made at different times and to different persons, and to subject the property to the plaintiff's liens, as in creditors' suits; or to compel a reconveyance and restoration of possession of the property, as in the case of suits by defrauded heirs or *cestuis que trustent*, and the like. There is but one cause of action against the various defendants in these and similar suits.[1] In like manner, the principle applies to actions brought by persons holding the equitable title to lands against those in whom the legal title is vested, for the purpose of setting aside the deeds under which the latter claim, on the ground of fraud or other illegality, and of recovering or confirming possession and quieting title. The different reliefs which the plaintiff seeks to obtain do not constitute different causes of action.[2] It also applies to actions for the fore-

320, 51 Pac. 102; Jenkins *v.* Taylor (1900), Ky., 59 S. W. 853; Steinbach *v.* Prudential Ins. Co. (1902), 172 N. Y. 471, 65 N. E. 281 (action to reform policy and judgment thereon as reformed). Imperial Shale Brick Co. *v.* Jewett (1901), 169 N. Y. 143, 62 N. E. 167 (also an action to reform policy and recover thereon as reformed). Hahl *v.* Sugo (1901), 169 N. Y. 109, 62 N. E. 135, see note (1) to p. 27, *ante*, for the facts of this case. Robinson *v.* Brown (1901), 166 N. Y. 59, 159 N. E. 775; Keys *v.* McDermott (1903), — Wis. —, 93 N. W. 553.]

[1] Bassett *v.* Warner, 23 Wis. 673, 685; Blake *v.* Van Tilborg, 21 Wis. 672; Bowers *v.* Keesecher, 9 Iowa, 422; Howse *v.* Moody, 14 Fla. 59, 63, 64. These were actions by heirs, or other persons in the position of beneficiaries, against administrators, or other individuals holding a fiduciary relation to them, and their grantees or assignees, to set aside fraudulent transfers, to compel an accounting and a restoration, and other like reliefs. The doctrine of the text was freely applied in them all; Winslow *v.* Dousman, 18 Wis. 456; Gates *v.* Boomer, 17 Wis. 455; North *v.* Bradway, 9 Minn. 183; Chautauqua Cy. Bk. *v.* White, 6 N. Y. 236. These actions were all ordinary creditors' suits.

[2] Phillips *v.* Gorham, 17 N. Y. 270; Laub *v.* Buckmiller, 17 N. Y. 620; Lattin *v.* McCarty, 41 N. Y. 107. See, further, Johnson *v.* Golder, 132 N. Y. 116 (complaint alleging that the plaintiff is the owner of land subject to a mortgage which was fraudulently foreclosed, and praying for redemption, accounting, and that a pretended mortgage given by the purchaser at a foreclosure sale be cancelled, states but one cause of action); Louvall *v.* Gridley, 70 Cal. 507 (prayer that a deed be declared a mortgage, and the title to the land involved be quieted).

[Beronio *v.* Ventura Lumber Co. (1900), 129 Cal. 232, 61 Pac. 958, was an action to have a sheriff's deed adjudged void and to quiet title to certain premises therein described. Defendant demurred upon the ground that two causes of action had been improperly united in the complaint, "viz., an action to quiet the plaintiff's title, and an action to have the sheriff's deed declared void." The court below sustained the demurrer. The Supreme Court in reversing the case said: "The complaint presents only a single cause of action, viz., the enforcement of the plaintiff's right to the premises in question against the unlawful claim of the defendant thereto. As a portion of the remedy for the enforcement of that right it seeks the annulment of the sheriff's deed, but a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right (Pomeroy's Code Remedies, sec. *459);" San Pedro Lumber Co. *v.* Rey-

closure of mortgages, where the plaintiff seeks to obtain not only a sale of the mortgaged premises, but also a judgment for a deficiency against the mortgagor and other persons who are personally liable for the debt.[1] In several States the codes expressly authorize such actions.[2] The weight of authority, however, in those States whose codes do not contain such express provisions, seems to be the other way; and the rule therein seems to be generally established, that, in an action of foreclosure, a judgment for a deficiency cannot be obtained against any persons liable for the debt other than the mortgagor himself; it is said that the

nolds (1896), 111 Cal. 588, 44 Pac. 309; Bremner *v.* Leavitt (1895), 109 Cal. 130, 41 Pac. 859; Richardson *v.* Opelt (1900), 60 Neb. 180, 82 N. W. 377.]

[1] [Reichert *v.* Stilwell (1902), 172 N. Y. 83, 64 N. E. 790: Under the statute in this State in an action to foreclose a mortgage there is but one cause of action alleged, even if the bond is set forth in the complaint and judgment for deficiency is demanded as a part of the relief. The statutory authority to render a personal judgment for the deficiency does not create a distinct and independent cause of action, but is an incidental remedy, dependent wholly upon the statute and subsidiary to the main object of the action. See Plankinton *v.* Hildebrand (1895), 89 Wis. 209, 61 N. W. 839. In Security Loan and Trust Co. *v.* Mattern (1901), 131 Cal. 326, 63 Pac. 482, the defendant Lena D. Mattern executed and delivered to plaintiff her promissory note for $3,500, and secured the payment of the same by her mortgage upon certain land. Subsequently, Mrs. Mattern desiring to exchange a portion of the land mortgaged, the plaintiff released this portion of the land from the lien of the mortgage in consideration of defendant Bechtel executing and delivering to him his mortgage on land owned by the latter as security for the payment of said note in lieu of said release. The action was brought to recover upon the note and to foreclose the Mattern and Bechtel mortgages. Mrs. Mattern and Bechtel were made defendants. Defendants demurred to the complaint, among other grounds, because of a misjoinder of causes of action. It was claimed that two distinct causes of action were set forth in the complaint — one against defendant Mattern and one against Bechtel. It seems that plaintiff had separated his complaint into two "Counts." In sustaining the ruling of the court below in overruling the demurrer the Supreme Court said: "Although one portion of the complaint is entitled therein 'First Count' and another portion 'Second Count,' the portions so entitled do not purport to set forth separate causes of action, but to state the facts by which the defendants Mattern and Bechtel are respectively related to the plaintiff's cause of action. A complaint, while setting forth a single cause of action, may at the same time ask for different relief from different defendants, according as they are connected with this cause of action, and its character is to be determined from its contents rather than from a misnomer on the part of the pleader." In American Savings and Loan Association *v.* Burghardt (1897), 19 Mont. 323, 48 Pac. 391, it was held that a complaint in such a case as that stated in the text did not state two causes of action, and that the money judgment and the decree were different modes of relief for the same wrong. See also First Nat. Bank *v.* Lambert (1895), 63 Minn. 263, 65 N. W. 451.]

[2] Conn. Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109; Sauer *v.* Steinbauer, 14 Wis. 70; Weil *v.* Howard, 4 Nev. 384; Greither *v.* Alexander, 15 Iowa, 470, 473, per Wright C. J.; Eastman *v.* Turman, 24 Cal. 379, 382, per Sawyer J.; Rollins *v.* Forbes, 10 Cal. 299; Farwell *v.* Jackson, 28 Cal. 105; [Endress *v.* Shove (1901), 110 Wis. 133, 85 N. W. 653.]

making such third person a party, and the praying a decree for deficiency against him, is a misjoinder of causes of action.[1] A suit by the vendor of land to recover the purchase price, and to enforce his lien therefor upon the premises sold or conveyed, includes but one cause of action, the double relief plainly arising from the single state of facts.[2]

§ 354. *460. **Same Subject.** The following are some additional instances in which the doctrine has been approved and enforced by the courts, and the cause of action held to be a single one. An action against a husband and wife, brought upon an alleged indebtedness of both, and an agreement of both to secure the same by a mortgage upon the wife's lands, although at the trial the debt was shown to be against the husband alone, and no such agreement as the one alleged was proven;[3] an action by the vendee in a land contract for a specific performance and for damages, where judgment was given for damages alone;[4] an action by the heirs and administrator of a deceased *cestui que trust* against the trustee, who held both real and personal estate in trust, for an accounting, a conveyance of the land, and a transfer of the personal property;[5] an action to remove a nuisance, for damages, and for an injunction;[6] for admeasurement of dower, possession, and recovery of rents and profits;[7] by one tenant in common against the other, to compel a specific performance of the latter's agreement to convey his share, or for a partition;[8] an action by a stockholder against a bank, its officers, and their assignee, to set aside an assignment, to remove the officers, for an accounting, and for a winding-up of the corporation, — all based

[1] Faesi *v.* Goetz, 15 Wis. 231; Cary *v.* Wheeler, 14 Wis. 281; Jesup *v.* City Bk. of Racine, 14 Wis. 331; Stilwell *v.* Kellogg, 14 Wis. 461; Borden *v.* Gilbert, 13 Wis. 670; Doan *v.* Holly, 26 Mo. 186, 25 Mo. 357. In Ladd *v.* James, 10 Ohio St. 437, it was said that when a mortgage is given to secure a note, and an action is brought setting out both, and demanding judgment for money on the note, and for a foreclosure and sale on the mortgage, any issue of fact affecting the former demand for relief must be tried by a jury if either party require it. See also McCarthy *v.* Garraghty, 10 Ohio St. 438.

[2] Stephens *v.* Magor, 25 Wis. 533; Turner *v.* Pierce, 34 Wis. 658; Walker *v.* Sedgwick, 8 Cal. 398. In the latter case, the action was on notes given for the price.

[3] Marquat *v.* Marquat, 12 N. Y. 336.

[4] Barlow *v.* Scott, 24 N. Y. 40; Sternberger *v.* McGovern, 56 N. Y. 12, 21. And see Duvall *v.* Tinsley, 54 Mo. 93, 95.

[5] Richtmyer *v.* Richtmyer, 50 Barb. 55.

[6] Davis *v.* Lambertson, 56 Barb. 480.

[7] Brown *v.* Brown, 4 Robt. 688.

[8] Hall *v.* Hall, 38 How. Pr. 97. This decision is certainly opposed to the principle stated in the text, and to the weight of authority. Two different primary rights are clearly stated; one based upon the contract, and the other upon the ownership in common.

upon the fraudulent practices of the officers;[1] where a debtor who had executed a deed to A. in trust for his creditor B. alleged that the two had fraudulently sold the land which had been bought in by B., and sought to set aside the sale and to redeem;[2] an accounting against the executor of a father and the administrator of his son, where the estates were so mingled and confused that a separate accounting was impossible;[3] an action against the executor of a lessee who had continued to occupy the premises, to recover the rent accruing before the death, as well as that accruing after;[4] an action to recover damages for negligently driving against and injuring the plaintiff and his horse and carriage;[5] an action to recover damages for fraudulent representations in the sale of some sheep, the plaintiff claiming special damages for the destruction of his entire flock, caused by the communication of disease from those which he had purchased;[6] an action for malicious prosecution, in which special acts of wrong and damage were alleged;[7] and, it has been said, an action to recover damages for several distinct and separate breaches of one contract.[8]

§ 355. * 461. **Cases in Missouri.** To the principle which I have thus stated, and the doctrine approved by such an overwhelming weight of judicial authority, there was opposed a series of decisions in Missouri, which, while they remained unquestioned, rendered the law of the State widely different in this respect from that which was established in other commonwealths. The Supreme Court held in numerous cases, and a great variety of circumstances, that where upon the facts the plaintiff would ultimately be entitled to different kinds of relief, — such as, for example, the setting aside deeds of conveyance to the defendant, and the recovery of the possession of the land, — if, after alleging

[1] Mitchell *v.* Bank of St. Paul, 7 Minn. 252, 255.

[2] McGlothlin *v.* Hemery, 44 Mo. 350. The opinion in this case is an elaborate discussion of the entire doctrine.

[3] McLachlan *v.* Staples, 13 Wis. 448, 451.

[4] Pugsley *v.* Aikin, 11 N. Y. 494.

[5] Howe *v.* Peckham, 10 Barb. 656 (S. T.). The correctness of this decision is more than doubtful. Mason J. makes the cause of action to consist of the delict alone. Certainly the plaintiff's right to his own person and to his property were different rights, and the injury to them created two causes of action.

[6] Wilcox *v.* McCoy, 21 Ohio St. 655, citing Packard *v.* Slack, 32 Vt. 9.

[7] Schenck *v.* Butsch, 32 Ind. 338.

[8] Fisk *v.* Tank, 12 Wis. 276, 298, per Dixon C. J. The acts and defaults complained of in this case can hardly be called distinct and separate breaches. See also Smiley *v.* Daweese (Ind. App. 1891), 27 N. E. Rep. 505. See Roehring *v.* Huebschmann, 34 Wis. 185; Kansas City Hotel Co. *v.* Sigement, 53 Mo. 176, that different items of an account or claim constitute but one cause of action.

all the facts, he should demand the separate reliefs, his complaint would contain different causes of action, and would be held bad on demurrer, or even judgment arrested after verdict, or reversed on appeal because of the error. In other words, the court completely identified the relief, and even the prayer for it, with the cause of action.[1] The court has, however, recently receded from this most untenable position, and seems to have overruled this long series of decisions.[2] The Missouri court seems to have finally brought the law of that State in reference to the subject-matter under consideration into harmony with the plain intent of the code and the well-settled doctrines of equity jurisprudence, as well as into a conformity with the rule settled by the unanimous consent of other courts.[3]

§ 356. *462. **Summary.** — I have thus described the cases in which but one cause of action is alleged, although the many and sometimes conflicting demands for relief may make it appear that several causes of action have been united and mingled together in the pleading. I have stated a general principle which will furnish a certain test for determining all such cases, by ascertaining what allegations contain the "cause of action," and what contain the demands for relief, and by showing the essential nature of each, and the necessary distinctions between them. I shall now proceed to consider the classes of cases in which different causes of action are united either properly or improperly.

IV. *The Joinder of Causes of Action Arising out of the same Transaction or Transactions Connected with the same Subject of Action; Legal Meaning of the Terms "Transaction" and "Subject of Action."*

§ 357. *463. **Most Frequent Applications of this Class. Includes Legal Controversies.** The class which is described by the language of the codes quoted in the above heading is broad, comprehensive, vague, and uncertain. The principal design was

[1] Curd *v.* Lackland, 43 Mo. 139; Wynn *v.* Cory, 43 Mo. 301; Gray *v.* Payne, 43 Mo. 203; Peyton *v.* Rose, 41 Mo. 257; Gott *v.* Powell, 41 Mo. 416; Moreau *v.* Detchemendy, 41 Mo. 431.

[2] Henderson *v.* Dickey, 50 Mo. 161, 165, per Wagner J.; Duvall *v.* Tinsley, 54 Mo. 93.

[3] [In State *ex rel. v.* Horton Land and Lumber Co. (1901), 161 Mo. 664, 61 S. W. 869, it is said: "The character of the action is determined by the facts stated in the petition and not by the prayer for relief." See also Liese *v.* Meyer (1898), 143 Mo. 547, 45 S. W. 282.]

undoubtedly to embrace the vast mass of equitable actions and causes of action which could not be classified and arranged in any more definite manner; and the language was properly left vague, so that it might not in any manner interfere with the settled doctrines of equitable procedure and pleading, parties and remedies. Although this general design is very apparent, yet it is no less evident that the author of the clause failed to distinguish between the "cause of action" and the remedy or relief which is sought to be obtained by means of the action. The most frequent application of this class in the actual administration of justice has been and will be to equitable actions: but the language is not confined to them; it includes legal controversies as well. If all the other requisites of the statute are complied with, legal causes of action of the most dissimilar character — for example, contract and tort — may be united in one proceeding, provided they all arise out of the same transaction, or out of transactions connected with the same subject of action.[1] With respect to equitable cases, there cannot be much difficulty; it is always easy to say, and perhaps to see, that the facts constituting the causes of action arise at least in some vague manner from the same transaction, or from transactions connected with the same subject of action. With respect to legal cases the difficulty is much greater, and is sometimes impossible to be overcome by any logical reasoning. The question will be sometimes presented, not only whether the facts constituting two or more causes of action have arisen from the same transaction, but whether it is possible, in the nature of things, that they could arise in such a manner.

§ 358. * 464. **Controlling Words herein. Necessity of Judicial Definition of.** A full interpretation of the language used in the

[1] [Pollock *v.* Association (1896), 48 S. C. 65, 25 S. E. 977, citing the text. See also Dinges *v.* Riggs (1895), 43 Neb. 710, 62 N. W. 74, a suit where the "petition set up three causes of action: First, malicious prosecution; second, damage to plaintiff's business by arresting occupants of her place of business; third, slander." The court in sustaining the ruling of the District Court in overruling the motion of the defendant to compel plaintiff to elect upon which one of the three causes of action stated in her petition she would rely, said: "There was no error in this ruling of the court. The causes of action, and each of them, sounded in tort, and they all grew out of and were connected with the same transaction, and were therefore properly joined. (Code of Civil Procedure, sec. 87; Freeman *v.* Webb, 21 Neb. 160.)" See Commercial Union Assurance Co. *v.* Shoemaker (1901), 63 Neb. 173, 88 N. W. 156, for case suggesting that "contract and tort" may not be united. See also Bank *v.* Grain Co. (1898), 60 Kan. 30, 55 Pac. 277, where this question was raised but not decided; and see further Willey *v.* Nichols (1898), 18 Wash. 528, 52 Pac. 237.]

codes would result in a general rule applicable to all actions; a rule which should determine when causes of action may and do arise out of the same transaction, or out of transactions connected with the same subject of action. This rule would be obtained, not from an analysis of all possible causes of action, but from a construction of the language used by the legislature; and it would require a legal definition, in an accurate but universal manner, of the terms "transaction," "connected with," and "subject of action." These three terms are the controlling words upon which the whole clause turns; and until the courts shall have defined them in a general and positive manner, all attempts at interpreting the language and deducing any comprehensive and practical rule from it must be futile. Until such a definition is made, each case must be decided upon its own circumstances, in a mere empirical method, so that the confusion and uncertainty will continue, and even increase, in the place of the uniformity and certainty in the practice which the profession and suitors have the right to demand. In short, the courts must break away from the judicial habit which has of late years grown upon them, and must be willing to attempt the discussion and settlement of definitions, principles, and doctrines connected with the reformed procedure, in a general and comprehensive form. Although little aid can be derived from judicial decisions I shall attempt the extremely difficult task of defining these terms, or, to be more accurate, shall attempt to describe their legal significance and effect, and thus to aid in reaching a general rule or principle by which to determine whether any given cases are embraced within the class designated by the legislature.

§ 359. * 465. **Language of Comstock J. and Author's Criticism.** In corroboration of the statement made above in regard to the general purport and object of the class in question, I quote the language used by an eminent judge of the New York Court of Appeals, which, while it contains some unjust remarks upon the authors of the New York code, is a very pointed and accurate description of the clause and of its immediate design: "In respect to the joinder of causes of action, the provision of the law, so far as is material to the question, now is, that 'the plaintiff may unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of the same transaction or transac-

tions connected with the same subject of action.' The authors of the code, in framing this and most of its other provisions, appear to have had some remote knowledge of what the previous law had been. This provision as it now stands was introduced in the amendment of 1852, because the successive codes of 1848, 1849, and 1851, with characteristic perspicacity, had in effect abrogated equity jurisdiction in many important cases by failing to provide for a union of subjects and parties in one suit indispensable to its exercise. This amendment, therefore, was not designed to introduce any novelty in pleading and practice. Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretation which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose, and yet so comprehensive, any rules less liberal than those which have long prevailed in courts of equity." [1] Mr. Justice Comstock plainly regards it unnecessary, if not impossible, to attempt a definition of the terms employed in the passage which he quotes, and would leave each case to be decided upon its own circumstances. This is undoubtedly the easier method for the courts to pursue; but suitors, as well as the profession, have a right to ask from them some rules by which a reasonable degree of certainty as to the correct manner of bringing and conducting causes shall be secured. Regarded as a statutory enactment of the equity doctrine touching the joinder of causes of action in one suit, the clause perhaps requires no special interpretation, since it may be assumed to permit the previous equitable principles and rules of procedure to exist unchanged. In this light alone it is treated by Mr. Justice Comstock in the extract taken from his opinion. But as it applies also to legal actions, and as there were no prior doctrines and rules of practice in courts of law which it reproduces or suffers to remain operative, it does as to them "introduce a novelty in pleading and practice." In order to fix its application in such cases, the meaning of its controlling terms must be determined. There was no prior rule of the common-law procedure which permitted the union of a claim upon contract with another arising from violence to property or person under any circumstances, and yet it is possible that such a combination may be made by virtue of this particular provision.

[1] N. Y. & N. H. R. Co. *v.* Schuyler, 17 N. Y. 592, 604, per Comstock J.

§ 360. * 466. **Observations Made by Courts Respecting Meaning of these Terms.** I shall first collect some general observations which have been made by the courts upon the legal import of these terms, and shall, with whatever aid is derived from the judicial interpretation, attempt an independent analysis. A complaint united a cause of action for an assault and battery with one for slander, alleging that the defamatory words were uttered while the beating was in actual progress. To a demurrer for a misjoinder, it was answered that both causes of action arose out of the same transaction. The court disposed of this position in the following manner: "It by no means follows that, because the two causes of action originated or happened at the same time, each cause arose out of the same transaction. It is certainly neither physically nor morally impossible that there should be two transactions occurring simultaneously, each differing from the other in essential attitudes and qualities. As here, the transaction out of which the cause of action for the assault springs is the beating, the physical force used; while the transaction out of which the cause of action for the slander springs is not the beating or the force used, but the defamatory words uttered. The maker of a promissory note might, at the very instant of its delivery and inception, falsely call the payee a thief; and yet who would say that the two causes of action arose out of the same transaction? It has been held that a contract of warranty and a fraud practised in the sale of a horse at the same trade did not arise out of the same transaction, so as to be connected each with the same subject of action, and that a complaint containing both causes of action was demurrable.[1] Assault and battery and slander are as separate and distinct causes of action as any two actions whatever that can be named. The subjects of the two actions are not connected with each other. Each subject is as distinct and different from the other as the character of an individual is from his bodily structure. The question is not whether both causes of action sprang into existence at the same moment of time. Time has very little to do with solving the real question. The question is, Did each cause of action accrue or arise out of the same transaction, *the same thing done?* It is apparent that each cause of action arose, and indeed must necessarily have arisen, out of the doing of quite different things by the defendant, — different in

[1] Sweet *v.* Ingerson, 12 How. Pr. 331.

their nature, in all their qualities and characteristics, and inflicting injuries altogether different and dissimilar. The same evidence would not sustain each cause of action, and they may require different answers." [1] It has been held, however, that the two causes of action under exactly the same circumstances *do* arise out of the same transaction, and may be united in the same complaint.[2]

§ 361. *467. **Author's Criticism.** A complaint contained one cause of action for the breach of a warranty given on the sale of a horse, and a second cause of action for fraudulent representa-

[1] Anderson *v.* Hill, 53 Barb. 238, 245, per T. A. Johnson J.; and see Dragoo *v.* Levi, 2 Duv. 520, which reaches the same conclusion. It should be noticed that Judge Johnson offers no affirmative definition of "transaction," except in making "the same transaction" equivalent to "the same thing done." See also Wiles *v.* Suydam, 64 N. Y. 173, per Church C. J.: *Held*, that the two causes of action cannot be joined; one is on contract, and the other is for a penalty given by statute; they do not "arise out of the same transaction," nor are they "connected with the same subject of action." Hay *v.* Hay, 13 Hun, 315; French *v.* Salter, 17 id. 546; Douglas Cy. Sup., 38 Wis. 179; Ogdensburgh & L. C. R. Co. *v.* Vt. & Can. R. Co., 63 N. Y. 176 (meaning of "subject-matter of the action").

[2] Brewer *v.* Temple, 15 How. Pr. 286; Harris *v.* Avery, 5 Kans. 146. The first of these was a special term decision, and is expressly overruled in Anderson *v.* Hill. I quote from the opinion in the other as an example of the argument on the other side of the question. The defendant had wrongfully arrested the plaintiff, and at the same time called him a thief. The court say: "We think that these facts constitute only one transaction. . . . Our code has abolished all common-law forms of action, and has established a system for the joinder of actions more philosophical and complete in itself. It follows the rules of equity more closely than it does those of the common law, one object seeming to be to avoid the multiplicity of actions, and to settle in one suit as equity did, as far as practicable, the whole subject-matter of a controversy. It is probably true that the two causes of action for assault and battery and for slander cannot, under our code, be united, unless both arise out of the same transaction; but we do not know any reason why they should not be united when both *do* arise out of the same transaction." The court here simply *assumes* that both causes of action did arise out of the same transaction, but does not venture upon any reasons for that opinion. The decision is a mere begging of the question.

[Benton *v.* Collins (1896), 118 N. C. 196, 24 S. E. 122. In this case a cause of action for assault and battery and an equitable cause of action to set aside a deed alleged to have been fraudulently executed to defeat plaintiff in the collection of his claim for damages for the assault, were held to be properly joined in the same complaint. See also Ferst's Sons *v.* Powers (1900), 58 S. C. 398, 36 S. E. 744, in which it is held that a legal cause of action for goods sold and delivered may be joined with an equitable cause of action to set aside a sale of a stock of goods as a fraud upon creditors. See also Endress *v.* Shove (1901), 110 Wis. 133, 85 N. W. 653, to the effect that "a cause of action to enforce a mortgage, and one to recover on the personal liability of the mortgagor, grow out of the same transaction and are connected with the same subject thereof, hence may be joined under the statute on that subject regardless of the statutory provision for deficiency judgments in foreclosure cases, provided no one other than the debtor is made a defendant and the two causes of action are separately stated."]

tions respecting the quality and condition of the horse made at the same sale, the plaintiff claiming that both causes of action arose out of the same transaction. The court said: "It is somewhat difficult to determine the precise extent and boundaries of the first subdivision of § 167 of the code, which provides for the joinder of causes of action where they arise out of the same transaction or transactions connected with the same subject of action. In this case the plaintiff first counts in assumpsit on an alleged warranty of the horse, and in the second count for fraud and deceit in wrongfully concealing the defects of the same horse. It may be true that these causes of action arise out of the same transaction, to wit, the bargain for the purchase of the horse; but are they connected with the same subject of action? The subject of the action is either the contract of warranty, or it is the fraudulent concealment of the defects complained of. These causes of action cannot consist with each other. I am inclined to think that the object of the section was to allow the plaintiff to include in his complaint two or more causes of action actually existing, arising out of the same transaction, and when a recovery might be had for both in the same action; and that the joinder must be of those causes of action which are consistent with, not those which are contradictory to, each other."[1] The judge here fell into at least one palpable error and misreading of the statute. If the causes of action arise out of the same transaction, it is not necessary that they should also be connected with the same subject of action. There are two alternatives: *first*, the causes of action must arise out of the same transaction, that is, *one* transaction, or, *secondly*, they must arise out of transactions which are themselves connected with the same subject of action. When it was conceded by the learned judge that the two causes of action in this case arose out of the same transaction, namely, the bargain for the sale of the horse, he had no room for further argument; the case was practically decided. The real question was, whether they did in fact arise out of the same transaction; whether the negotiation preceding the sale *was* the "transaction" within the legal meaning of the provision. The rule laid down at the end of

[1] Sweet *v.* Ingerson, 12 How. Pr. 331, per Bacon J. What inconsistency exists between these two causes of action? Does the learned judge mean to be understood that a vendor *cannot* enter into a contract of warranty, and also make false representations at the same sale *and in the same language?*

the citation affords no help in solving the difficulty, if indeed it has any meaning whatever.

§ 362. *468. **Same Subject.** In a case where the defendants — common carriers — had carried a quantity of wheat of the plaintiffs on their boats from Buffalo to New York, the complaint separately stated two causes of action. The first alleged a wrongful conversion of 340 bushels of wheat, and demanded judgment for their value, as damages; the second alleged an overpayment of freight on the shipment to the amount of $170, and demanded judgment for that sum. In passing upon the question raised by the defendants' demurrer, the court said: "It must be admitted that the first cause of action is for a tort, and that the second is on an implied contract to recover back money paid by plaintiffs under a mistake of facts. But the counsel for the plaintiffs insists that both causes of action arise out of the same subject of action, viz. the transportation of wheat from Buffalo to New York, or arise out of transactions connected with that subject of the action, and are therefore joined under the first subdivision of § 167 of the code. Cases throw but little light on the unmeaning generality of the first subdivision of this section. Now, I do not think the transportation of the wheat to New York is the subject of the plaintiffs' action. The plaintiffs have two causes of action. The subject of the first would be the loss, waste, or wrongful conversion of the 340 bushels of wheat by the defendants, and their wrongful neglect or act by which the plaintiffs lost their property. The subject of the second cause of action would appear to be the $170 of the plaintiffs' money, which the plaintiffs overpaid to the defendants on account of freight, and which the defendants ought to have paid back to the plaintiffs. But have both these causes of action, or subjects of action, arisen out of the same transaction, within the meaning of this provision of the code? I do not want to nullify the code, and I have no right to nullify it; and this provision has, or was intended to have, some meaning. Why, then, should I not say that the transaction in this case, out of which have arisen the plaintiffs' two causes of action, and subjects of action, commenced with the shipment of wheat at Buffalo, and has not ended yet, even by the commencement of this action; the plaintiffs' two causes of action being links in the chain of facts containing the transaction, and thus arising out of, or connected with, the same transaction? By

the 'subject of action' in this section of the code must be intended, not the subjects of the different counts, or of the several causes of action, but of the action as a unit. To say that by the 'subject of action' is meant the several causes of action nullifies this provision of the code. To give force and effect to it, it appears to me you must say that it means that the plaintiffs can unite several causes of action against the same party, arising out of the same transaction, and nothing more; and you must treat the concluding words, 'or transactions connected with the same subject of action,' as useless and unmeaning surplusage. Upon the whole, I have come to the conclusion that the plaintiffs had a right to unite the two causes of action in this complaint; but I have done so, knowing that no reasoning on this point can have much logical precision, or lead to a satisfactory result."[1]

§ 363. * 469. **Same Subject.** This opinion, which I have quoted in full, is one of the most elaborate attempts to be found in the reports at an analysis and definition of these terms. Some observations upon it are appropriate here, before passing to the other citations. It is plain that the learned judge labored under a hopeless confusion, both in respect to his notions of the meaning of the important terms, and in respect to his reading of the clause itself. He is completely afloat as to the legal import of "subject of action," constantly treating it interchangeably with "transaction," and, notwithstanding his disclaimer, confounding it with "cause of action." Why, in the one case, is the "subject of action" declared to be the conversion of the wheat, the wrongful act or neglect by which the wheat was lost to the plaintiffs, — that is, the very *delict* committed by the defendant, and in the other case declared to be the *money*, — the very physical thing which the plaintiffs had mistakenly paid to the defendants, and which the defendants were under an implied contract to repay? It is self-evident that, if by the term "subject of action" is meant the delict or wrong by which the plaintiffs' primary right of property in their wheat was invaded, it must also mean the wrong in the other case, — that is, the breach of the implied contract to repay the money; and if it denotes, in the one instance, the money which is the subject of the plaintiffs' claim, it must denote the same in the other. But the great error of the learned judge consists in his mistaken reading of the statute. The view of the

[1] Adams *v.* Bissell, 28 Barb. 382, 385, per Sutherland J.

plaintiffs' counsel, which he repudiates, was certainly simple and intelligible. That view regarded both causes of action as arising out of one and the same transaction, — the transport of the grain, with all of its incidents. After rejecting it, the judge, in fact, returns to this theory at last, and rests his decision upon it. In his discussion, however, he reverses the order of the statute; he treats it as though it required the "subjects of action" to be connected with one "transaction," instead of prescribing that the "transactions" should be connected with the same "subject of action;" and, finding that this construction leads him into difficulties from which there is no escape, he finally pronounces the important clause of the section useless surplusage, to be entirely rejected. I need hardly say that courts have no authority to reject any portion of a statute, unless it be absolutely meaningless. This clause is certainly not thus without meaning. Causes of action may arise from the same transaction, and they may arise from transactions which are connected with the same subject of action, — that is, which have a common point of connection with which they are all united, and which common point is the subject of the action. This, I say, is far from meaningless; on the contrary, it is a simple and plain expression, as far as the language is concerned, when that language is used in its ordinary and popular signification. The difficulty, and the only difficulty, springs from the question, whether the words are thus used in their proper sense, or whether they must receive a special and technical legal interpretation in order to arrive at the legislative intent, and to frame from them a definite rule which shall be applicable to all possible cases. It is an abuse of judicial power to reject an express provision of a statute on the sole ground of a difficulty in understanding and enforcing it.

§ 364. *470. **Same Subject.** In an action by a judgment creditor against his debtor and an assignee of such debtor to set aside transfers, to recover property, and for other relief, it was said by the court: "What is the subject of the action in this case? It is the restitution of the property of the judgment debtor, whom the plaintiff represents. To entitle himself to this relief, the plaintiff avers in his complaint different transactions out of which his right to a restitution flows."[1] There is here a plain confusion of ideas. The restitution of the debtor's property, which is the relief de-

[1] Palen *v.* Bushnell, 46 Barb. 24.

manded, is the *object* of the action. If there is anything connected with this matter clear, it is that the authors of the code used the terms "subject of action" and "object of the action" to describe different and distinct facts.

§ 365. *471. **Jones v. Steamship Cortes.** The general theory of pleading and of actions embodied in the new system was stated with some fulness by the Supreme Court of California, in an action brought against a steamboat company by a passenger to recover damages. The plaintiff had purchased a ticket from San Francisco to San Juan, being led to believe, by public advertisements of the defendants, that the vessel landed at the latter place. She was carried on to Panama, the boat not stopping at San Juan, and was subjected to many personal discomforts and injuries, and also suffered consequential pecuniary losses and damage. The complaint was in the form of an action for deceit, rather than on the contract, and contained allegations of false and fraudulent representations. In respect to this complaint, the court pronounced the following opinion: "Our system of pleading is formed upon the model of the civil law, and one of its principal objects is to discourage protracted and vexatious litigation. It is the duty of the courts to assist as far as possible in the accomplishment of this object, and it should not be frittered away by the application of rules which have no legitimate connection with the system. The provisions for avoiding a multiplicity of suits are to be liberally and beneficially construed; and we see no reason why all matters arising from, and constituting part of, the same transaction, should not be litigated and determined in the same action. Causes of complaint differing in their nature, and having no connection with each other, cannot be united; but the object of this rule is to prevent the confusien and embarrassment which would necessarily result from the union of diverse and incongruous matters, and it has no application to a case embracing a variety of circumstances, so connected as to constitute but one transaction. . . . Every action under our practice may be properly termed an action on the case; and it would seem that every ground of relief which can be regarded as a part of the case may with propriety be included in the action. . . . The plaintiffs have brought their suit upon the whole case to recover damages, not only for the breach of the contract, but for the wrongs and injuries committed by the owners and agents of the defendants in that connection. The

defendants are liable for all the damages resulting from these causes; and there is certainly no impropriety in adjusting the whole matter in one controversy." [1] The section found in all the codes defining a "counter-claim" contains the expressions "transaction" and "connected with the subject of action," used in the same sense as in the passage now under consideration. In a few of the decisions which have been based upon that section, there is some approach towards a general interpretation of these phrases. The cases are collected in the succeeding chapter, in the section which treats of the counter-claim, and may be consulted for whatever light they throw upon the present discussion.

§ 366. *472. **Observations of the Author. Two Alternatives.** It is plain that little real help can be obtained from the foregoing judicial explanations, and we must return to the very language of the statute itself. This language must be carefully studied, and the proper force and effect given to all its words. In order that different causes of action may be united, they must arise out of a transaction, or out of transactions. Nothing is said about their being connected with or arising out of the same "subject of action." There are two alternatives only: First, these different causes of action may arise out of the same transaction, — that is, out of *one;* or, secondly, they may arise out of different transactions; but in that case these transactions must be connected with the same "subject of action." The words "arise out of" are important and emphatic. They indicate a sequence of cause and effect, so that the causes of action must result as consequences from, or be produced by, the transactions. It is plain that there must be a close connection between the transaction, as the origin, and the causes of action, as the products.

§ 367. *473. **Meaning of "Transaction."** "Transaction" is defined by Worcester as "the act of transacting or conducting any business; negotiation; management; a proceeding." We must recur to the definition of cause of action already given. It includes the plaintiff's primary right which has been invaded, and the wrongful act or default — the delict — of the defendant by which the right is broken. In order that causes of action may arise out of a transaction, there must therefore be a negotiation, or a proceeding, or a conduct of business, between the parties, of such a nature that it produces, as necessary results, two or more

[1] Jones *v.* Steamship Cortes, 17 Cal. 487, 497, per Cope J.

different primary rights in favor of the plaintiff, and wrongs done by the defendant which are violations of such rights. The proceeding, or negotiation, or conduct of business, must, of course, be a unit, one affair, or else it would not be a single transaction; and yet it must be in its nature complex, for it must be the origin of two or more separate primary rights, and of the wrongs which violate them. In order that this may be so, the facts from which the different primary rights flow *must be parts of, or steps in, the transaction;* and, for the same reason, the wrongful acts or omissions of the defendant must be parts of the same transaction. If a single transaction — that is, a single, continuous, and complex proceeding, or negotiation, between the parties — is analyzed and reduced into its series of acts and defaults, and some of these acts are the facts from which spring one primary right in favor of the plaintiff, and other acts are the facts from which spring a different primary right in his favor, and others still are the violations or breaches of these rights, these two causes of action do truly arise out of the same transaction.

§ 368. * 474. **Same Subject.** It is clear that every event affecting two persons is not necessarily a "transaction" within the meaning of the statute; indeed, the word as used in common speech has no such signification. "Transaction" implies mutuality, something done by both in concert, in which each takes some part. Much less can it be said that, because two events occur to the same persons at the same time, they are necessarily so connected as to become one transaction. The case cited above, in which a cause of action for an assault and battery and one for a slander were united, illustrates this statement. Two events happened simultaneously, the beating and the defamation, but neither was a "transaction" in any proper sense of the word. The wrong which formed a part of one cause of action was the beating; that which formed a part of the other was the malicious speaking. The plaintiff's primary rights which previously existed were broken by two independent and different wrongs. The only common point between the causes of action was one of time; but this unity of time was certainly not a "transaction." [1] Much of

[1] [See De Wolfe *v.* Abraham (1896), 151 N. Y. 186, 45 N. E. 455, in which "the plaintiff sued the defendants, merchants in the city of Brooklyn, for slander, alleging that at their place of business, and in the presence and hearing of a large number of people, the defendants, through their lawful agents, charged plaintiff with theft, in that she had stolen from them a certain ring. The plaintiff's

the difficulty in construing this language has resulted, I think, from a failure to apprehend the true nature of a "cause of action," from a forgetfulness that it includes two factors, — the primary

counsel, in opening the case to the jury, stated that the alleged slander was not uttered by the defendants, or either of them, but by a clerk or salesman in their employ; that plaintiff, at the time of the slander, was falsely imprisoned by a detective of defendants, and that she sought to recover damages for false imprisonment and the slander. Thereupon the counsel for the defendants moved upon the complaint and the opening for a dismissal upon the ground that the defendants were not liable for the slander of their clerk, and that the complaint was solely for slander. This motion was denied and the plaintiff was allowed to withdraw a juror for the purpose of applying to the Special Term for leave to amend her complaint, so as to allege a cause of action for false imprisonment against the defendants. A motion was accordingly made at Special Term, and the justice presiding held that the proposed amended complaint contained a union of the causes of action for slander and false imprisonment, and denied the motion. On appeal the Appellate Division reversed the order of the Special Term and allowed the amendment, holding that 'injury at the same time to the person by physical violence and to the character by language may well be regarded as parts of a single tort.'" The question presented to the Court of Appeals was "whether under all the circumstances of the case the plaintiff should have been allowed to amend her complaint for slander by adding thereto the statement of a cause of action for false imprisonment." In reversing the order appealed from the Court of Appeals, among other things, said: "We are unable to agree with the conclusion reached by the learned Appellate Division that injury at the same time to the person by physical violence and to the character by language may well be regarded as parts of a single tort. We think to so hold is to ignore a distinction that exists in all jurisdictions where the common law is administered. It is not necessary, however, to examine precedents, as the Code of Civil Procedure (§ 484) is decisive of this appeal." After stating the provisions of this section of the code the court proceeds: "It thus appears that the legislature has indicated with great clearness and particularity the causes of action that may be united in the same complaint. The test is very simple, as all causes of action united must belong to the same subdivision of the section we are considering. False imprisonment is an injury to the person and is embraced within subdivision 2, while slander is in express terms excluded therefrom and placed in subdivision 3. The plaintiff's case is not aided by subdivision 9 of the section, which provides for uniting causes of action upon claims arising out of the same transaction. It does not follow that two causes of action, originating at the same time, arose as matter of law out of the same transaction, or are proved by the same evidence (Anderson *v.* Hill, 53 Barb. 245, 246). In the case cited the General Term of the Supreme Court held that causes of action for assault and battery and slander could not be united in the same complaint." Here the court quotes the text commenting upon the case of Anderson *v.* Hill cited in the opinion and concludes as follows: "The separate and distinct nature of the causes of action of false imprisonment and slander are apparent when we apply the test under the circumstances of the case at bar, whether the same evidence would prove the plaintiff's case. It is obvious that it would not; in the action for false imprisonment plaintiff must show an unlawful arrest and detention; in the action for slander the proof would be the uttering of the slander in the presence of others, its falsity, if justified, and extrinsic evidence of malice if any existed. The measure and proof of damages in the two causes of action would be entirely different."]

right and the wrong which invades it. A "cause of action" cannot be said to "arise out of" an event, when the event produces or contains but one of these factors, — the delict or wrongful act.[1]

[1] [*Meaning of the Term "Transaction."*

Gutzman *v.* Clancy (1902), 114 Wis. 589, 90 N. W. 1081, holds that the word "transaction," in the statute, is broad enough to include an entire, continuous physical encounter; Gilbert *v.* Loberg (1894), 86 Wis. 661, 57 N. W. 982; Story & Isham C. Co. *v.* Story (1893), 100 Cal. 30, 34 Pac. 671, quoting the author. In Knapp *v.* Walker (1900), 73 Conn. 459, 47 Atl. 655, the court said: "The complaint before us, containing but one count, describes a cause of action for fraud. It alleges that the defendant by certain false and fraudulent representations, which are set forth, induced the plaintiff to part with his horse of the value of $100. It also describes a cause of action for breach of contract. It alleges that the defendant failed to perform his agreement to deliver a certain gray mare in exchange for the horse which he had received from the plaintiff. The dealings between the plaintiff and defendant with reference to an exchange of horses was the transaction out of which both the alleged causes of action arose, and a statement of all the claimed facts of the entire transaction therefore involved a statement of both of said causes of action."

In Craft Refrigerating Machine Co. *v.* Quinnipiac Brewing Co. (1893), 63 Conn. 551, 29 Atl. 76, the court said: "As the word is employed in American codes of pleading and in our own Practice Act, a transaction is something which has taken place whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. The transaction between the parties to the present action began when they made the contract for the manufacture and sale of the two machines. Then followed the delivery of the machines, the refusal to accept them, the attempt of the plaintiff to retake them, the forcible prevention of their removal, and the subsequent continuance of their use in the defendant's business. Without taking each and all of these events into consideration, the legal relations of the parties could not be fully determined. From the delivery of the machines to the commencement of the action, they had remained continuously in the defendant's possession. It had simply dealt with them in a different way at different times. The Practice Act is to be 'favorably and liberally construed as a remedial statute.' . . . It has taken the word transaction, not out of any legal vocabulary of technical terms, but from the common speech of men. So far as we are aware it has never been the subject of any exact judicial definition. It is therefore to be construed as men commonly understand it, when applied, as in our Practice Act it certainly is applied, . . . to any dealings between the parties, resulting in wrongs, without regard to whether the wrong be done by violence, neglect, or breach of contract. It seems to us hardly to be doubted that any ordinary man would consider everything stated in the complaint as properly belonging to a narrative of the whole transaction between the parties, and necessary for the information of one who was to form a judgment as to their respective rights. That a broader meaning should be given to the term 'transaction' than it has received in some of the courts of our sister States, is plain from the provision in the Practice Book, . . . that 'where several torts are committed simultaneously against the plaintiff (as a battery accompanied by slanderous words) they may be joined as causes of action arising out of the same transaction, notwithstanding they may belong to different classes of action.' This was the deliberate adoption of a view of the meaning of the word in question which had been previously disapproved in New York, as well as by Judge Bliss in his treatise on

§ 369. *475. **Meaning of "Subject of Action."** The same analysis applies also to the remaining portion of the clause, the sole difference being that the causes of action arise out of different transactions instead of one. The common tie between the causes of action in that case is, that the transactions themselves are connected with the same "subject of action." What is meant by this term? It cannot be synonymous with "cause of action." This appears from making the substitution, since the result would be, "causes of action may be united when they arise out of transactions connected with the same cause of action;" which is an absurdity, a mere statement in a circle. "Subject of action" must, therefore, be something different from "cause of action." It is also different from "object of the action." The object of the action is the thing sought to be attained by the action, the remedy demanded and finally awarded to the plaintiff. Causes of action cannot arise out of transactions connected with the "object of the action," because that object is something in the future, and could have had no being when the transactions took place out of which the causes of action arose. As the causes of action arise out of certain transactions, and as these transactions are connected with a "subject of action," it is plain that this subject must be in existence simultaneously with the transactions themselves, and prior to the time when the causes of action commence. This fact also shows that the "subject" must be something other than the cause of action. The phrase was not used in legal terminology prior to the code, but another one very similar to it was in constant use, and had acquired a well-defined meaning; namely, "*subject-matter of the action.*" Thus the rule is familiar, that courts must have jurisdiction of "the subject-matter of the action," as well as over the parties. Courts might have the power in a proper case to grant any kind of relief, legal or equitable, and to entertain any form of proceeding, and yet not have jurisdiction over some particular "subject-matter." The term "subject of action," found in the code in this and one or two other sections, was doubtless employed by its authors and the legislature as synonymous with, or rather in the place of, "subject-matter of the action." I can conceive of no other interpretation

Code Pleading (§ 125), though accepted in Kansas. Anderson *v.* Hill, 53 Barb. 238, 245; Harris *v.* Avery, 5 Kans. 146."

See also McHard *v.* Williams (1896), 8 S. D. 381, 66 N. W. 930.]

which will apply to the phrase and meet all the requirements of the context. "Subject-matter of the action" is not the "cause of action," nor the "object of the action." It rather describes the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted. It is possible, therefore, that several different "transactions" should have a connection with this "subject-matter," or, what seems to me to be the same thing, with this "subject of action." The whole passage is, at best, a difficult one to construe in such a manner that any explicit and definite rule can be extracted from it.[1] I remark, in bringing this analysis of the language to a close, that the latter clause of the subdivision — "or transactions connected with the same subject of action" — can probably have no applica-

[1] [*Meaning of the Term "Subject of Action."*

In Box *v.* Chicago, R. I. & P. Ry. Co. (1899), 107 Ia. 660, 78 N. W. 964, the court quotes as follows from Rodgers *v.* Association, 17 S. C. 406: "What is a cause of action? We must keep in view the difference between the subject of the action and the cause of the action. The subject of the action was what was formerly understood as the subject-matter of the action." See Adkins *v.* Loucks (1900), 107 Wis. 587, 83 N. W. 934; Jordan *v.* Estate of Warner (1900), 107 Wis. 539, 83 N. W. 946; Foster *v.* Posson (1899), 105 Wis. 99, 81 N. W. 123. In Zinc Carbonate Co. *v.* First National Bank of Shullsburg (1899), 103 Wis. 125, 79 N. W. 229, the court said: "There is but one subject of action, — the conspiracy to defraud and its consummation to the damage of plaintiff. All the allegations of fact are parts of the presentation of that one subject." Dinan *v.* Coneys (1894), 143 N. Y. 544, 38 N. E. 715: "The subject-matter of the plaintiff's action was the alleged right of possession of the land sought to be recovered. The subject-matter of the counter-claim was the right to recover against the plaintiff the amount of the legacy, and also . . . the right to relief by sale of the land for its payment." Ponca Mill Co. *v.* Mikesell (1898), 55 Neb. 98, 75 N. W. 46: "Another ground of demurrer was that two causes of action are improperly joined. This is because the plaintiff alleged the proceedings to set aside the conveyance to Jordan and the lien resulting to himself, and prayed a foreclosure. The Code of Civil Procedure provides (sec. 87) that the plaintiff may unite several causes of action relating to 'the same transaction or transactions connected with the same subject of action.' The vagueness of that language has caused the profession much difficulty; but the facts out of which the lien arose embrace a part of the fraudulent conduct justifying interposition through a receivership; they resulted in giving plaintiff a special interest aside from that of a stockholder, and it would certainly seem that the language quoted is broad enough to cover such a state of facts." McHard *v.* Williams (1896), 8 S. D. 381, 66 N. W. 930. In Craft Refrigerating Machine Co. *v.* Quinnipiac Brewing Co. (1893), 63 Conn. 551, 29 Atl. 76, it is said: "It follows that both the causes of action were properly united in the same complaint. The same result would also be reached if what we have viewed as one transaction could be regarded as consisting of several transactions, since such would all be connected with the same subject of action, that is, the two machines and the title to them;" Daniels *v.* Fowler (1897), 120 N. C. 14, 26 S. E. 635; Solomon *v.* Bates (1896), 118 N. C. 311, 24 S. E. 746: "There is the same 'subject of action' throughout, *i. e.* the plaintiff's loss of his deposit."]

tion to legal causes of action, and can only be resorted to in practice as describing some equitable suits which involve extremely complicated matters. In fact, Mr. Justice Comstock's position is doubtless correct, that the entire subdivision finds its primary and by far most important application to equitable rather than to legal proceedings.[1]

§ 370. * 476. **Examples of Causes of Action Held to have arisen out of the same Transaction.** Although the courts have generally refrained from any discussion of this clause, they have had frequent occasion to invoke its aid; and the following cases will furnish some examples of judicial decisions based upon it.[2] The causes of action united in the same complaint or petition were held to have arisen out of the same transaction, where one was for the recovery of the possession of land, and the other was for the value of its occupation by the defendant;[3] for an accounting and payment of the balance found due, and for the surrender up of securities;[4] for injuries to the person and for those to the

[1] In support of the interpretation of the phrase "subject of the action," suggested by the text, namely, that it "describes the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted," see Holmes *v.* Abbott, 53 Hun, 617, 6 N. Y. Suppl. 943. A cause of action entitling to injunction and damages for continuous interference with rights of property by the maintenance and operation of a steam railroad in a highway may be united with a claim for damages for personal injuries suffered by the plaintiff while driving along the highway in consequence of his horses being frightened by the noise of a passing engine and train; since both claims are "connected with the same subject of action," which in this case is the unlawful obstruction of the highway by the defendant: Lamming *v.* Galusha, 135 N. Y. 239.

[2] [Bush *v.* Froelick (1896), 8 S. D. 353, 66 N. W. 939. "Under Comp. Laws, sec. 4932, authorizing the joinder of causes of action arising out of 'the same transaction, or transactions connected with the same subject of action,' the holder of a note secured by a trust deed may in one action seek to foreclose the trust deed, to set aside a prior foreclosure made by the trustee without plaintiff's knowledge or consent, to enjoin the county treasurer from issuing to the trustee a tax deed for the mortgaged premises, and to adjust the equities of the various parties." Dinges *v.* Riggs (1895), 43 Neb. 710, 62 N. W. 74; for malicious prosecution, for damage to plaintiff's business by arresting occupants of her place of business, and for slander. Maldaner *v.* Beurhaus (1900), 108 Wis. 25, 84 N. W. 25; Alliance Elevator Co. *v.* Wells (1896), 93 Wis. 5, 66 N. W. 796: one count alleged the withholding of premises wrongfully after expiration of lease therefor; the other count, that certain personal property, that by the terms of the lease defendant was entitled to the use of, had been converted. *Held*, upon demurrer for improper joinder of causes, that both causes arose out of the same transaction or transactions connected with the same subject of action. Porter *v.* International Bridge Co. (1900), 163 N. Y. 79, 57 N. E. 174; Scott *v.* Flowers (1900), 60 Neb. 675, 84 N. W. 81, a cause of action for false imprisonment joined with a count for malicious prosecution.]

[3] Armstrong *v.* Hinds, 8 Minn. 254. See Larned *v.* Hudson, 57 N. Y. 151; also *post*, § * 494, and note.

[4] Montgomery *v.* McEwen, 7 Minn. 351.

property of a passenger, committed by the wrongful acts and frauds of a steamboat company on the same voyage;[1] where the owner of stereotype plates of a book alleged a breach of defendant's contract to furnish paper and print a book therefrom, and also injuries negligently done to the plates themselves while in the defendant's possession;[2] detaining the plaintiff's chattels, and wrongfully and negligently injuring them while thus detained;[3] an action by a judgment creditor against his debtor and another to recover back money wrongfully paid as usury to such person by the debtor, to compel this assignee to account for actual securities placed in his hands by the debtor, and to set aside certain transfers of personal property made by the debtor;[4] an action in which the plaintiff sought to recover the agreed price in a contract for building a house, damages caused by the defendant's delay to have the premises ready in time for the work to go on, and the price of extra work and materials, and finally to set aside, on the ground of fraud, an award made in reference to certain of the matters in dispute;[5] an action to recover damages for the conversion of goods by the defendant, a common carrier, and to recover back money mistakenly paid as freight for the same goods;[6] where lands incumbered by an outstanding mortgage had been conveyed by a warranty deed, and the grantee therein brought an action against the grantor and the holder of the mortgage, and prayed a judgment fixing the amount due upon the mortgage, if any, and directing the same to be delivered up and cancelled upon payment by the plaintiff of the amount so ascertained, and ordering the grantor thereupon to repay that sum to the plaintiff;[7] action against a constable and the sureties upon his official bond, alleging the issue of an execution to such officer and a levy by him upon property of the judgment debtor sufficient to have made the amount due, a neglect to return the execution,

[1] Jones *v.* Steamboat Cortes, 17 Cal. 487, 497. See, however, Grant *v.* McCarty, 38 Iowa, 468. Injury to the person and injury to the property of the plaintiff by one negligent act of the defendant: Rosenberg *v.* Staten Island Ry. Co. (Com. Pl. 1891), 14 N. Y. Suppl. 476. But see Taylor *v.* Metropolitan El. Ry. Co., 52 N. Y. Super. Ct. 299.

[2] Badger *v.* Benedict, 4 Abb. Pr. 176.

[3] Smith *v.* Orser, 43 Barb. 187.

[4] Palen *v.* Bushnell, 46 Barb. 24. It might, perhaps, have been better to say that there was but one cause of action.

[5] Lee *v.* Partridge, 2 Duer, 463.

[6] Adams *v.* Bissell, 28 Barb. 382, 385.

[7] Wandle *v.* Turney, 5 Duer, 661. Although Bosworth J. says the causes of action all arose out of the same transaction, yet, upon the principles already stated in the text, there was actually but one cause of action.

the receipt and collection of the money, and refusal or neglect to pay over the same to the plaintiff,[1] where the plaintiff alleged that he had placed $100 in the defendant's hands for the purpose of entering an eighty-acre lot in the plaintiff's name, at the expected price of $1.25 per acre; that the defendant thereupon entered the lot in his own name, but paid therefor only $10, and converted the residue of the money to his own use; and demanded judgment for the $90 and interest, and also for a conveyance of the land to himself;[2] an action to recover a specified sum due upon a written contract, and damages for the breach of certain covenants in the same instrument, and also to compel the specific performance of a covenant to convey land contained therein;[3] where one cause of action was for the defendant's deceit practised in the sale of oil leases to the plaintiff, and the other was for money had and received, being the price paid by the plaintiff in the same sales.[4] The owner in fee of land having been induced by the defendant's fraud to convey the same by a deed in which the wife joined, the grantor and his wife brought a joint action to recover damages for the deceit. The New York Court of Appeals held that the husband had a cause of action for the loss of the land which he owned in fee; that the wife had a cause of action for the loss of her inchoate dower right; that they could recover one joint judgment as a satisfaction for both claims; and, finally, that the two causes of action were properly united, since they arose out of the same transaction, — namely, the bargaining and sale of the premises and the fraudulent representations made therein by the defendant.[5] Several of the cases cited in the last preceding sub-

[1] Moore *v.* Smith, 10 How. Pr. 361.

[2] Callaghan *v.* McMahan, 33 Mo. 111.

[3] Gray *v.* Dougherty, 25 Cal. 266.

[4] Woodbury *v.* Delap, 1 N. Y. S. C. 20; s. c. 65 Barb. 501. The first count set out the sale and the deceit and the damages; the others, for money had and received, alleged that the money had been had and received by the defendant "as above stated." This, it was held, incorporated into the latter counts the averments of the former, and showed that all arose out of the same transaction. See also Gertler *v.* Linscott, 26 Minn. 82 (if a cause of action on contract and one for a tort arise out of the same transaction, or out of a series of connected transactions, they may be joined); Barr *v.* Shaw, 10 Hun, 580 (causes of action for different torts may arise out of the same transaction, and be joined); Young *v.* Young, 81 N. C. 91.

[5] Simar *v.* Canaday, 53 N. Y. 298, 305, per Folger J. The complaint was not framed at all upon the theory which the court adopted in making this decision. It did not purport to set forth two separate causes of action; it was a joint complaint, and alleged a joint cause of action in favor of the plaintiffs, and demanded a single joint judgment. The peculiar feature of the decision is that which sustains a single judgment for one sum as damages in satisfaction of both demands,

division of this section might perhaps be regarded as instances of causes of action arising out of the same transaction; they certainly would be so if they were to be considered as embracing more than one cause of action.[1]

§ 371. * 477. **Examples of Causes of Action Held not to have arisen out of the same Transaction.** The following are examples of causes of action contained in the same complaint or petition which have been held not to arise out of the same transaction: for an assault and battery and for a slander, although committed simultaneously;[2] for a breach of a warranty of soundness given on the sale of a horse, and for fraudulent representations as to the soundness made at the same sale;[3] a claim by the plaintiffs as next of kin and legatees of A., two of the defendants being A.'s executors, and a claim by them as legatees of B., one of the defendants being B.'s executor, the action being for an account and settlement of both estates.[4]

§ 372. * 478. **What Facts must be averred herein.** When the plaintiff unites two causes of action which can only be joined because they arise out of the same transaction, or out of transactions connected with the same subject of action, the facts showing such common origin or connection must be averred, so that the court may see whether the joinder is proper. A mere general allegation that the causes of action all arose out of the same transaction is of no avail, and would be surplusage.[5]

although the case is expressly based upon the doctrine that there were separate and distinct causes of action. Assuming that the court was correct in this position, they plainly both arose out of the same transaction.

[1] See *supra*, §§ *459, *460, and especially Bidwell *v.* Astor Mut. Ins. Co., 16 N. Y. 263; Phillips *v.* Gorham, 17 N. Y. 270; Laub *v.* Buckmiller, 17 N. Y. 620; N. Y. Ice Co. *v.* N. W. Ins. Co., 23 N. Y. 357; Lattin *v.* McCarty, 41 N. Y. 107; Howe *v.* Peckham, 10 Barb. 656; Blake *v.* Van Tilborg, 21 Wis. 672; Fish *v.* Berkey, 10 Minn. 199.

[2] Anderson *v.* Hill, 53 Barb. 238, 245; Dragoo *v.* Levi, 2 Duv. 520. But, *per contra*, see Harris *v.* Avery, 5 Kan. 146; Brewer *v.* Temple, 15 How. Pr. 286.

[3] Sweet *v.* Ingerson, 12 How. Pr. 331. In accordance with the principles maintained in the text, the two causes of action in this case clearly arose out of the same transaction; indeed, a more illustrative example could hardly be found among purely *legal* actions.

[4] Viall *v.* Mott, 37 Barb. 208. The Supreme Court of North Carolina, in a very recent case, seems to deny any operative force whatsoever to the first clause of the section under consideration, which, as it occurs in the code of that State, is identical with the one given in the text. Although the language used by the court is only a dictum, it is a strong expression of opinion that no causes of action can be united by reason of that particular provision unless they are embraced within some of the other classes mentioned by the section. See N. C. Land Co. *v.* Beatty, 69 N. C. 329, 334.

[5] Flynn *v.* Bailey, 50 Barb. 73. See Woodbury *v.* Delap, 1 N. Y. S. C. 20, 65 Barb. 501.

V. *Instances in which the Proper Joinder of Causes of Action is connected with the Proper Joinder of Defendants; Discussion of the Provision that all the Causes of Action must affect all of the Parties.*

§ 373. * 479. **Statement of Question Examined in this Subdivision.** Questions relating to the uniting of causes of action may be presented in two forms. In whatever one of the enumerated classes they fall they may (1) be against the single defendant, or the several defendants all equally liable, — perhaps jointly liable, — in which case the inquiry has to do solely with the joinder of the causes of action themselves, and is not concerned with the joinder of the defendants; or (2) they may be against several defendants unequally and differently liable, one cause of action affecting a portion of the defendants more directly and substantially than it does others. In such case the inquiry has to do with the joinder of the defendants as well as with the union of the causes of action. I shall, in the present subdivision, examine the latter of these cases. It is required by all the codes as a prerequisite to the uniting of different causes of action, that, notwithstanding they may all belong to the same class, they must affect all the parties to the action.[1] The only exception mentioned in any statute is the action to foreclose a mortgage.[2]

[1] [Hayden *v.* Pearce (1898), 33 Ore. 89, 52 Pac. 1049; The Victorian Number Two (1894), 26 Ore. 194, 41 Pac. 1103; Pretzfelder *v.* Merchants' Ins. Co. (1895), 116 N. C. 491, 21 S. E. 302; Cook *v.* Smith (1896), 119 N. C. 350, 25 S. E. 958; Burrell *v.* Hughes (1895), 116 N. C. 430, 21 S. E. 971; Barry *v.* Wachosky (1899), 57 Neb. 534, 77 N. W. 1080; A. T. & S. F. Rld. Co. *v.* Comm'rs of Sumner Co. (1893), 51 Kan. 617, 33 Pac. 312; Draper *v.* Brown (1902), 115 Wis. 361, 91 N. W. 1001; Stewart *v.* Rosengren (1902), — Neb. —, 92 N. W. 586; State *v.* Krause (1897), 58 Kan. 651, 50 Pac. 882; Hughes *v.* Hunner (1895), 91 Wis. 116, 64 N. W. 887; John R. Davis Lumber Co. *v.* Home Insurance Co. of New York (1897), 95 Wis. 542, 70 N. W. 84, the objection that the causes joined do not affect all the parties to the action must be raised by demurrer on that ground; Blakely *v.* Smock (1897), 96 Wis. 611, 71 N. W. 1052; Egaard *v.* Dahlke (1901), 109 Wis. 366, 85 N. W. 369; Hilton *v.* Hilton's Adm'r (1901), 110 Ky. 522, 62 S. W. 6; Clayton *v.* City of Henderson (1898), 103 Ky. 228, 44 S. W. 667; Jamison *v.* Culligan (1899), 151 Mo. 410, 52 S. W. 224; Kruczinski *v.* Neuendorf, 99 Wis. 264, 74 N. W. 974; Anderson *v.* Scandia Bank (1893), 53 Minn. 191, 54 N. W. 1062; Carrier *v.* Bernstein (1898), 104 Ia. 572, 73 N. W. 1076; Smith *v.* Day (1901), 39 Ore. 531, 65 Pac. 1055; Beane *v.* Givens (1898), 5 Idaho, 774, 51 Pac. 987; Insley *v.* Shire (1895), 54 Kan. 793, 39 Pac. 713.]

[2] This exception, in fact, confounds "relief" with "cause of action." It simply permits defendants to be joined against whom some special relief is demanded, and is therefore entirely unnecessary. In every such suit there is only *one* cause of action, unless a common-law action on the note or bond is combined with the foreclosure.

§ 374. *480. **Effect of Code Provision Requiring that Causes of Action Joined in one Complaint must affect all the Parties.** While the causes of action thus united must affect all of the parties, it is not necessary that they should affect them all equally or in the same manner.[1] If equality and uniformity were required, a large part of the equity jurisdiction would be swept away at one blow; for it is the distinguishing feature of that system that all persons having *any* interest in the subject-matter of the controversy or in the relief granted should be made parties, however various and unequal their interests may be. Indeed, equality of right or of liability was not essential in all common-law actions. It was only when the proceeding was in form joint that this equality was indispensable according to legal conceptions. The provision of the codes has not changed any of these former doctrines; it simply enacts in one statutory and comprehensive

[1] Vermeule *v.* Beck, 15 How. Pr. 333. The following cases furnish illustrations of the questions discussed in this and the succeeding paragraphs. Schnitzer *v.* Cohen, 7 Hun, 665; Barton *v.* Speis, 5 id. 60; Nichols *v.* Drew, 19 id. 490; Cook *v.* Horwitz, 10 id. 586; Brown *v.* Coble, 76 N. C. 391; Mendenhall *v.* Wilson, 54 Iowa, 589; Thorpe *v.* Dickey, 51 id. 676; Cogswell *v.* Murphy, 46 id. 44; Addicken *v.* Schrubbe, 45 id. 315; Hackett *v.* Carter, 38 Wis. 394; Heath *v.* Silverthorn Min. Co., 39 id. 146; Greene *v.* Nunnemacher, 36 id. 50; Lull *v.* Fox & Wis. Imp. Co., 19 id. 101; Arimond *v.* Green Bay & Miss. Canal Co., 31 id. 316. See also Kelly *v.* Newman, 62 How. Pr. 156 (defendants); Higgins *v.* Crichton, 11 Daly, 114; Hynes *v.* Farmers' Loan & Tr. Co. (Supreme, 1890), 9 N. Y. Suppl. 260 (plaintiffs); Mitchell *v.* Mitchell (N. C. 1887); 1 S. E. Rep. 648 (defendants); Himes *v.* Jarrett (S. C. 1887), 2 S. E. Rep. 393; Hoffman *v.* Wheelock, 62 Wis. 434; Waddell *v.* Waddell, 99 Mo. 338; Levering *v.* Schnell, 78 Mo. 167 (persons injured by fraud, whose interests are distinct, cannot join as plaintiffs unless the fraud was accomplished through a joint transaction); Mullen *v.* Hewitt, 103 Mo. 639 (fraudulent conveyances to separate grantees, no common design shown); Faivre *v.* Gillan (Iowa, 1892), 51 N. W. Rep. 46; Berg *v.* Stanwood, 43 Minn. 176 (improper joinder, where complaint alleges separate promises by two defendants to pay for the same work, and does not allege a joint promise); Langevin *v.* St. Paul (Minn. 1892), 51 N. W. Rep. 817; Brenner *v.* Egly, 23 Kan. 123; Lindh *v.* Crowley, 26 Kan. 47 (a cause of action against all the parties to a promissory note cannot be united with a cause of action on a judgment rendered on the note against one of the parties thereto); Heutig *v.* S. W. Mut. Benev. Ass., 45 Kan. 462; Rizer *v.* Davis Cy. Comm'rs, 48 Kan. 389; Haskell Cy. Bank *v.* Bank of Santa Fé (Kan. 1893), 32 Pac. Rep. 624; Hoye *v.* Raymond, 25 Kan. 665; Johnson *v.* Kirby, 65 Cal. 482; Powell *v.* Dayton, etc. R. Co., 13 Ore. 446. It is not a misjoinder to sue the sureties on a guardian's original bond and those on his additional bond in a single action; as "the rights and liabilities of each set of sureties depend for their extent on a correct ascertainment and adjustment of those of the other set, each is interested in the result of the litigation with the other; hence all the parties are affected as required by the code;" 26 Weekly Law Bulletin (Cincinnati Com. Pleas), 147, 148, citing Allen *v.* State, 61 Ind. 268; Matthews *v.* Copeland, 79 N. C. 493; Holeran *v.* School Dist., 10 Neb. 406; and other cases. [Grady *v.* Maloso (1896), 92 Wis. 666, 66 N. W. 808.]

form the principle which controlled the courts, both of law and equity, under the former practice. It leaves an equitable action to be governed by the same rules as to parties which controlled it when equity was a distinct department, and it extends the theory at least to legal actions as well. The practical effect of this clause in the statute will be best learned from an examination of the cases in which it has been applied, and from the judicial construction which has been thereby put upon it. Those which are quoted first in order pronounce against the propriety of the union made by the plaintiff, because the causes of action did not affect all the parties.

§ 375. *481. **Illustration.** The owner of a tract of land had made O. his agent for the purpose of selling it, and O. had sold the land to S., who also stood in a fiduciary relation to the owner, and S. had conveyed portions of the land to different purchasers. The original owner thereupon brought an action against O. and S., charging fraud and a violation of their fiduciary duty against both. The complaint demanded a judgment of damages against O. for his deceit, and against S. an account and payment of all the proceeds and profits that he had or might have made from his own sales, and a reconveyance of the portion yet remaining unsold. The New York Court of Appeals held that the causes of action were improperly united; and, as its opinion is instructive, I quote from it at some length. "The plaintiff has elected to regard S. as his trustee, and the complaint as to him and the decree proceed on this basis. The plaintiff therefore elects to affirm the sale as to S. He cannot *uno flatu* affirm it as to him, and disaffirm it as to the defendant O. It is difficult to see how under the provision of § 167 of the code these causes of action may be united in the same complaint. Although it may be said that both causes of action arise out of the same transaction, namely, the sale of the plaintiff's land to the defendant S., yet the cause of action against O. is for an injury to the plaintiff's property, while that against S. is a claim against him as a trustee by operation of law. The causes of action joined in the complaint do not affect both of the parties defendant. O. is not affected by nor in any way responsible for S.'s acts as plaintiff's trustee, and the complaint does not profess to make him liable therefor. So S. is not sought to be made responsible for the fraudulent acts of O. On the plaintiff's own showing, he has separate and distinct causes of action

against each of the defendants which cannot be joined under the code."[1]

§ 376. *482. **Illustrations.** The same doctrine was asserted and ruling made in the following cases, the causes of action being held improperly united in each because they did not affect all of the parties: where one cause of action was on a judgment against the defendant and two others, a second on a judgment against the defendant and one other, while a third was on a judgment against the defendant alone;[2] where the first cause of action was against a husband and wife for a slander by the wife, and the second against the husband for his own slander;[3] an action against a husband and wife on a contract made by both in the wife's business, where a personal judgment was demanded against him, and a judgment to enforce the demand against the wife's separate estate;[4] where the plaintiff's agent, with whom certain securities had been deposited, had transferred them, in violation of his duty, to various assignees, and a single action was brought against him and all these transferees to set aside the assignments and to recover the bonds or their proceeds;[5] an action by a reversioner against the tenant for life and the occupant to recover damages for injuries done by them to the land, the complaint containing

[1] Gardner *v.* Ogden, 22 N. Y. 327, 340, per Davies J.

[Tew *v.* Wolfsohn (1903), 174 N. Y. 272, 66 N. E. 934. In this case the complaint alleged that one defendant conducted a certain business as agent for the other defendant, his wife, who owned it; that he pretended to be conducting the business as his own, and entered into a contract with plaintiff as agent for his wife, his undisclosed principal; that the defendants refused to perform the terms of the contract, and induced plaintiff to pay money, for which they refused to account. *Held,* not demurrable on the ground of misjoinder of causes of action, as, if it does not state a single cause of action against the wife only, it states a single cause of action against both defendants. Haskell County Bank *v.* Bank of Santa Fé (1893), 51 Kan. 39, 32 Pac. 624. In this case it was held that "an action to recover damages against a number of defendants for a fraudulent conspiracy cannot be joined with an action to obtain a cancellation of a certificate of deposit owned and held by one of said defendants alone, even though such certificate was obtained as one of the fruits of the conspiracy." Hawarden *v.* Youghiogheny & Lehigh Coal Co. (1901), 111 Wis. 545, 87 N. W. 472: *held,* that a cause of action at law for damages to the plaintiff growing out of an unlawful combination cannot be united with a cause of action in equity in favor of the plaintiff and others similarly situated to restrain further operations by the combination, since both causes of actions do not affect all the parties. Plankinton *v.* Hildebrand (1895), 89 Wis. 209, 61 N. W. 839.]

[2] Barnes *v.* Smith, 16 Abb. Pr. 420.

[3] Malone *v.* Stilwell, 15 Abb. Pr. 421. And see Dailey *v.* Houston, 58 Mo. 361, 366.

[4] Palen *v.* Lent, 5 Bosw. 713.

[5] Lexington & B. S. R. Co. *v.* Goodman, 15 How. Pr. 85. This was a special term decision, and is therefore not entitled to much authority. The case is clearly in principle identical with the ordinary creditor's suit.

a cause of action against *one* defendant for cutting and removing timber, a second against *both* for the same acts, and a third against *both* for removing fire-wood already cut;[1] an action for deceit, in which one count of the complaint alleged fraudulent acts against a part of the defendants, and other counts charged similar acts against all;[2] where damages were claimed from the owner of a city lot for making an excavation in a street, into which the plaintiff fell, and from the city for permitting the street to be broken up;[3] an action against two defendants to recover damages for the flowing of plaintiff's lands, the complaint alleging in the first count that one defendant erected a dam in the north branch of a certain river, and in the second count that the other defendant constructed a dam in the south branch of the same stream, by the combined effects of which obstructions the injury was done;[4] an action against two defendants, in which the claim against one was for goods sold and delivered, and that against the other was on his promise to pay the price thereof;[5] an action against a public officer and the sureties on his official bond for a breach thereof, the complaint containing also a cause of action against the officer alone for damages caused by a distinct and different negligent act;[6] a cause of action against A., B., and C. for money loaned to them, and one against A., D., and E. on a note given by them as collateral security for the same loan.[7]

§ 377. * 483. **Causes of Action so Joined must also affect all the Plaintiffs. Illustrations.** The causes of action must not only affect all the defendants, but all the plaintiffs as well, the provision of the codes applying equally to both parties.[8] Thus an action by

[1] Rodgers *v.* Rodgers, 11 Barb. 595.

[2] Wells *v.* Jewett, 11 How. Pr. 242.

[3] Trowbridge *v.* Forepaugh, 14 Minn. 133. See also Kelly *v.* Newman, 62 How. Pr. 156.

[4] Lull *v.* Fox & Wis. Imp. Co., 19 Wis. 100, 102.

[5] Sanders *v.* Clason, 13 Minn. 379.

[6] State *v.* Kruttschnitt, 4 Nev. 178; Ghirardelli *v.* Bourland, 32 Cal. 585. And against the sureties on an administrator's bond for a breach thereof, and against the administrator himself for a violation of his trust. Howse *v.* Moody, 14 Fla. 59, 64, 65.

[7] Farmers' Bank of Mo. *v.* Bayliss, 41 Mo. 274. And see Lane *v.* State, 27 Ind. 108.

[Davis *v.* Novotney (1901), 15 S. D. 118, 87 N. W. 582: A trustee in bankruptcy cannot join in one complaint causes of action against several defendants, each of whom, in a separate suit, obtained property of the bankrupt by replevin or levied upon it in attachment, within the prohibition of the bankruptcy act, since such causes of action do not arise out of the same transaction nor are they connected with the same subject of action. There is also a misjoinder of parties defendant.]

[8] Where a husband and wife sued for an assault and battery upon the wife, and the petition set forth a claim for the injuries sustained by the wife, for which both must sue, and also a claim for the loss of

three persons having entirely distinct and separate claims against the defendant for work and materials, brought to foreclose their individual mechanics' liens on their debtor's house, was held improper;[1] and where six persons, owners of distinct and separate parcels of land through which a stream ran, each being entitled to the use of the water as it passed through his land, joined in a suit to restrain the defendant from diverting the entire stream at a point above all their premises, the Supreme Court of Nevada condemned the complaint as improperly uniting the causes of action and the plaintiffs.[2] In an action to recover possession of land brought by two plaintiffs, the complaint con-

her services, for which he alone must sue, two causes of action were held to be improperly united. Dailey *v.* Houston, 58 Mo. 361, 366; Tell *v.* Gibson, 66 Cal. 247; Reynolds *v.* Robinson, 64 N. Y. 589; Filer *v.* N. Y. Central R. Co., 49 N. Y. 47; Mosier *v.* Beale, 43 Fed. Rep. 358; and see *ante*, § * 242.

[Anderson *v.* Scandia Bank (1893), 53 Minn. 191, 54 N. W. 1062: A cause of action by a husband and wife to avoid usurious securities given by them upon a loan made to the wife, cannot be joined with another by the wife alone to recover back money paid by her upon the usurious contract. See also Morton *v.* Western Union Tel. Co. (1902), 130 N. C. 299, 41 S. E. 484.

The several causes, in order that they may be united, must not only affect all the plaintiffs but must be brought in the same right. In the case of Carrier *v.* Bernstein (1898), 104 Ia. 572, 73 N. W. 1076, plaintiff filed a petition in two counts, the first being a suit by her as wife under § 1557 of the code to recover actual and exemplary damages for injury to her person, property, etc., caused by sales of intoxicating liquors to her husband, the second being a suit by her as a citizen of the county, under Code, § 1539, for one-half the forfeit imposed by law for the selling of liquor to an intoxicated person or habitual drunkard. *Held*, that there was a misjoinder because the causes of action, while prosecuted by the same kind of proceedings, are not by the same party as plaintiff or in the same right, as required by Code, § 2630. As to the parties plaintiff, in one the plaintiff sues in her own name. In the second count the plaintiff does not sue as wife but as a citizen of the county and as informer. But even though the actions be considered brought by the same party, "surely it cannot be said that they are in the same right. The first is in the right as wife for damages to her person, property, and means of support, and is a right existing solely and exclusively in favor of the plaintiff, for injuries actually suffered by her. The second is in the right of the county, not to damages, but to the forfeiture to its school fund. The citizen prosecuting such an action as informer has no personal right of recovery. He cannot recover anything in his own right, and it is only when recovery is had in favor of the school fund that the informer is compensated by receiving one-half the amount recovered."]

[1] Harsh *v.* Morgan, 1 Kan. 293, 299. Tenants in common who have been imposed on by the fraud of a common vendee to whom they have at different times executed separate deeds, each of his interest, cannot join in a suit to set these aside: Jeffers *v.* Forbes, 28 Kan. 174.

[2] Schultz *v.* Winter, 7 Nev. 130. For contrary cases, see *supra*, § * 269 (note). Though the separate owners may, by the weight of authority, join in claiming an injunction, the uniting of their several claims for damages in one complaint is improper, as the plaintiffs have a common interest in obtaining the equitable, but not the legal relief. See Barham *v.* Hostetter, 67 Cal. 272; Foreman *v.* Boyle, 88 Cal 290.

tained two counts: the first averred a title to the premises in one of the plaintiffs, while the second alleged a different and even hostile title in the other. A demurrer to this complaint was sustained, on the ground that the two causes of action did not affect both of the plaintiffs. The former practice of naming different lessors of the plaintiff in ejectment, and afterwards of uniting different plaintiffs who claim under distinct and hostile titles, has been abolished by the code. "The action to recover possession of land now stands on the same footing precisely in respect to parties and the union of causes of action with all other actions." [1]

§ 378. * 484. **The Doctrine, as Stated by the New York Court of Appeals, respecting a Cause of Action against an Executor, Administrator, or Trustee United with one against him in his Individual Capacity.** Causes of action to recover possession of different chattels from different defendants cannot be joined in the same suit.[2] Nor can a cause of action against a trustee to compel the conveyance of the trust property be united with a cause of action against an administrator on a demand growing out of the same property.[3] A cause of action against an executor, administrator, or trustee, in his representative character, cannot be united with one against the same individual personally. The doctrine was recently stated by the New York Court of Appeals, as the result of an elaborate examination of the authorities: "The following principles are settled by these authorities: 1. That, for all causes of action arising upon contract made by deceased in his lifetime, an action can be maintained against the executor or administrator *as such*, and the judgment would be *de bonis testatoris*, or *intestatoris*. 2. That in all causes of action, where the same arise upon a contract made after the death of the testator or intestate, the

[1] Hubbell *v.* Lerch, 62 Barb. 295, 297, per T. A. Johnson, J.; St. John *v.* Pierce, 22 Barb. 362; Hubbell *v.* Lerch, 58 N. Y. 237, 241. [See Behlow *v.* Fischer (1894), 102 Cal. 208, 36 Pac. 509.]

[2] Robinson *v.* Rice, 20 Mo. 229.

[3] McLaughlin *v.* McLaughlin, 16 Mo. 242. The following cases are additional illustrations of the rule that the causes of action must affect all the parties. Cheely's Adm. *v.* Wells, 33 Mo. 106; Liney *v.* Martin, 29 Mo. 28; Stalcup *v.* Garner, 26 Mo. 72. A cause of action to recover possession of one parcel of land with damages for withholding the same, it has been held, cannot be joined with a similar cause of action in respect to another parcel, *sed qu.*, Holmes *v.* Williams, 16 Minn. 164, 169; nor can a claim for a specific performance against A. be joined with a claim to recover possession of land against B., Fagan *v.* Barnes, 14 Fla. 53, 56; nor can a cause of action for fraud against one defendant be united with a cause of action upon contract against another, Van Liew *v.* Johnson, 6 N. Y. S. C. 648; N. C. Land Co. *v.* Beatty, 69 N. C. 329.

claim is against the executor or administrator personally, and not against the estate, and the judgment must be *de bonis propriis.* 3. That these different causes of action cannot be united in the same complaint."[1]

§ 379. * 485. **Illustrations.** Under the provisions of the Indiana code an action was sustained against a husband and wife, brought by a creditor of the husband to recover a judgment for the amount of the demand against him, and to charge certain land held by the wife under an implied trust for her husband with a mechanic's lien which accompanied the demand;[2] and also an action against a husband and wife, which was brought to obtain a judgment against him for the price of goods sold and delivered, and also to set aside his deed of land fraudulently conveyed to her, so as to let in the lien of the judgment when recovered.[3]

§ 380. * 486. **Discussion of Questions under Consideration in Wilson v. Castro.** The questions under consideration, in their application to equitable actions, were thoroughly and ably discussed by the Supreme Court of California in the case of Wilson *v.* Castro,[4] and I shall close this subdivision with an extract from the opinion. After a statement of the general rules and doctrines of equity in relation to parties, the learned judge proceeds to discuss the question as to the joinder of causes of action in connection with the union of the defendants, or, to adopt the nomenclature used by equity courts, the subject of "*multifariousness.*" "A bill in equity is said to be 'multifarious' when distinct and independent matters are joined therein, — as, for example, the uniting of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature, against several

[1] Ferrin *v.* Myrick, 41 N. Y. 315, 319–322, per Hunt C. J.; Austin *v.* Munro, 47 N. Y. 360, 364, 365, per Allen J.; Austin *v.* Munro, 4 Lans. 67. See, *per contra,* Tradesman's Bank *v.* McFeely, 61 Barb. 522, decided in the face of Ferrin *v.* Myrick. Joinder of causes of action against executors and administrators in their individual and representative capacities is permitted in New York in certain cases by C. C. P., § 1815. But a claim against the defendant as a stockholder, to recover a demand due from the corporation, may be joined with a claim against him as a trustee of the company for the same demand, both being based upon a statute. Wiles *v.* Suydam, 6 N. Y. S. C. 292, citing Durant *v.* Gardner, 10 Abb. Pr. 445; 19 How. Pr. 94; Sipperly *v.* Troy & B. R. Co., 9 How. Pr. 83; Dickens *v.* N. Y. Cent. R. Co., 13 How. Pr. 228. See *post,* § * 502. [Schlicker *v.* Hemenway (1895), 110 Cal. 579, 42 Pac. 1063.]

[2] Lindley *v.* Cross, 31 Ind. 106.

[3] Frank *v.* Kessler, 30 Ind. 8.

[4] Wilson *v.* Castro, 31 Cal. 420.

defendants. But the case of each particular defendant must be entirely distinct and independent from that of the other defendants, or the objection cannot prevail; for, as said by Judge Story, 'The case of one may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case the objection of multifariousness could not be allowed to prevail. So it is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matter in the suit, and they are connected with the others.'[1] The same author lays it down that, 'To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must concur: *first*, the different grounds of suit must be wholly distinct; *secondly*, each ground must be sufficient as stated to sustain a bill; if the grounds be not entirely distinct and unconnected, if they arise out of one and the same transaction, or series of transactions forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, the objection does not apply.'[2] When the point in issue is a matter of common interest among all the parties to the suit, though the interests of the several defendants are otherwise unconnected, still they may be joined. In Salvidge *v.* Hyde,[3] Sir John Leach V. C. said, 'If the objects of the suit are single, but it happens that different persons have separate interests in distinct questions which arise out of the single object, it necessarily happens that such different persons must be brought before the court in order that the suit may conclude the whole subject.' In Boyd *v.* Hoyt,[4] Mr. Chancellor Walworth laid down the same doctrine in substantially the language used by Sir John Leach in Salvidge *v.* Hyde; and Mr. Daniell, in his excellent work,[5] says, in reference to the doctrine held in Salvidge *v.* Hyde, there is no doubt that the learned judge stated the principle correctly, though in the application of it he went, in the opinion of Lord Eldon, too far.[6] In Whaley *v.* Dawson,[7] Lord Redesdale observed that in the English cases, when demurrers, because the plaintiff demanded in his bill matters of

[1] Story's Eq. Pl. §§ 271, 271 *a*.
[2] Ibid. § 271 *b*.
[3] Salvidge *v.* Hyde, 5 Madd. Ch. R. 138.
[4] Boyd *v.* Hoyt, 5 Paige, 78.
[5] 1 Daniell's Ch. Pl. p. 386.
[6] 1 Jac. R. 151.
[7] Whaley *v.* Dawson, 2 Sch. & Lef. 370.

distinct natures against several defendants not connected in interest, have been overruled, there has been a general right in the plaintiff covering the whole case, although the rights of the defendants may have been distinct. In such cases the court proceeds on the ground of preventing multiplicity of suits, when one general right is claimed by the plaintiff against all the defendants; and so in Dimmock *v.* Bixby,[1] the court held that when one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights, the bill of complaint is not multifarious. In the elaborate case of Campbell *v.* Mackay,[2] Lord Cottenham held that when the plaintiffs have a common interest against all the defendants in a suit, as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstance of the defendants being subject to distinct liabilities in respect to different branches of the subject-matter will not render the bill multifarious. In the same case his lordship observed that it was utterly impossible upon the authorities to lay down any rule or abstract proposition as to what constitutes multifariousness which can be made universally applicable. The only way, he said, of reconciling the authorities upon the subject, is by adverting to the fact, that although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two kinds, one of which, properly speaking, is on account of a misjoinder of causes of action; that is to say, uniting claims of so different a character that the court will not permit them to be litigated in one record, even though the plaintiff and defendants may be parties to the whole transactions which form the subject of the suit. The other of which, as applied to a bill, is that a party is brought as a defendant upon a record, with a large portion of which, and with the case made by it, he has no connection whatever. A demurrer for such a cause is an objection that the complaint sets forth matters which are multifarious; and the real cause of objection is, as illustrated by the old form of demurrer, that it puts the parties to great and useless expense, — an objection which has no application in a case of mere misjoinder of parties. Upon this subject Judge Story says: 'In the former class of cases, where there is a joinder of distinct claims between

[1] Dimmock *v.* Bixby, 20 Pick. 368. [2] Campbell *v.* Mackay, 1 Myl. & Cr. 603.

the same parties, it has never been held as a distinct proposition that they cannot be united, and that the bill is of course demurrable for that cause alone, notwithstanding the claims are of a similar nature, involving similar principles and results, and may therefore without inconvenience be heard and adjudged together. If that proposition were to be established and carried to its full extent, it would go to prevent the uniting of several demands in one bill, although the parties were liable in respect to each, and the same parties were interested in the property which may be the subject of each. Such a rule, if established in equity, would be very mischievous and oppressive in practice, and no possible advantage could be gained by it.' [1] He states in conclusion the result of the principles of the cases to be,[2] 'That where there is a common liability in the defendants, and a common interest in the plaintiffs, different claims to property, at least if the subjects are such as may without inconvenience be joined, may be united in one and the same suit; and further, that where the interests of the plaintiffs are the same, although the defendants may not have a co-extensive common interest, but their interests may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the court will not hesitate to sustain the bill against all of them.' " [3]

[1] Story's Eq. Pl. §§ 531, 532.

[2] Ibid. §§ 533, 534.

[3] Wilson *v.* Castro, 31 Cal. 420, 426–431, per Currey J.

[*Multifariousness.*

We quote at length from the case of Benson *v.* Keller (1900), 37 Ore. 120, 60 Pac. 918, as follows: "Objections on account of multifariousness seem to be divided primarily into two classes: (1) Those which go to a misjoinder of two or more independent and incompatible causes of suit; and (2) where several matters of a distinct nature are stated and demanded against different parties. The two kinds of objections are well illustrated by Lord Chancellor Cottenham in Campbell *v.* Mackay, 1 Mylne & C. 603, wherein the distinction is clearly stated. He says: 'Frequently the objection raised, though termed "multifariousness," is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character that the court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term "multifariousness" as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever.' See also Gartland *v.* Dunn, 11 Ark. 720. It is said in Alexander *v.* Alexander, 85 Va. 353, 363 (7 S. E. 335, 339, 1 L. R. A. 125, 127), 'that a bill will always be deemed multifarious where several matters joined in the bill against one defendant are so entirely distinct and inde-

§ 381. *487. **Calvert's Observations upon the Distinction between "Subject" and "Object" of the Action.** The observations of Mr. Calvert upon the distinction between "subject" and "ob-

pendent of each other that the defendant will be compelled to unite in his answer and defence different matters wholly unconnected with each other, and as a consequence the proof applicable to each would be apt to be confounded with each other, and great delays might be occasioned respecting matters ripe for hearing by waiting for proofs as to some other matter not ready for hearing; or, again, where there is a demand of several matters of a distinct and independent nature in the same bill, rendering the proceeding oppressive because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection.' In Attorney-General *v.* Craddock, 3 Mylne & C. 85, it was said: 'The object of the rule against multifariousness is to protect a defendant from unnecessary expense, but it would be a great perversion of that rule if it were to impose upon the plaintiffs and all the other defendants the expenses of two suits instead of one.' . . . The difficulty of laying down any rule of universal application, as it respects the subject of multifariousness, is suggested by many of the authorities. The cases upon the subject are extremely various, and the courts, in deciding them, seem to have considered 'what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule.' Gartland *v.* Dunn, 11 Ark. 720. The objection does not go to the merits of the cause, but relates more nearly to a question of convenience in conducting the suit; and, in a large measure, it simply calls for an exercise of discretion in deciding whether both or all the causes of suit set forth in the bill shall be tried in a single suit, or be split up, and the parties relegated to the bringing of two or more suits for the accomplishment of their purposes, or whether a defendant who is a necessary party in respect of one or more matters suggested by the complaint has a sufficient interest in or connection with the other matters involved to make him a proper party in respect to such other matters; Bolles *v.* Bolles, 44 N. J. Eq. 385 (14 Atl. 593). Mr. Justice Depew, in Lehigh Val. R. R. Co. *v.* McFarlan, 31 N. J. Eq. 706, 758, says: 'The rule with regard to multifariousness, whether arising from the misjoinder of causes of action or of defendants therein, is not an inflexible rule of practice or procedure, but is a rule founded in general convenience, which rests upon a consideration of what will best promote the administration of justice without multiplying unnecessary litigation, on the one hand, or drawing suitors into needless and unnecessary expenses on the other.' See also Stevens *v.* Bosch, 54 N. J. Eq. 59 (33 Atl. 293). Upon the whole, it would seem that each case must be examined with reference to its own particular and peculiar features; and, 'much,' as Mr. Justice Story remarks in Oliver *v.* Piatt, 44 U. S. (3 How.) 333, 412, 'must necessarily be left — where the authorities leave it — to the sound discretion of the court.' See also Gaines *v.* Chew, 43 U. S. (2 How.) 619; Barney *v.* Latham, 103 U. S. 205, 215; United States *v.* Union Pac. R. R. Co., 98 U. S. 569, 604."

In Conley *v.* Buck (1896), 100 Ga. 187, 28 S. E. 97, the court said: "This court has repeatedly decided that multifariousness is an objection not favored by courts of equity. A leading case in this country, on these two subjects, which has been cited, approved, and followed in numerous decisions by courts of last resort in America, is that of Brinkerhoff *v.* Brown, 6 Johns. Ch. 139, where it was urged by way of demurrer that the bill was multifarious, first, as to parties; second, as to the objects of the bill. In that case the court decided that 'a bill may be filed against several persons, relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned, though not jointly in each act.' And Chancellor Kent, after an able and elaborate review of the leading English author-

ject" of the action, and upon the sense in which the former term is used in the common method of stating the general rules of

ities, said: 'The principle to be deduced from these cases is, that a bill against several persons must relate to matters of the same nature and having a connection with each other, and in which all of the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct.' In Fellows *v.* Fellows, 4 Cowen, 682, decided by the Court of Errors of New York, in 1825, one of the defendants demurred to the bill 'because it was for several distinct matters and causes in many of which the defendant was not concerned;' but the court, following the ruling in Brinkerhoff *v.* Brown, *supra*, held 'that the defendants were properly joined, and that the demurrer should be overruled.' And the court said, 'This was held as well because there was one connected interest, centering in the point in issue, or one common point of litigation, as that the joinder tended to prevent multiplicity of suits.' The court stated that 'the general rule is, that where a bill is filed concerning things of distinct natures against several persons, it is demurrable; but unconnected parties may join in a suit, when there is one connected interest among them all, centering in the point in issue in the cause.'"

Montserrat Coal Co. *v.* Coal Mining Co. (1897), 141 Mo. 149, 42 S. W. 822: "The sole question presented by this record is the propriety of the judgment of the circuit court holding the petition multifarious and sustaining the demurrer. In the leading case of Campbell *v.* Mackay, 1 Myl. & C. 603, 13 Condensed Eng. Chcy. Repts. 543, Lord Cottenham, after reviewing the English cases, remarked that 'to lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition, is, upon the authorities, impossible.' The decided cases since his lordship's day do not render the solution of the question any the less difficult. Indeed, no rule of equity pleading has less of certainty and uniformity in its application; a result, doubtless, owing to the variety of degrees of right and interest which enter into the affairs of life. The general definition given by this court in Clark *et al. v.* Ins. Co., 52 Mo. 272, is as accurate as any to be found in the books: 'A bill is said to be multifarious when distinct and independent matters are improperly joined whereby they are confounded, as the writing in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill.' In Gaines *v.* Chew, 2 How. (U. S.) 619, the court say: 'In general terms a bill is said to be multifarious which seeks to enforce against different individuals demands which are wholly disconnected.' The rule is best illustrated by the cases themselves." See also Budde *v.* Rebenack (1896), 137 Mo. 179, 38 S. W. 910; Boggess *v.* Boggess (1894), 127 Mo. 305, 29 S. W. 1018.

In Fry *v.* Rush (1901), 63 Kan. 429, 65 Pac. 701, the court said: "As before intimated, the petition in this case is also objectionable because it presents two distinct forms of the vice of multifariousness, — that of uniting in the same count distinct and disconnected subjects, matters, and causes, and that of joining in the same suit, both as plaintiffs and defendants, parties who are without a common interest in the subject of the litigation and have no connection with one another."

In Demarest *v.* Holdeman (1901), 157 Ind. 467, 62 N. E. 17, it is said: "It has been held sufficient to sustain a bill against the charge of multifariousness, that each defendant has an interest in some one matter common to all the parties. And where the subject of the action has become so complicated and entangled that the rights of the parties are involved in doubt, and it is difficult to determine who is liable, and who is not, except upon a full hearing in which all the persons in any way affected or interested are before the court, equity permits the joinder of all those so related to the controversy, and who have a common interest in some one or more branches of it."

In Daniels *v.* Fowler (1897), 120 N. C. 14, 26 S. E. 635, the court said: "If the grounds of the complaint 'arise out of the

equity procedure, are so valuable and instructive, that I shall quote them, with some condensation. They apply as well to the doctrine of parties heretofore discussed as to the particular language of the codes under consideration in the present section. After laying down the equity rule as to parties in the customary form adopted by several eminent judges, in which the necessity or propriety of their being joined is made to depend upon their interest in the "subject" of the suit,[1] he proceeds:[2] "The expression 'subject of suit' may mean one of two things, — either the fund or estate respecting which the question at issue has arisen, or else that question itself. For instance, in a foreclosure

same transaction, or series of transactions, forming one course of dealing, and all tending to one end; if one connected story can be told of the whole,' it is not multifarious."

In Foster *v.* Landon (1898), 71 Minn. 494, 74 N. W. 281, the rule was said to be well settled that "the case against one defendant may be so entire, as to be incapable of being prosecuted in several suits; and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case the objection of multifariousness could not be allowed to prevail," quoted from Story, Eq. Pl. § 271 *a*. The court also cited Pomeroy, Code Rem. § *486. See also Allred *v.* Tate (1901), 113 Ga. 441, 39 S. E. 101; Level Land Co. *v.* Sivyer (1901), 112 Wis. 442, 88 N. W. 37; South Bend Chilled Plow Co. *v.* George C. Cribb Co. (1900), 105 Wis. 443, 81 N. W. 675; Plankinton *v.* Hildebrand (1895), 89 Wis. 209, 61 N. W. 839.

In Whitehead *v.* Sweet (1899), 126 Cal. 67, 58 Pac. 376, the court said: "On well understood principles of equity pleading, a bill is not multifarious because the plaintiffs are not entitled to a decree in their favor jointly or *in solido*. It is sufficient if they are injured in a similar way, that they have common grievances to redress, and that they are entitled to relief of the same kind. (4 Thompson on Corporations, sec. 4602.) Applying the principles above laid down to this case, the complaint does not contain actions improperly joined. It tells one continued story, and alleges wrongs wilfully perpetrated by the defendants, and the way in which they were perpetrated. No third parties appear in any way to be involved. If defendant Sweet agreed for the benefit of the corporation to transfer his stock with proxy irrevocable, and has violated his contract, why should he not now and in this action be compelled to perform it? A bill in equity is said to be multifarious when distinct and independent matters are joined therein. If the subject-matter in the main relates to one transaction around which the others cluster, and each party has an interest in some matters in the suit, and they are connected, even though all the parties do not have an interest in all the matters in the suit, the bill is not multifarious."

"It is not, however, the mere fact that several causes of action are united in the same suit which the plaintiffs may bring in different rights that will make a complaint bad by reason of multifariousness. There must be such an inconsistency or repugnancy in the various rights declared on as to cause confusion and embarrassment on the part of the court in administering the relief which the facts might warrant were separate suits brought for the enforcement of the several rights:" Henshaw *v.* Salt River Canal Co. (1898), Ariz., 54 Pac. 577.]

[1] See Lord Redesdale, Plead. 164, 170; Lord Hardwicke in Poore *v.* Clarke, 2 Atk. 515; Lord Thurlow in Anon, 1 Ves. 29; Sir William Grant in Palk *v.* Clinton, 12 Ves. 58; Wilkins *v.* Fry, 1 Meriv. 262; Lord Eldon in Cockburn *v.* Thompson, 16 Ves. 325; Calvert on Parties, pp. 3, 4.

[2] Calvert on Parties, p. 5.

suit it may mean either, in the first sense, the mortgage debt or mortgaged premises, or, in the second sense, the question whether a foreclosure ought or ought not to take place." He goes on to show by citations from their judgments that in the cases quoted below, Lord Eldon and Sir William Grant used the phrase in the first sense, and adds: "If the words 'subject of suit' were taken in that very extensive meaning in which Lord Eldon and Sir William Grant used them, the general rule as laid down by them would be inconsistent with several distinctions which are firmly established." This statement he illustrates by a reference to many instances in which it is well settled that persons who are directly interested in the property, fund, or estate affected by the action, need not be made parties, — as for example in an action by or against trustees, the *cestuis que trustent* are under some circumstances neither necessary nor proper parties.[1]

§ 382. *488. **Same Subject.** Upon these premises Mr. Calvert proceeds to develop his own views as follows: "The rule, then, which has been stated in these cases in reference to the 'subject of the suit,' meaning thereby the estate or fund on which the question at issue has arisen, does not appear to be adapted to general application. It must be taken in connection with other authorities which will now be quoted." The authorities then cited by him, while using the same phrase, "subject of the suit," make the necessity of a person's being joined as a party to depend upon his interest *in the questions involved in the litigation, and the effect which the decree will have upon that interest.* This doctrine was tersely expressed by Lord Lyndhurst: "The general rule is, that all persons who are interested in the *question* must be parties to a suit instituted in a court of equity."[2] He thus sums up the matter: "Not all concerned in the *subject-matter* respecting which a thing is demanded, but all concerned *in the very thing which is demanded, the matter petitioned for in the prayer of the bill*, in other words, *the object of suit*, should be made parties in equity. Upon a combination of all these authorities, it is pro-

[1] Calvert on Parties, pp. 6, 7, 8.

[2] Small *v.* Atwood, Younge, 458. The other *dicta* cited by Mr. Calvert are Lord Loughborough in King *v.* Martin, 2 Ves. 643; Lord Eldon in Fenton *v.* Hughes, 7 Ves. 288; Sir T. Plumer in Whitworth *v.* Davis, 1 Ves. & B. 550; Sir John Leach in Smith *v.* Snow, 3 Madd. R. 10; Lloyd *v.* Lander, 5 Madd. R. 289; Lord Hardwicke in Poore *v.* Clarke, 2 Atk. 515; Com. Dig. Tit. Chan., E. 2.

posed to state the general rule in the following words: All persons having an interest in the *object* of the suit ought to be made parties." [1]

§ 383. *489. **Author's Criticism of Calvert's Theory.** This theory is open to a very plain criticism. Assuming that "subject of the suit" may be used in the two senses mentioned by Mr. Calvert, and conceding that the rule requiring all persons interested in the "subject," taken in the first of these senses, to be made parties, would not be universally correct, the natural conclusion would be that the phrase "subject of the suit," as found in the general rule, should be taken in its second sense. The author seems in his argument to reach this position; but in the very act of arriving at this result he confounds this second sense of the expression with a very different thing, — the *object* of the suit. The "object of the suit" is, as he states it to be, the very relief prayed for by the bill, the remedy asked and granted; but this relief or remedy is certainly not identical with the "subject of the suit" used in its secondary meaning. Taking his illustration of the foreclosure suit, the "subject" may be the mortgaged debt or the mortgaged premises on the one hand, or the question whether a foreclosure ought or ought not to take place on the other. The latter is clearly not the same as the sale of the land and the payment of the debt out of the proceeds, which is the only *object* of the action. It would seem very clear then, by the author's own argument, that the final conclusion which he reaches is not derived from his premises nor established by his reasoning. The authorities agree, in one form of expression or another, that all persons materially interested in the "subject of the suit" should regularly be made parties. The "subject of the suit" may be the fund, estate, or property, in respect of which the action is maintained; and it is true that, in a very large number of instances, — in fact, in a very large majority of instances, — all the persons interested in this fund or estate should be parties in an equity suit. But the "subject of the suit" may be regarded as describing the questions respecting this fund or estate which are involved in the litigation; and if the rule as just stated is too broad to be of absolutely universal application, it is certainly true that all persons materially interested in these questions ought to be joined as parties.

[1] Calvert, pp. 10, 11.

§ 384. *490. **Application of Calvert's Analysis to the Language of the Codes.** Let us apply Mr. Calvert's analysis of the term to the language found in the codes. In equitable actions there is generally, if not quite always, a fund, or estate, or property, which is the subject of the suit, as well as questions concerning the same to which the term may also be applied. The provisions of the codes, however, embrace legal actions; and in them it cannot generally be said that there is any fund, property, or estate, in relation to which the questions at issue have arisen, and which can be regarded as the "subject." In a very large proportion of legal actions, therefore, the term "subject of the action" can only be conceived of in the second sense which has been attributed to it, and denotes the totality of questions at issue between the parties, embracing, in short, both the primary rights and duties of the litigants, and the remedial rights and duties which have sprung from the injuries complained of. The term does not seem capable of any clear and complete analysis, and the result is that it may denote the "thing," if any, — land, chattel, person, fund, estate, and the like, — in respect of which rights are sought to be maintained and duties enforced, or it may denote the sum of the questions between the parties to be determined by the judgment of the court. The latter meaning is distinguishable and is to be distinguished from the "object of the action," which is always the relief to be obtained by the determination of the questions which constitute the "subject of the action."

VI. *Instances in which all the Causes of Action are against a Single Defendant, or against all the Defendants alike.*

§ 385. * 491. **Questions Discussed in this Subdivision pertain wholly to Joinder of Causes and not to Parties.** In the cases included in this subdivision, no question can arise respecting the proper joinder of defendants. The only matter of inquiry is, whether all the causes of action fall within some one of the classes enumerated in the statute, so that they may be united in one judicial proceeding. As the first and most general of these classes has already been fully considered in another subdivision, it will not be again referred to. No general principle is involved which needs illustration and explanation; and I shall simply state, first, a number of cases as examples of a proper joinder,

and, secondly, a number of instances in which the joinder has been held to be improper.

§ 386. * 492. **Joinder of Causes Arising out of Contract. Illustrations.** All causes of action arising out of contract may be united, and this includes, of course, implied as well as express contracts. A complaint contained four causes of action. The first alleged that the father of the defendant, being indebted to the plaintiff, devised and bequeathed all of his property, real and personal, to the defendant, and in his will declared that "the said [defendant] is to pay all the debts that I may owe at my decease," "and also $35 annually during her lifetime to" the plaintiff; that the defendant accepted such gifts and took possession of the property, and thus became liable to pay such debts and said annuity. The second count was for money had and received, the third on an express promise to pay money, and the fourth for rent due. Upon demurrer to this complaint, the defendant's liability in respect to the matters alleged in the first count was held to be, in contemplation of law, on an implied promise, and all the causes of action thus arising out of contract were properly united.[1]

§ 387. * 493. **When Tort is waived and Suit is brought upon Implied Promise. Illustrations.** In certain cases the plaintiff is allowed an election to treat the wrong done as a tort, or to waive the tort, and sue as upon an implied promise of the defendant.

[1] Gridley *v.* Gridley, 24 N. Y. 130. See also Quellen *v.* Arnold, 12 Nev. 234; Sullivan *v.* The Sullivan Co., 14 S. C. 494; South Side Ass'n *v.* Cutler, etc. Co., 64 Ind. 560; Witte *v.* Wolfe, 16 S. C. 256 (on an unsecured money demand, and to foreclose a mortgage); Childs *v.* Harris Manuf. Co., 68 Wis. 231 (a judgment is a contract within the meaning of the code provision). Joinder of causes of action upon a *quantum meruit* and for the breach of an express contract: Waterman *v.* Waterman, 81 Wis. 17; Wilson *v.* Smith, 61 Cal. 209; Cowan *v.* Abbott, 92 Cal. 100. A statute allowing an attachment to issue, under certain circumstances, on a claim before it is due, does not make it a cause of action, so that it may be joined in the same action with causes of action on claims that are due: Wurlitzer *v.* Suppe, 38 Kan. 31.

[Kearney Stone Works *v.* McPherson (1894), 5 Wyo. 178, 38 Pac. 920 (cause of action for work and labor joined with one for money loaned); McCorkle *v.* Mallory (1903), 30 Wash. 632, 71 Pac. 186 (a cause of action to recover damages for breach of contract united with one alleging the same contract and that defendant had wrongfully taken possession of certain buildings erected by plaintiff in order to fulfil the contract). Dudley *v.* Duval (1902), 29 Wash. 528, 70 Pac. 68 (a cause of action on a contract for services united with one upon a guaranty). Reindl *v.* Heath (1901), 109 Wis. 570, 85 N. W. 495 (a cause of action to recover for work done by plaintiff under a contract, united with a cause of action for breach of a provision in the same contract by which defendant agreed to furnish a certain quantity of logs to be sawed). Gunderson *v.* Thomas (1894), 87 Wis. 406, 58 N. W. 750.]

When this is permitted, a cause of action of such a nature in which the tort has been waived and the claim placed upon the footing of an implied promise may be joined with causes of action arising out of any other form of contract, express or implied; as, for example, where the first cause of action was for goods sold and delivered, and the second averred that the defendant had wrongfully taken the goods of the plaintiff, had sold them and received their price, and demanded judgment for this sum so retained by him.[1] It has been recently held by the Supreme Court in New York, that where the plaintiff seeks to unite a cause of action merely upon contract with another cause of action originally for a tort, but in which the tort may be waived and the liability treated as springing from an implied promise, the pleading must show in some direct manner that the tort *is* waived, and that the claim is upon a promise; and to this end the plaintiff must not only allege the facts as they occurred, but must aver a promise to have been made by the defendant, in the same manner as an action of assumpsit was distinguished under the former system.[2] A complaint contained three counts. The first alleged a sale by the defendants of certain county warrants drawn in their favor as payees, and facts constituting an implied promise or guaranty that these instruments were legal and genuine, but that they were not genuine, and had been adjudged invalid as against the county in an action brought upon them; the second sought to charge the defendants as indorsers, treating the instruments as negotiable notes; the third was for money had and received. These causes of action were held to be properly united, since they all arose out of contract.[3]

§ 388. * 494. **Additional Illustrations.** A claim to recover possession of land, a claim to recover damages for its detention or wrongful taking, and a claim for the rents and profits thereof during the defendant's occupancy, may all or any of them be united in one action:[4] but the plaintiff is not compelled to do so;

[1] Hawk *v.* Thorne, 54 Barb. 164; Leach *v.* Leach, 2 N. Y. S. C. 657. See also Freer *v.* Denton, 61 N. Y. 492; Logan *v.* Wallis, 76 N. C. 416. Fifield *v.* Sweeney, 62 Wis. 204.

[2] Booth *v.* Farmers' & Mech. Bk. of Rochester, 1 N. Y. S. C. 45.

[3] Keller *v.* Hicks, 22 Cal. 457.

[4] Vandevoort *v.* Gould, 36 N. Y. 639, 645; Livingston *v.* Tanner, 12 Barb. 481; Holmes *v.* Davis, 21 Barb. 265; 19 N. Y. 488; Tompkins *v.* White, 8 How. Pr. 520; Armstrong *v.* Hinds, 8 Minn. 254, 256; Walker *v.* Mitchell, 18 B. Mon. 541; Burr *v.* Woodrow, 1 Bush, 602; Sullivan *v.* Davis, 4 Cal. 291; Langsdale *v.* Wool-

he may sue separately on each.[1] An action to compel the specific performance of a contract to convey land is, within the meaning of the statute, an action to recover possession of lands, and may be united with a cause of action for damages on account of defendant's delay in performing the contract.[2] In like manner, a claim to recover possession of chattels may be united with a claim for damages for their taking or detention.[3]

§ 389. *495. **Causes for Injuries to Property. Illustrations.** Causes of action for injuries to property form a distinct class, and the generality of this language permits the union of claims arising from injuries of all kinds, whether with or without force, whether direct or consequential, and whether to real or to personal property. Singularly enough, injuries to the person are placed in the same group in most of the States, rather than in a class by themselves, or with injuries to character.[4] The following are examples of causes of action arising from injuries to property which have been held properly united in a single suit: in an action against a railroad company, (1) for damages resulting from the unlawful throwing down the fences on plaintiff's farm, whereby cattle entered and destroyed the growing crops, (2) for damages caused by water thrown on to the farm by means of an embankment, (3) for damages from earth piled upon the farm, obstructing the passage of teams and the free use of the land, (4) for damages occasioned by the killing of cattle by means of passing engines;[5]

len, 120 Ind. 16; Hiles *v.* Johnson, 67 Wis. 517; Black *v.* Drake, 28 Kan. 482; Fletcher *v.* Brown (Neb. 1892), 53 N. W. 577. A claim to recover land, with damages for withholding the same, and a claim of the rents and profits for its use, are distinct causes of action, and evidence to prove the latter is inadmissible under a complaint which does not contain such cause of action, but simply alleges the former. Larned *v.* Hudson, 57 N. Y. 151; Pengra *v.* Munz, 29 Fed. Rep. 830. But compare § *454, *ante*. It has been held that a claim to recover possession of one parcel of land cannot be joined with a similar claim in respect to another and distinct parcel. Holmes *v.* Williams, 16 Minn. 164, 169. See, however, Beronio *v.* Southern Pac. R. Co., 86 Cal. 415. See also Merrill *v.* Deering, 22 Minn. 376; Lord *v.* Deering, 24 id. 110; Hackett *v.* Carter, 38 Wis. 394; Spahr *v.* Nicklaus, 51 Ind. 221; Bottorf *v.* Wise, 53 id. 32.

[1] Ibid.

[2] Worrall *v.* Munn, 38 N. Y. 137. A demand for a specific performance against A. cannot be united with a demand to recover possession against B. Fagan *v.* Barnes, 14 Fla. 53, 56.

[3] Pharis *v.* Carver, 13 B. Mon. 236.

[4] [Thelin *v.* Stewart (1893), 100 Cal. 372, 34 Pac. 861, holding that a cause of action for an injury to the person cannot be united with a separate cause of action for a subsequent injury to property, and that a demurrer to a complaint on this ground, where such causes of action are so set out, will be sustained. Code Civ. Proc., § 427.]

[5] Clark's Adm. *v.* Han. & St. Jos. R. Co., 36 Mo. 202; and see Tendesen *v.* Marshall, 3 Cal. 440.

an action by a mine-owner, alleging (1) injuries caused by the bursting of defendant's dam, negligently constructed, whereby gold-bearing earth was washed away and (2) damages resulting from the delay and hindrance in working the mine;[1] where the complaint contained two counts, the first being for trespasses done to the land prior to its conveyance to the plaintiff, the claim having been assigned to him, and the second alleged that the plaintiff was owner and in possession of the land, that the defendants were about to enter upon the same and quarry and carry away minerals therefrom, and prayed an injunction restraining the trespassers, the two causes of action were held to be properly joined, although one was legal and the other equitable.[2] On the same principle, in a suit to recover possession of land, a separate cause of action may be added to restrain a threatened trespass and commission of waste.[3] A cause of action for deceit practised in the sale of chattels may be joined with one for the unlawful taking and conversion of other goods; the claim of damages for the fraud in such a case arises from an "injury to property" within the meaning of the codes.[4]

§ 390. *496. **Malicious Prosecution and Slander or Libel.** Within the class of "injuries to character" fall not only actions for libel and for slander, but those for malicious prosecution; the gist of the latter, according to the old authorities, being the wrong done to the plaintiff's reputation.[5] A cause of action for malicious

[1] Fraler *v.* Sears Union Water Co., 12 Cal. 555.

[2] More *v.* Massini, 32 Cal. 590, 595, per Shafter J. The opinion in this case is instructive.

[3] Natoma Water Co. *v.* Clarkin, 14 Cal. 544.

[4] Cleveland *v.* Barrows, 59 Barb. 364, 374, 375, per T. A. Johnson J. See also De Silver *v.* Holden, 50 N. Y. Super. Ct. 236. Joinder of a cause of action for trespass to real property with one for assault, Craig *v.* Cook, 28 Minn. 232; waste, and deceit in the sale of personalty, Gilbert *v.* Loberg (Wis. 1892), 53 N. W. 500.

[5] [Fred *v.* Traylor (1903), — Ky. —, 72 S. W. 768, Hellstern *v.* Katzer (1899), 103 Wis. 391, 79 N. W. 429, in which the court said: "One ground of demurrer assigned is that several causes of action have been improperly united. The statute expressly authorizes a party to 'unite in the same complaint several causes of action . . . where they arise out of' and 'belong to one' of the several classes therein mentioned and affect all the 'parties to the action' and do 'not require different places of trial' and are 'stated separately.' R. S. 1878, sec. 2647. One of the classes so named therein is 'injuries to character.' Id. Under this statute this court has held that a plaintiff may unite in the same complaint a cause of action for libel and another cause of action for slander. Noonan *v.* Orton, 32 Wis. 106. It logically follows that two or more separate causes of action for slander may be united in the same complaint. In the case at bar we are clearly of the opinion that only one cause of action is alleged, or attempted to be alleged. True, the complaint sets forth three several excerpts

prosecution may therefore be joined with one for libel or slander, or both.[1]

§ 391. *497. **Special Cases.** The following are some special cases. In Wisconsin a complaint was sustained in an action by a creditor, one count of which set up a cause of action against a bank to recover certain property or its value, and another count alleged a cause of action against delinquent stockholders of the corporation.[2] Where a complaint contained two causes of action, the first to enforce an implied trust alleged to have arisen in favor of the plaintiff on the conveyance of lands from himself to the defendant, and the second to enforce a vendor's lien on the same lands, they were held to be properly united, since both arose out of trusts, the one by virtue of a contract, and the other by operation of law.[3] In another equitable suit the joinder of four causes of action was sustained, where the first was to reform a certain trust deed by inserting the name of a trustee, and to foreclose it when reformed, the second was to foreclose a mortgage upon the same land, while the third and fourth were to enforce certain charges which were liens on the land, and which the plaintiff had been compelled to pay in order to protect his security.[4]

§ 392. *498. **Rule in Iowa.** All of the foregoing cases were decided under State codes which contain substantially the same provisions and the same division into classes. In Indiana and Iowa, it will be remembered, the corresponding sections of the

from the discourse complained of; but it alleges that they were each and all made at the same time and place, in the same connection, and that the language employed in each of such excerpts was understood by the persons then and there present in the congregation, or by the most of them. It is true that in discussing the subject of damages it has been said that where the article complained of contains several expressions, each of which is libellous *per se*, each such expression is, in legal effect, a separate cause of action. Candrian *v.* Miller, 98 Wis. 168. But that does not mean that each such expression must necessarily be pleaded as a separate cause of action." Scott *v.* Flowers (1900), 60 Neb. 675, 84 N. W. 81, in which it was said a cause of action for false imprisonment may be joined in the same petition with a count for malicious prosecution, both causes of action arising out of the same transaction.]

[1] Martin *v.* Mattison, 8 Abb. Pr. 3; Hull *v.* Vreeland, 18 Abb. Pr. 182; Watson *v.* Hazzard, 3 Code Rep. 218; Shore *v.* Smith, 15 Ohio St. 173; Hargan *v.* Purdy (Ky. 1892), 20 S. W. 432 (slander joined with libel).

[2] Seaman *v.* Goodnow, 20 Wis. 27, *sed qu.*

[3] Burt *v.* Wilson, 28 Cal. 632. See also Price *v.* Brown, 10 Abb. N. Cas. 67 (causes of action arising out of breach of trust may be united in a suit against the trustee's executors).

[4] Burnside *v.* Wayman, 49 Mo. 356. The "trust deed" mentioned was, in fact, a form of security used in several of the States instead of a mortgage. See also Williams *v.* Peabody, 8 Hun, 271; Hay *v.* Hay, 13 id. 315.

statute are peculiar, and more latitude is permitted, especially in the latter State, in the joinder of unlike causes of action. As in Iowa all legal or equitable causes of action may be united, a claim arising upon contract may be included in the same petition with one for damages resulting from any kind of tort.[1] And where twenty-two different parcels of land belonging to the same owners had been conveyed to the plaintiff by as many separate tax deeds, he was permitted to foreclose all these deeds, and thus cut off the owner's right of redemption in one action.[2] In construing the sections of the Iowa code which give the trial court a discretion in reference to the joinder of unlike causes of action, and which authorize it to compel an election, or to strike out on the defendant's motion, it is held that the provision for compelling the plaintiff to elect applies only to a case where the various causes of action set forth in the petition are merely different modes of stating one and the same demand, and the defendant must file an affidavit showing this fact as the basis of his motion; but the court may, on defendant's motion, strike out a cause of action which it deems impossible or inconvenient to try with the others, but in no case is a demurrer the proper remedy.[3]

§ 393. * 499. **Illustrations from Indiana and California.** In Indiana, a cause of action by a wife for an absolute divorce was held properly joined with a cause of action to compel the specific performance of an agreement to convey certain lands to her made

[1] Turner *v.* First Nat. Bk. of Keokuk, 26 Iowa, 562. See also Mendenhall *v.* Wilson, 54 Iowa, 589 (trespass and contract); Thorpe *v.* Dickey, 51 id. 676; Stevens *v.* Chance, 47 id. 602.

[2] Byington *v.* Woods, 13 Iowa, 17, 19. See, *per contra,* Turner *v.* Duchman, 23 Wis. 500.

[Campbell *v.* Equitable Loan & Trust Co. (1901), 14 S. D. 483, 85 N. W. 1015. Under the statute allowing joinder of causes of action to recover real property, it is proper to join five causes of action to set aside five tax deeds on five separate tracts of land.]

[3] Reed *v.* Howe, 28 Iowa, 250, 252; Iowa & Minn. R. Co. *v.* Perkins, 28 Iowa, 281. In the following cases, the causes of action were held to have been improperly joined: an action by two plaintiffs for the destruction of chattels owned by them jointly, and also for an assault and battery committed upon each; but, no motion having been made to strike out, the irregularity was thereby waived: Grant *v.* McCarthy, 38 Iowa, 468; an action by two persons not partners for a slander of each, but on the trial the case was severed, and the trial proceeded on behalf of one alone, and this was held proper: Hinkle *v.* Davenport, 38 Iowa, 355. For further illustration, see Faivre *v.* Gillan (Iowa, 1892), 51 N. W. 46.

[See the following recent Iowa cases: Devin *v.* Walsh (1899), 108 Ia. 428, 79 N. W. 133; Prader *v.* Nat. Acc't. Ass'n. (1899), 107 Ia. 431, 78 N. W. 60; Clayton County *v.* Herwig (1897), 100 Ia. 631, 69 N. W. 1035; Jenks *v.* Lansing Lumber Co. (1896), 97 Ia. 342, 66 N. W. 231.]

by the husband at the time of their separation.[1] In California, by virtue of the provisions of a special statute, a cause of action against a sheriff to recover damages for his neglect to execute and return process may be joined with a claim to recover a statutory penalty for the failure in his official duty.[2]

§ 394. *500. **Cause of Action upon Contract cannot be joined with one to recover Damages for a Tort. Illustrations. Author's Criticism.** I shall conclude this section with a classified series of decisions which will illustrate the improper union of different causes of action. Except in Iowa, the rule is universal that a cause of action upon contract cannot be joined with one to recover damages for a tort, unless both should arise out of the same transaction, and thus fall within the inclusive terms of the first class. The following are examples merely of this elementary rule.[3] A count against the defendant for his wrongful acts as president of a bank, and one against him as a stockholder in such bank to recover on its notes, were improperly embraced in the same complaint,[4] also a claim against certain part owners of a vessel to recover her hire, which they had received, and one to restrain them from a threatened wrongful sale of the ship.[5] It has been held that a demand arising from the breach of a warranty given upon the sale of chattels cannot be joined with one based upon the vendor's deceit practised in the same sale.[6] Notwithstanding

[1] Fritz *v.* Fritz; 23 Ind. 388.

[See late cases in Indiana as follows: Coddington *v.* Canaday (1901), 157 Ind. 243, 61 N. E. 567; State *ex rel. v.* Peckham (1893), 136 Ind. 198, 36 N. E. 28; Richwine *v.* Presbyterian Church (1893), 135 Ind. 80, 34 N. E. 737.]

[2] Pearkes *v.* Freer, 9 Cal. 642.

[3] [Clough *v.* Rocky Mountain Oil Co. (1898), 25 Colo. 520, 55 Pac. 809: A cause of action in contract against a corporation cannot be joined with a cause of action against the directors of the same corporation brought under a statute making the directors liable for the debts of the company in case they failed to make certain reports as to the condition of the company, the latter being the cause of action in tort. Allen *v.* Macon, etc. R. R. Co. (1899), 107 Ga. 838, 33 S. E. 696: A cause of action on contract cannot be joined in a single suit with a cause of action arising from a tort. Corbett *v.* Wrenn (1894), 25 Ore. 305, 35 Pac. 658: Where a complaint contains allegations of a covenant against incumbrances and its breach, and also allegations of the representations of the defendant as to the freedom of the property from incumbrances, their falsity, defendant's knowledge that they were false, and plaintiff's reliance on them, there is a misjoinder of causes, one being in contract, the other in tort, but unless the objection is taken by demurrer it is waived. See also Conant *v.* Storthz (1901), 69 Ark. 209, 62 S. W. 415.]

[4] Butt *v.* Cameron, 53 Barb. 642; but see Wiles *v.* Suydam, 6 N. Y. S. C. 292.

[5] Coster *v.* N. Y. & E. R. Co., 3 Abb. Pr. 332.

[6] Springsteed *v.* Lawson, 14 Abb. Pr. 328; Sweet *v.* Ingerson, 12 How. Pr. 331. See Gertler *v.* Linscott, 26 Minn. 82; Logan *v.* Wallis, 76 N. C. 416; Doughty *v.* Atlantic & N. C. R. Co., 78 id. 22; Keller *v.* Boatman, 49 Ind. 104.

these decisions, it is impossible to conceive of two legal causes of action which more completely and accurately correspond to the language of the codes, as "arising out of the same transaction." The bargain between the parties is certainly a transaction; certain language used by the seller may amount to a contract of warranty; certain other language may be the false representations; indeed, it is possible, and not at all unlikely, that the selfsame words spoken by the vendor might be at once the fraudulent representations and the promise, for language otherwise sufficient is none the less a promise because the person using it knowingly lied when he uttered it. To say that these two demands do not arise out of the same transaction is virtually to say that no two different *legal* claims ever can so arise. I cannot regard these decisions, therefore, otherwise than as mistaken.

§ 395. * 501. **Illustrations.** In an action against a railroad company, the complaint contained three counts: the first for wrongfully carrying away and converting cattle; the second for the same injury done to hogs; and the third set up an agreement to transport cattle from a specified place to another, and averred a breach thereof by means of a negligent omission whereby the plaintiff lost his cattle. On demurrer, it was said that the first two causes of action, being for torts, could be joined; but the third was upon contract, and its union with the others was error.[1] The joinder of a count for the conversion of chattels with one for money had and received would be clearly wrong;[2] and the same is true of any tort and implied contract.[3] It is doubtful whether a cause of action on contract and one for a tort to the person can be conceived of as arising out of the same transaction, so that they may be embraced in the same pleading. The attempt, however, has been made to unite a claim for the breach of a written contract to convey land with a cause of action for assault and battery

[1] Colwell *v.* N. Y. & E. R. Co., 9 How. Pr. 311; Hoagland *v.* Han. & St. Jos. R. Co., 39 Mo. 451. See also Stark *v.* Wellman, 96 Cal. 400.

[2] Cobb *v.* Dows, 9 Barb. 230, and cases in last note. See also Teall *v.* Syracuse, 32 Hun, 332.

[3] Hunter *v.* Powell, 15 How. Pr. 221. It was held in Thomas *v.* Utica & B. R. R. Co., 97 N. Y. 245, that a cause of action for the omission by a railroad company to construct and maintain a farm crossing, as required by statute, arises upon the breach of an implied contract to perform a statutory duty, and therefore cannot be united with a cause of action for damages for injuries to real property caused by the diversion of a stream. Followed in Hodges *v.* Wilmington & W. R. Co., 105 N. C. 170, a case presenting similar facts.

committed by the defendant in forcibly taking the instrument from the plaintiff's possession, but it was unsuccessful.[1] In like manner, a cause of action against a lessee arising upon the lease cannot be joined with a claim for damages on account of injuries done to the property, unless, of course, the latter is embraced within some stipulation or covenant of the lease, so that it would in fact be a demand on the contract.[2] It can make no difference with the rule that the tort is a fraud consisting in false statements or concealments. Thus, a complaint by an indorsee against his immediate indorser was held bad on demurrer, one count of which alleged the ordinary liability of defendant as indorser, and the other set up certain false representations as to the solvency of the maker, by which the plaintiff was induced to purchase the paper.[3] The rule, in short, applies to all cases of demands based upon a promise, express or implied, and claims based upon fraud, unless the tort may be waived, and the complaint be framed so as to present both causes of action as arising from contract.[4]

§ 396. * 502. **Cause of Action against one in Personal Character cannot be united with one against him in Representative Character. Reason. Author's Criticism. Illustrations.** Another particular rule, which is but an application of the same doctrine, requires that the several causes of action against or for a given person should all affect him in the same capacity. In other words a demand for or against a party in his personal character cannot be united with another demand for or against him in a representative character as trustee, executor, administrator, receiver, and the like.[5] The reason usually given

[1] Ehle *v.* Haller, 6 Bosw. 661.

[2] Ederlin *v.* Judge, 36 Mo. 350. Conversely, a claim of damages for the breach of the lessor's covenant of quiet enjoyment, and a claim of damages for a trespass in his wrongful entering upon the demised premises and injuring the lessee's property thereon, cannot be joined. Keep *v.* Kaufman, 56 N. Y. 332.

[3] Jamison *v.* Copher, 35 Mo. 483.

[4] Forkner *v.* Hart, Stanton's Code (Ky.), 60; Wilson *v.* Thompson, Id. 60; Hubbell *v.* Meigs, 50 N. Y. 480, 487; Booth *v.* Farmers' & Mech. Bk. of Rochester, 1 N. Y. S. C. 45.

[5] [Hawarden *v.* Youghiogheny & Lehigh Coal Co. (1901), 111 Wis. 545, 87 N. W. 472. Plaintiff was a retail coal-dealer in the city of Superior, and filed his complaint in two counts against the defendants, who are wholesale and retail coal-dealers. His first count stated a cause of action in favor of himself alone, for damages caused by an alleged malicious conspiracy on the part of the defendants to destroy his business, said defendants having combined for the purpose of establishing a monopoly and preventing plaintiff from purchasing coal. His second count stated an equitable cause of action in favor of himself and a number of other retail coal-dealers similarly situated, in whose behalf

for this rule when applied to defendants is, that the judgment upon one cause of action would be against the defendant personally, to be made *de bonis propriis*, while the judgment upon the other cause of action would be against him in his representative or official capacity, and not perhaps to be made out of his own property; as, for example, it might be made *de bonis testatoris*. This reasoning, borrowed from the old law, is a mere formula of words, for there is nothing in the nature of things which prevents such a double judgment. It is just as easy for such a judgment to be rendered in one action as it is for two distinct judgments to be granted in separate suits. The argument, however, like so much of so-called legal reasoning, still has convincing force with most of the courts, even while administering the reformed system. The following cases are given as illustrations of this doctrine, and in all of them the joinder was pronounced improper: a complaint on a partnership debt against the defendant as surviving partner, and against him in a separate count as executor of his deceased partner;[1] against the defendant personally, and also as an executor or administrator;[2] in a suit against an executor or administrator, a demand which existed against the deceased in his lifetime, and a different demand which arose from a promise made by the executor or administrator after the death, for as to the latter claim the defendant is personally liable.[3] On the

he sued to restrain the defendants from a further enforcement of said conspiracy. A general demurrer was filed to the whole complaint on the ground that two causes of action were improperly joined. The court said: "The statute provides that causes of action, in order to be united in one complaint, 'must affect all the parties to the action.' Stats. 1898, sec. 2647. It is clear that this limitation would be violated if the two causes of action in this complaint were allowed to be united in one complaint. The first cause of action is a straight action at law for damages to the plaintiff alone. No one else has any interest in the judgment in that action, whatever it be. But the second cause of action is a cause of action in favor of a large number of persons constituting a class represented by the plaintiff. Potentially all of the class are parties. They are invited to become formal parties plaintiff, and presumably will accept the invitation. Thus the first cause of action affects but one party plaintiff, whereas the second cause of action affects numerous parties plaintiff. The doctrine is frequently stated that the several causes of action for or against a person must affect him in the same capacity in order to make them capable of being joined. Pomeroy, Code Remedies, § * 502. These conclusions are conclusive to the effect that the general demurrer to the whole complaint on the ground of improper joinder should have been sustained."]

[1] Landau *v.* Levy, 1 Abb. Pr. 376.

[2] McMahon *v.* Allen, 3 Abb. Pr. 89. By C. C. P. of New York, § 1815, such joinder is allowed in certain specified cases. [Crowley *v.* Hicks (1898), 98 Wis. 566, 79 N. W. 348.]

[3] Ferrin *v.* Myrick, 41 N. Y. 315, 322; Austin *v.* Munro, 47 N. Y. 360, 364; s. c. 4 Lans. 67. See, however, Tradesman's Bank *v.* McFeely, 61 Barb. 522, which cannot be regarded as correct in the light of these other decisions.

same principle, a demand upon a contract between the plaintiff and the defendant, and a claim by the plaintiff as a shareholder in an unincorporated company against the defendant as president thereof, in respect of matters connected with the management of its affairs, were held to be improperly joined, since the defendant's liability, if any, in the latter cause of action existed against him as a trustee.[1] The plaintiff must also sue in the same capacity in respect of all the causes of action. He cannot in one count sue as an executor or administrator, and in another sue in his personal character.[2] In an action for malicious prosecution the complaint contained three counts: the first for the malicious prosecution of the plaintiff himself; the second for the same wrong done to his wife, she having been imprisoned; and the third for a like tort to his minor children. The only legal ground for recovery on the second and third of these counts was declared to be the loss of the wife's society in the one case, and of the children's services in the other; as these injuries were personal to the plaintiff, they could be joined with the cause of action alleged in the first count for the tort directly to himself.[3]

§ 397. * 503. **Some Unclassified Cases. Author's Criticism.** The cases which follow do not admit of any classification, and several of them are of doubtful authority, even if not palpably erroneous. A cause of action for a limited divorce on the ground of cruelty, desertion, and the like, cannot be united with one for an absolute divorce on account of adultery, or of any other matter prescribed by statute. The two demands are simply incompatible.[4] It was decided by one judge in New York that a

[1] Warth *v.* Radde, 18 Abb. Pr. 396. See, however, Logan *v.* Wallis, 76 N. C. 416.

[2] Lucas *v.* N. Y. Cent. R. Co., 21 Barb. 245. But see Armstrong *v.* Hall, 17 How. Pr. 76, per C. L. Allen J., at Special Term, — a decision in direct opposition to the rule stated in the text; also, Hart *v.* Metrop. El. Ry. Co., 15 Daly, 391. See also Quellen *v.* Arnold, 12 Nev. 234; Cincinnati, etc. R. Co. *v.* Chester, 57 Ind. 299.

[3] Rogers *v.* Smith, 17 Ind. 323. [A cause of action for pain and suffering cannot be joined with the statutory cause of action for death. See Louisville Ry. Co. *v.* Will's Adm'r (1902), — Ky. —, 66 S. W. 628; Lewis Adm'r *v.* Taylor Coal Co. (1902), 112 Ky. 845, 66 S. W. 1044; Page *v.* Citizens Banking Co. (1900), 111 Ga. 73, 36 S. E. 418. "Causes of action for malicious prosecution, malicious arrest, and false imprisonment, all sounding in tort, may be joined in the same action when the plaintiff and defendants in each cause of action thus joined are identical. Civil Code, § 4944." See also Sams *v.* Derrick (1898), 103 Ga. 678, 30 S. E. 668.]

[4] Henry *v.* Henry, 17 Abb. Pr. 411; McIntosh *v.* McIntosh, 12 How. Pr. 289; Zorn *v.* Zorn, 38 Hun, 67; but see *contra*, Grant *v.* Grant (Minn. 1893), 54 N. W.

demand to recover possession of a chattel cannot be united with a claim of damages for the taking, detaining, and converting the same. But as the codes expressly authorize the joinder of claims for the possession of chattels, and of damages for the withholding the same, this decision can hardly be sustained. "Withholding" clearly includes "detaining," and, as it is not a technical term, it was doubtless intended to embrace "taking" and "conversion" as well.[1] A cause of action to recover the possession of a certain parcel of land cannot, it has been said, be united with a demand of damages caused by the defendant's trespasses upon other lands of the plaintiff.[2] It has also been held that a claim to recover possession of land, and a demand of damages for the defendant's tortious entry upon the same land, cannot be joined, *because they are entirely inconsistent.*[3]

§ 398. *504. **Grouping of Actions for Injuries to the Person in some States. Illustrations.** In one or two of the States, actions for injuries to the person constitute a separate class, and are not grouped together with those for injuries to property. Thus in California, an "action to recover damages for alleged injuries to the person and property of the plaintiff, and for his false imprisonment, and for forcibly ejecting him from a house

1059. It would be difficult to determine in what class the action for either kind of divorce falls. One judge in McIntosh *v.* McIntosh suggested that limited divorce was a claim for injury to the person. It seems to be *casus omissus*. See also Haskell *v.* Haskell, 54 Cal. 262 (in an action for divorce, adultery and habitual intemperance are distinct causes); Uhl *v.* Uhl, 52 id. 250 (a cause of action to annul a marriage by reason of a former marriage of the plaintiff to one still alive cannot be joined with a cause of action to quiet plaintiff's title to her separate property, in which defendant falsely claims an interest. But in Prouty *v.* Prouty, 4 Wash. 174, a complaint in an action for divorce and alimony, which asked that alleged fraudulent conveyances by the husband of all his property be set aside, was held to present no misjoinder. The same complaint cannot unite causes of action for divorce, and to obtain the annulment of a separation deed: Galusha *v.* Galusha (N. Y. App., May, 1893), 33 N. E. 1062).

[1] Maxwell *v.* Farnam, 7 How. Pr. 236, per Harris J., at Special Term.

[2] Hulce *v.* Thompson, 9 How. Pr. 113. But cannot both causes of action be referred to the single class of "injuries to property"? The recovery of possession is merely the relief, and not the cause of action.

[3] Budd *v.* Bingham, 18 Barb. 494, per Brown J. It is difficult to perceive this inconsistency. This and some similar decisions are cited, not because they have any authority or any value, but to complete the statement of the judicial interpretation put upon this provision of the statute. For further illustrations, see Buckmaster *v.* Kelley, 15 Fla. 180; Mattair *v.* Payne, 15 id. 682; Williams *v.* Lowe, 4 Neb. 382; Paxton *v.* Wood, 77 N. C. 11; Suber *v.* Allen, 13 S. C. 317; Stevens *v.* Chance, 47 Iowa, 602; Schnitzer *v.* Cohen, 7 Hun, 665; French *v.* Salter, 17 id. 546; Dyer *v.* Barstow, 5 Cal. 652; Brown *v.* Rice, 51 id. 89.

and lot in his possession, and detaining the possession thereof from him," was held to be an improper union, as it embraced causes belonging to two if not three of the classes specified in the code;[1] and in another case, the joining of a claim to recover possession of land, damages for its detention, damages for the forcible expulsion of the plaintiff from the premises, and the value of the improvements made by him, was pronounced equally an error for the same reason.[2]

§ 399. *505. **Holding of Wisconsin Court in Action to quiet Title.** An action to quiet the title to three different tracts of land which had belonged originally to different owners, and which the plaintiff held under three distinct tax deeds executed at separate times, was held in Wisconsin to violate the requirements of the code. The proceeding was likened by the court to the foreclosure in one action of three different mortgages given by three different owners upon three separate parcels of land.[3]

SECTION THIRD.

THE GENERAL PRINCIPLES OF PLEADING.

§ 400. *506. **The Three Types of Pleading Prior to the Reformed System. Pleading by Allegation.** In order that the system of pleading introduced by the reformed procedure may be accurately understood, I shall briefly describe the essential principles and doctrines of those which prevailed in different courts at the time of its adoption, and the comparison which can thus be made will be of great assistance in arriving at correct results. The three types of pleading then known either in England or in this country were the common law, the equity, and that which in the absence of a distinctive name I shall call "pleading by allegation." The last-mentioned method was used in the courts of admiralty, of probate and divorce, the ecclesiastical courts, and wherever the law as administered was based directly upon the doctrines and modes of the Roman Civil Law. Its peculiar features consisted (1) in breaking up an entire pleading into a number of separate paragraphs, — technically

[1] McCarty v. Fremont, 23 Cal. 196, 197. [See late case of Lamb v. Harbaugh (1895), 105 Cal. 680, 39 Pac. 56.]

[2] Mayo v. Madden, 4 Cal. 27. And see Bowles v. Sacramento Turnp. Co., 5 Cal. 224; Bigelow v. Gove, 7 Cal. 133.

[3] Turner v. Duchman, 23 Wis. 500.

"allegations," — each of which should properly contain a single important circumstance or principal fact going to make out the cause of action; and (2) the statement in each allegation of all the minute and subordinate facts which taken together compose, and are evidence of, the main circumstance or fact relied upon by the litigant party to sustain his contention. The pleading as a whole, therefore, comprised not only averments of the substantial facts, the important conclusions of fact which must be established by the proofs, — those facts which in the common-law system are called "issuable" or "material," — but also a narrative of all the probative facts, of all the evidence from which the existence of the "issuable" facts must be inferred. A libel constructed upon this theory disclosed the whole case of the complaining party; if properly framed, it set forth in a continuous and narrative form a complete account of the transaction, describing the situation of the parties at its commencement, all the various incidents which happened in its progress, its final conclusion, and the results produced upon each, and prayed for such relief as the law affords in the given case. The codes of several States have plainly intended to borrow one feature of this system; that is, the separation of the pleading into a number of distinct paragraphs continuously numbered, and each comprising the statement of a single material or issuable fact. The second feature, namely, the narrative of probative facts and circumstances in the manner above described, violates the fundamental and essential principle of the reformed procedure.

§ 401. *507. **The Equity System of Pleading.** The equity method of pleading, when freed from all the superfluous additions which had become incorporated with it in practice, and when thus reduced to its mere essential elements, consisted in a statement of all the facts indicating the relief to which the complainant is entitled, and in this original aspect it did not differ in principle from that prescribed by the codes. I purposely make use of the expression "facts indicating the relief to which the complainant is entitled," rather than the ordinary phrase "facts constituting the complainant's cause of action," for a reason which will be fully explained in the sequel. I now call attention to the form of expression, for it is important, and will assist in removing certain difficulties which have been suggested by some of the judges in their exposition of the codes.

Practically, a bill in equity, prior to any modern reforms, had been changed from the original simplicity as above described, and had come to consist of three distinct parts or divisions, the narrative, the charging, and the interrogative. The first of these contained a statement of the complainant's case for relief; the second anticipated and rebutted the defendant's supposed positions; while the last was used to probe the defendant's conscience, and to extract from him admissions under oath in his answer concerning matters within his own knowledge which the existing rules of evidence did not permit to be proved by the parties themselves as ordinary witnesses. The result of these modifications was an almost entire departure from the simple conception of equity pleading. The bill and answer were generally made to include the evidence by which either party maintained his own contention, or defeated that of his adversary, and also legal conclusions and arguments which more appropriately belonged to the briefs of counsel and the discussions at the hearing. All this, I say, although very common and perhaps universal in the actual practice before any reforms through legislation or rules of court, was really unnecessary, and formed no essential part of the theory of equity pleading. The only indispensable portion of a bill was the narrative. Except for the purpose of eliciting evidence from the defendant, there was no more reason why this should contain mere *evidence* of the facts that were the foundation of the complainant's demand for relief, as contradistinguished from those facts themselves, than there was for the same kind of probative matter to be inserted in a declaration at law. The bill in equity, as has been already said, should comprise a statement of all the facts which show the relief to which the complainant is entitled, which indicate the nature and extent of that relief whether total or partial, and the modifications or exceptions to be made in it; while the answer should perform the same office for the defendant. By the application of this doctrine, a bill in equity was generally quite different in its contents from a declaration at law; it was ordinarily more minute in its averments, and contained statements of matter which in a legal action would more naturally and properly belong to the evidence rather than to the allegations of issuable facts. The reason for this distinction lay entirely in the difference between equitable and legal primary

rights and between equitable and legal remedies, especially in the latter. A judgment at law was always a single award of relief; the recovery either of a specific tract of land, or of a specific chattel, or of a definite sum of money, and such judgment, whatever might be its amount, was either wholly rendered for the plaintiff, or wholly denied. Furthermore, the right to recover a legal judgment always depended upon the existence of a comparatively few important facts, — "issuable" or "material" facts, — and the very definition of an issuable fact is, one which, if denied and not proved, would prevent the plaintiff from recovering. In equity, the primary rights and remedies of the complainant were often very different from those which existed at law. His remedy was not necessarily a single recovery of some specific form of relief; it might vary in its nature and extent through a wide range; it might be total or partial, it might be absolute or conditional. The defence, on the other hand, might be total or partial; and it might even consist of modifications made in the form of relief demanded by the complainant, or in supplemental provisions added thereto in order to meet some future contingency. In short, it was impossible to say that the complainant's right to recover always depended upon the existence of certain "issuable" facts, the failure to establish either one or even all of which would necessarily defeat his contention. It is true that in some cases the equitable remedy sought by the complainant might be of such a nature that it would follow from the proof of such issuable facts as completely and directly as the plaintiff's right to a common-law judgment does in a legal action. While this was possible in some instances, in the great majority of equitable actions the relief was more complicated; the primary rights were more comprehensive; and the decree as a whole was shaped, modified, and adapted to various circumstances and minor facts upon which individually the cause of action or the defence did not entirely rest, but all of which in combination entered into the resulting remedial right belonging to the litigant parties. Now, on the theory of equity pleading, all these facts should be averred by the complainant or the defendant as the case might be; and while it can be properly said that they all indicate and affect the relief to be awarded by the court, they cannot all be said "to constitute the cause of action" or the defence in the same sense

in which the "issuable" or "material" facts constitute the cause of action or the defence in a suit at law. I repeat the statement already made, for it is an important one, that this description does not necessarily apply to every case of equitable relief. Under certain circumstances, and in some particular instances, the remedy and the right to its recovery are single and depend upon the existence of a few well-defined and controlling facts; such facts are then "material" or "issuable" in the strictest sense of those terms, and they are all that it is requisite to allege in the pleading. In most instances, however, an equity pleading necessarily contained allegations of facts which were not "issuable" in the technical meaning of that word, but which were nevertheless the basis of the relief demanded and obtained. I have dwelt thus carefully upon the foregoing analysis, because it is the element which enters into and decides a most important question to be considered in the sequel; namely, whether the proper modes of pleading in legal and in equitable actions under the reformed procedure can be referred to and derived from the single fundamental principle announced by all the codes. Another essential feature belonged to the equity method of pleading, and distinguished it from that which prevailed in courts of law. The facts upon which the contentions of the litigant parties wholly or partially depended were averred as they actually happened or existed, and not the legal effect or aspect of those facts. This distinction was a vital one, as will be fully pointed out in the succeeding paragraphs, and its relations with the reformed theory of pleading are direct and intimate.

§ 402. *508. **The Common-Law System of Pleading. Introductory.** I come finally to the common-law system of pleading. It has frequently been said, even by able judges, that under this method the material, issuable *facts* constituting the cause of action, and they alone, were to be alleged; and that, as exactly the same principle lies at the basis of the new system, the latter has made no substantial change, but has only removed the unnecessary and troublesome incidents which had been gathered around the original simple common-law conception. In support of this view, the general language of Chitty and other text-writers is quoted as conclusive. There is just enough truth in this description of the common-law pleading to make it plausible; but enough of error to render it, when adopted as a means of

interpreting the codes, extremely misleading. In fact, it is impossible to describe the common-law pleading as a unit: it was governed by no universal principles; the modes which prevailed in certain actions were radically unlike those that were employed in others. I shall attempt in a very brief manner to point out all its essential features, and to explain its general character.

§ 403. *509. **Technicality of the System.** In the first place, certain elements were firmly incorporated into the system which were not really fundamental and essential, although often regarded and spoken of as its peculiarly characteristic requisites. I refer to the extreme nicety, precision, and accuracy which were demanded by the courts in the framing of allegations, in averring either the facts from which the primary rights of the parties arose, or those which constituted the breach of such rights, in the use of technical phrases and formulas, in the certainty of statement produced by negativing almost all possible conclusions different from that affirmed by the pleader, in the numerous repetitions of the same averment, and finally in the invention and employment of a language and mode of expression utterly unlike the ordinary spoken or written English, and meaningless to any person but a trained expert. This requirement of accuracy and precision was in former times pushed to an absurd and most unjust extreme; as for example, the use of the past tense "had," instead of the present "have," in a material allegation, would be fatal to the plaintiff's recovery. If it be said that these extreme niceties and absurd technicalities were things of the past, abandoned by the law courts in modern times, a perusal of some standard reports — for instance, those of Meeson and Welsby — will show on what grounds of the merest form the rights of litigant parties have been determined, even within the present generation. Still, I do not regard this precision, accuracy, and general technicality, which actually distinguished the common-law system of pleading, as something essential to its existence, as its absolutely necessary elements. It might have retained all its fundamental principles in respect to the nature of the allegations used and the kinds of facts averred, and at the same time have employed the familiar language of common narrative in making all these averments. The essential elements of the system would then be presented in their naked simplicity. The actual technicalities which have been thus mentioned, and

which were the boast of the skilful special pleader, were only a disgrace to the administration of justice. However pleasant they might have been as exercises in logic, they were productive of untold injustice to suitors. It is simply amazing that they could have been retained so long and adhered to so tenaciously, and even lauded with extravagant eulogium, among peoples like the English and the American. That they were entirely abrogated by all the codes of procedure is plain; and after a series of improvements, commencing in 1834, when the celebrated "Rules of Hilary Term" were adopted, the British Parliament has swept them out of the English law, and has introduced the substance of the American system.

§ 404. * 510. **Essential Principles and Elements of Common-Law Pleading.** Passing from these technical incidents, I proceed to inquire what were the real and essential principles and elements of the common-law pleading. How far was it true that the material facts constituting the cause of action, and these alone, were to be alleged? This statement was partly correct, — that is, correct under most important limitations and reservations, in certain of the forms of action; while in the other of these forms of action it was not true in the slightest extent; in fact, it was diametrically opposed to the truth. I will recapitulate the important actions, and refer them to their proper classes. In ejectment there can be no pretence that any attempt was made to allege the actual facts constituting the cause of action; the declaration and accompanying proceedings were a mass of fictions which had become ridiculous, whatever may have been their original usefulness, and the answer was the general issue; the record thus threw no light upon the real issues to be tried by the jury. In trover, the averments of the declaration were that the plaintiff was possessed, as his own property, of certain specified chattels; that he lost them; and that the defendant found them, and converted them to his own use. Throwing out of view the abused fictions of a loss and a finding, there was here the statement of two facts, namely, the description of the chattels so as to identify them, and the plaintiff's property in them; but the most important allegation of all, the one upon which in the vast majority of cases the whole controversy would turn, was a pure conclusion of law. The statement that defendant had converted the same to his own use did not indicate any fact to

be considered and decided by the jury in reaching their verdict. In the action of debt, also, the important allegation was a mere conclusion of law, namely, that the defendant was indebted to the plaintiff in a certain sum whereupon an action had accrued; and although the declaration contained a further statement of the consideration or cause of the indebtedness, yet as a whole it did not pretend to set forth the material facts constituting the cause of action. In assumpsit, the pleadings were of two very different species, in all cases of implied promises, and especially when the common counts were resorted to, the averments were purely fictitious, as much so as in ejectment; there was not the slightest approach towards a statement of the facts constituting a cause of action as they actually existed. When the suit was brought upon an express contract, and the declaration was in the form of a special assumpsit, there was a greater *appearance* of alleging facts; but even here the facts were stated in their supposed *legal* aspect and effect, as legal conclusions, and not simply as they occurred. There are left to be considered the actions of covenant, detinue, trespass, and case. In each one of these, according to the nature of the action, the facts constituting the grounds for a recovery were more nearly stated, although in some of them the averments were required to be made in an exceedingly precise and technical manner. The declaration in a special action on the case necessarily comprised a narrative of the actual facts constituting the cause of action; but as has been said, this narrative was thrown into a very arbitrary, technical, and unnatural shape. It therefore bore some resemblance in substance to a complaint or a petition, when properly framed according to the reformed theory; and some judges have even said that every such complaint or petition is a declaration in a special action on the case. The assertion so often made by the older text-writers, and repeated by modern judges, that the common-law system of pleading demanded allegations of the *facts* constituting the cause of action or the defence, is thus, as a general proposition, manifestly incorrect, for in many forms of action there was no pretence of any such averments.

§ 405. *511. **Same Subject.** But we must go a step farther in order to obtain an accurate notion of the common-law theory. In all the instances where fictions were discarded, and where the important allegations were not mere naked conclusions of law,

but where, on the contrary, the plaintiff assumed to state the "issuable" facts constituting his cause of action, he did not narrate the exact transaction between himself and the defendant from which the rights and duties of the respective parties arose; *he stated only what he conceived to be the legal effect of these facts.* The "issuable" facts, in the contemplation of the common-law system, were not the actual controlling facts as they really occurred, and as they would be proved by the evidence, from which the law derived the right of recovery: they were the *legal aspect of those facts*, — not strictly the bare conclusions of law themselves derived from the circumstances of the case, but rather combinations of fact and law, or the facts with a legal coloring, and clothed with a legal character. The result was, that the "issuable" facts as averred in the pleading were often purely fictitious; that is, no such events or occurrences as alleged ever took place, but they were represented as having taken place in the manner conceived of by the law. The pleader of course set forth his own view of this legal effect under the peril of a possible error in his application of the law to his case; if a mistake was made in properly conceiving of this legal effect, — or, in other words, if the facts established by the evidence did not correspond with his opinion as to their legal aspect stated in the declaration, — the plaintiff's suit would entirely fail.[1]

[1] In corroboration of these conclusions, I quote a paragraph from a series of exceedingly able articles upon the English Judicature Bill, which appeared in the "Saturday Review" during the year 1873, and were correctly attributed to one of the foremost English barristers as their author. While discussing the pleading which ought to be introduced, he describes the common-law methods by way of contrast, and, among others, the following as one of its features: "The first striking difference is this, that, on the common-law plan, a plaintiff is required to state, not the facts, but what he considers to be the legal effect of the facts. If his advisers take a wrong view of a doubtful point, and make him declare, say, for goods sold and delivered when the real facts, as proved, only make a case of goods bargained and sold, the unlucky plaintiff is cast, not because he is not entitled to recover, but because he has not put his case as wisely as he might have done. In practice, dangers of this kind are mitigated, though by no means invariably escaped, by inserting a multitude of counts, all giving slightly different versions of the same transaction, in order that on one or other of them the plaintiff may be found to have stated correctly the legal effect of the facts. The permission to do this was in fact a recognition of the plaintiff's inherent right to ask alternative relief; but it was clogged by the absurd condition that he could only do so by resorting to the clumsy fiction of pretending to have a number of independent grounds of action, when he knew that he had only one, but did not know exactly what the court might consider the legal effect of his facts to be. This was not only unscientific and irrational, but, in some cases, it has led to enormous expense by compelling a plaintiff to declare on, and a defendant to plead to, scores of

§ 406. *512. **History of the Action of Assumpsit.** The extent of these fictitious allegations in pleading, and their influence upon the form and growth of legal doctrines at large, are exhibited in a remarkable manner by the history of the action of assumpsit, and its effect in originating and developing the doctrine of implied promises and contracts. At an early day, the action of debt was the only one by which to recover for the breach of an unsealed contract; but the defendant was permitted to "wage his law," and by that means to greatly embarrass, if not to defeat, the plaintiff's recovery. To obviate this difficulty, the action of assumpsit was at length invented. The gist of this action was the defendant's promise; the distinctive averment of the declaration was the promise, of course express in form, and so indispensable was it, that, if the allegation was omitted, judgment would be arrested, or reversed on error, even after verdict in the plaintiff's favor. The promise was stated to have been

fictitiously differing counts, when there was only one matter in dispute between them. We do not suppose that the greatest zealot among special pleaders would say that such a queer scheme as this is preferable to one under which the plaintiff states the facts on which he founds his claim, and asks for such relief as their legal effect may entitle him to." "Saturday Review," April 12, 1873, vol. 35, p. 472. In the face of this most accurate description of common-law pleading in its essence, the assertion that it requires a statement of the actual facts constituting the cause of action is seen to be as fictitious as many of its ordinary allegations, — one of the *fictions* which make up so large a part of the system itself.

[Some recent utterances of the Supreme Court of Missouri are interesting in this connection. In Estes *v.* Desnoyers Shoe Co. (1900), 155 Mo. 577, 56 S. W. 316, the court said: "The petition, however, was obnoxious to a salutary rule of pleading which would have rendered it liable to demurrer if the demurrer had covered that feature. The defect in the petition is that it sets out the contract sued on *in hæc verba* instead of pleading it by its legal effect. That form of pleading is to be considered none the less bad because it is not of uncommon practice even among learned lawyers. The rules of good pleading require that the instrument relied on should be pleaded by its legal effect, which requirement is not for mere form, but rests on substantial reason. The pleading is addressed to the court and should state the pleader's theory of his case, not leaving it to the court to construct a theory as best it may from the evidence set out, and not leaving his adversary in the dark as to what the theory advanced is, or what construction the pleader puts upon his contract. It is not a contest in which the combatants may catch as they can. If the contract is inartificially drawn so that its meaning or effect is obscure, it is all the more important that the pleader advancing it should take the responsibility of stating its legal effect, leaving the instrument itself to be used as evidence, which is its only office." And in the still later case of Reilly *v.* Cullen (1900), 159 Mo. 322, 60 S. W. 126, the court said that a petition which alleged a contract *in hæc verba* instead of by its legal effect left the issue uncertain, that the code system of pleading furnished no authority for such uncertainty, and that such a petition would be held bad on demurrer on the ground that it did not state facts constituting a cause of action.]

express, and in fact no form of common-law action provided for a recovery upon an implied promise; in every case of assumpsit, either general or special, on the common counts or otherwise, the defendant was represented as having expressly promised. For a considerable period of time after the invention of assumpsit, undoubtedly the contracts enforced by its means were all express, so that the averment of the declaration accorded with the actual transaction between the parties, as shown by the evidence. In the course of time, however, cases were brought before the courts, in which the right of action on the one hand, and the liability to pay on the other, depended upon a moral and equitable duty of the defendant, arising, not from any promise made by him, but from the acts, circumstances, and relations existing between him and the plaintiff. The courts were thus placed in a dilemma. The obligation of the defendant and the right of the plaintiff were founded upon the plainest principles of equity and justice, and to deny their existence was impossible. Still, there was no action directly appropriate for their enforcement. None of the actions *ex delicto* could be used, since there was no tort; debt was also out of the question, because the amount claimed was unliquidated damages; even assumpsit was not applicable, for there was no promise. In this emergency the English judges were true to their traditions, and to all their modes of thought. Instead of inventing a new action, and applying it to the new class of facts and circumstances, they reversed the order, and applied the facts and circumstances to the already existing actions. They fell back upon their invariable resource, the use of fictions; but went farther than ever before or since; and, instead of inventing a fictitious element in the action, they actually added a fictitious feature to the facts and circumstances from which the legal right and duty arose. They selected the existing action of assumpsit as the one to be employed in such classes of cases; and since that action is based upon a promise, and since the declaration must invariably allege a promise to have been made, the early judges, instead of relaxing this requirement of pleading, actually added the fictitious feature of a promise which had never been made to the facts which constituted the defendant's liability. In other words, the courts invented the notion of an implied promise, in order that the cases of liability and duty resulting from certain acts, omissions,

or relations where there had been no promise, might be brought within the action of assumpsit, and be tried and determined by its means. There is no more singular and instructive incident than this in the whole history of the English law, and it has a most direct and important connection with the practical rules of pleading under the reformed procedure of the codes. We see that the notion of an implied promise as the ground of recovery in these cases of moral and equitable duty did not exist prior to and independent of the action which was selected as the proper instrument for its enforcement; on the contrary, the action already existed the distinguishing feature of which was the allegation of a promise made by the defendant, and a fictitious or "implied" promise was invented and superadded to the actual facts constituting the defendant's liability, for the simple purpose of bringing his case within the operation of that action and its formal averment.[1]

[1] It would be both interesting and instructive to trace this doctrine of implied promises through the whole series of cases, from its first suggestion as a fiction of pleading until it became firmly incorporated into the general theory of contracts; but my limits will not permit such an excursion. I quote, however, the conclusions reached by Judge Metcalf in his exceedingly able work upon Contracts, as an authority for the position taken in the text. After an analysis of numerous early cases, he says: "As there will be no occasion to advert hereafter to the fictions adopted in setting forth the plaintiff's claim in declarations in the action of assumpsit, it may not be amiss to present a succinct view of those fictions, and of the reasons on which they are founded. The usual action on a simple contract in old times was debt. The declaration in that action averred in substance that the defendant owed the plaintiff, and thereupon an action had accrued, etc. No promise was alleged, for no promise was necessary. But the defendant was allowed to wage his law. To avoid this wager of law, a new form of action was devised, to wit, the action of assumpsit, in which a promise of the defendant was alleged, and was indispensable. A declaration which did not aver such promise was insufficient even after verdict; and the law is the same at this day. The promise declared on is always taken to be express. In pleading, there is no such thing as an implied promise. But as no new rule of evidence was required in order to support the new action of assumpsit, it being necessary only to prove a debt, as was necessary when the action was debt, the fictitious doctrine of an implied promise was introduced; and for the sake of legal conformity it was held, when the defendant's legal liability was proved, that the law presumed that he had promised to do what the law made him liable to do. . . . A single example will illustrate these two fictions [the author had described the kindred fiction of an (implied) request alleged to have been made.] A husband is bound by law to support his wife; and if he wrongfully discard her, any person may furnish support to her, and recover pay therefor of the husband. In the action of debt, there would be no necessity to allege a promise in such a case. But the husband might wage his law, and defraud the plaintiff. In the action of assumpsit, the furnishing of the supplies must be alleged to have been by the plaintiff at the husband's request, and a promise of the husband to pay must also be alleged. But proof of the actual facts

§ 407. *513. **Outline of Proposed Discussion of Reformed Procedure.** Having thus described the three types of pleading in existence when the reformed procedure was inaugurated, I now proceed to examine the system introduced by that procedure itself. In pursuing this investigation, I shall endeavor, *first*, to ascertain the essential and general principles upon which it is founded; *secondly*, to determine the manner in which the plaintiff should set forth the affirmative subject-matter of the action in his complaint or petition; and *thirdly*, to apply the results thus reached to the most important and common instances of action and remedy. Although I shall aim at a close conformity with the true spirit and intent of the statutory legislation, yet this intent will be sought for in the decided cases which have given a judicial interpretation to the codes. It must be conceded at the outset that there is an irreconcilable conflict between two classes of decisions, not only in mere matters of detail, but in their whole course of reasoning, in the premises which they assume, and in the conclusions which they draw therefrom. But this conflict was, in by far the greater part of the States, confined to the earlier periods of the reform, and has virtually disappeared. There is a substantial agreement among the courts in respect to the general principles which they have finally adopted: whatever differences now exist arise in the process of applying these fundamental doctrines to particular cases. The confusion which actually prevails to a very great extent in several of the States results not from any uncertainty either in the general principles or in the more subordinate rules, but from an entire ignorance or disregard of them by pleaders, and from a neglect to enforce them by the judges.

§ 408. *514. **Two Theories as to the Relation between the New and Old Systems.** Before entering upon the matter thus outlined a preliminary question suggests itself, upon the answer to which much of the succeeding discussion must turn. This question

supports both these allegations. The husband, being in law liable to pay, is held to have (impliedly) made both the request and the promise." Metcalf on Contracts, pp. 203, 204. This origin of the implied promise, of its invention as a fiction in order to bring the case within the operation of "assumpsit" throws a strong light upon the question, whether, in an action to enforce such a liability under the codes, the plaintiff should, in addition to the actual facts from which the defendant's liability arises, also allege a promise to have been made by him. The promise was simply a formal incident of the particular action in the old system, and is certainly no more than such an incident in the new.

involves the true relations between the doctrines and rules of pleading enacted by the codes and those which existed previously as parts of the common law and the equity jurisprudence, and may be stated as follows: Are the doctrines and rules contained in the statute to be regarded as the sole guides in pleading under the reformed procedure? or are the ancient methods still controlling, except when inconsistent with some express provisions of the later legislation? In answering this inquiry, the two schools of interpretation so often mentioned again appear, and the difference between them is the same as that already described under a somewhat altered shape. It is plain that the position taken by the courts, in answering the question here suggested, must to a very great extent influence the whole body of practical rules which they adopt in reference to pleading as well as to all the other features of the civil action. According to one theory, these doctrines and rules of the common law and of equity still remain, although changed in many particulars by the reform legislation: the pleader must first recur to them, and must then examine how far their requirements have been abrogated or altered by the statute; in a word, the legislation is purely amendatory, and is not reconstructive. According to the other theory, these doctrines and rules of the common law and of equity do not exist at all as authoritative and controlling, — that is, as controlling *because* rules of the common law or of equity. The general principles and fundamental requirements of the codes have been substituted in their place, completely abrogating them, and constituted by the legislature as the only sources of authority to the bench and the bar in shaping the details of the reformed procedure. If any particular doctrine or rule which formerly prevailed is also found existing to-day, it so exists not because it is a part of the common law or of the equity system, but because it is either expressly or impliedly contained in and enacted by the reformatory statute. When, therefore, in discussing and interpreting such a doctrine, a resort is had to the former methods for aid, the reference is, not to obtain authority, but to find an analogy or explanation. In other words, the system introduced by the codes is regarded as complete in itself, entirely displacing the ancient modes. In several particulars, however, its doctrines and rules are either identical with or closely resemble those which existed before; and, in their judi-

cial construction, recourse must be had by way of explanation and analogy merely to these original forms, but no such recourse is to be had for the purpose of obtaining the authority for any proposed measure or practical regulation connected with the pleading under the new procedure.

§ 409. *515. **The Theory generally Adopted.** During the earlier periods of the present system, there was an evident disposition on the part of some judges and courts to adopt the former of these two views, and to hold that the old methods, rules, and requisites of the common law and of equity, are still applicable in substance when not inconsistent with the provisions of the statute; or, in other words, that they had been supplanted only so far as such inconsistency extends.[1] The second theory has, however, been generally if not universally adopted as the true interpretation to be put upon the language of the codes, and as the starting-point in the work of constructing a system of practical rules for pleading. The proposition, as stated in the foregoing paragraph, has been expressly announced in well-considered judgments; in the vast majority of instances, however, it has rather been assumed and impliedly contained in the decision of the court, yet none the less passed upon and affirmed. It may now, I think, be regarded as the established doctrine, that the code in each of the States is the only source of authority from which rules of pleading may be drawn, that its methods have completely supplanted those which preceded it, so that the latter can no longer be appealed to as possessing of themselves any force and authority.[2]

§ 410. *516. **Essential Principles of Reformed System of Pleading. Introductory.** I shall now proceed to gather from the text of the codes, as interpreted by the most authoritative decisions, and to state in order, the comparatively few general and essential principles of pleading introduced by the reformed procedure,

[1] See Howard *v.* Tiffany, 3 Sandf. 695; Fry *v.* Bennett, 5 Sandf. 54; McMaster *v.* Booth, 4 How. Pr. 427; Rochester City Bank *v.* Suydam, 5 How. Pr. 216; Wooden *v.* Waffle, 6 How. Pr. 145; Buddington *v.* Davis, 6 How. Pr. 401; Houghton *v.* Townsend, 8 How. Pr. 447; Boyce *v.* Brown, 7 Barb. 80; Knowles *v.* Gee, 8 Barb. 300; Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309, 313.

[2] School Sec. Trs. *v.* Odlin, 8 Ohio St. 293; Jolly *v.* Terre Haute Drawbr. Co., 9 Ind. 421; White *v.* Joy, 13 N. Y. 83, 90; People *v.* Ryder, 12 N. Y. 433, 438, 439; Ahern *v.* Collins, 39 Mo. 145, 150. See also Clark *v.* Bates, 1 Dak. 42; Clay Cy. *v.* Simonsen, 1 id. 403, 430; Scott *v.* Robards, 67 Mo. 289; Dunn *v.* Remington, 9 Neb. 82; Ingle *v.* Jones, 43 Iowa, 286.

which constitute the foundation of its simple, natural, and scientific as well as practical system. These essential principles apply to certain classes of answers in addition to all complaints or petitions, although from the nature of the two pleadings they find their fullest and highest expression in the latter. Whenever the answer is simply in the form of denial, whether general or specific, it is of course governed by rules applicable to it alone. But so far as the answer contains defences of new matter, and *a fortiori* so far as it contains a counter-claim, or set-off, or the basis of any affirmative relief, its allegations and those of the complaint or petition must conform to the same requirements, must follow the same method. The general and essential principles of the reformed pleading now to be discussed, illustrated, and arranged in an orderly manner, apply therefore alike to the plaintiff's statement of his case for relief, and to the defendant's statement of affirmative matter, either by way of defences in confession and avoidance, or by way of cross-demands against any parties to the action.

§ 411. *517. **Manner of Averring Material Facts.** The fundamental and most important principle of the reformed pleading, the one from which all the others are deduced as necessary corollaries, is the following: The material facts which constitute the ground of relief, or the defence of new matter (confession and avoidance), should be averred as they actually existed or took place, and not the legal effect or aspect of those facts,[1] and

[1] [*Pleading according to Legal Effect.* The rule that facts should be averred as they actually existed or took place, and not the legal effect or aspect of those facts, is not universally sustained by the cases. Thus the Supreme Court of Missouri, in several recent cases, has taken the other view, holding that a contract should be alleged, not *in hæc verba*, but according to its legal effect. Estes *v.* Desnoyers Shoe Co. (1900), 155 Mo. 577, 56 S. W. 316; Reilly *v.* Cullen (1900), 159 Mo. 322, 60 S. W. 126; Anderson *v.* Gaines (1900), 156 Mo. 664, 57 S. W. 726. See note to § *511, where the first two cases are quoted from at length. An older case, Nichols *v.* Nichols (1896), 134 Mo. 187, 35 S. W. 577, on the contrary, quoted the text with approval. In New York, also, it is held that facts may be alleged according to their legal effect or as they actually existed, at the option of the pleader, and when the former mode is adopted the opposite party may, if he is ignorant of the exact facts, demand a bill of particulars or move to make more definite and certain. New York News Publishing Co. *v.* Steamship Co. (1895), 148 N. Y. 39, 42 N. E. 514. So, in Kentucky, in Brady *v.* Peck (1896), 99 Ky. 42, 34 S. W. 906, it was held to be immaterial whether an averment of a covenant be in the words used in the deed or according to the force and effect which the statute gives to the words. See also, to the same effect, More *v.* Elmore County Irr. Co. (1893), 3 Idaho, 729, 35 Pac. 171; Porter *v.* Allen (1902), — Idaho, —, 69 Pac. 105; Matthiesen *v.* Arata (1897), 32 Ore. 342, 50 Pac. 1015; Blaine *v.* Knapp & Co. (1897), 140

not the mere evidence or probative matter by which their exist-

Mo. 241, 41 S. W. 787; Nelson *v.* Great Northern Ry. Co. (1903), 28 Mont. 297, 72 Pac. 642. See also §§ * 74 *et seq.* See also South Milwaukee Co. *v.* Murphy (1902), 112 Wis. 614, 88 N. W. 583, where it was held that the performance of conditions precedent might be alleged according to their legal effect, but solely by reason of the statute.

Exhibits. Another method of pleading a written instrument is to attach the same to the pleading as an exhibit, but different rules prevail in different jurisdictions as to the precise function of such exhibits. In some States the exhibit is considered a part of the pleading for all purposes, and may be looked to in considering the sufficiency of the pleading: Elliot *v.* Roche (1896), 64 Minn. 482, 67 N. W. 539; Realty Revenue, etc. Co. *v.* Farm, etc. Co. (1900), 79 Minn. 465, 82 N. W. 857; Union Sewer Pipe Co. *v.* Olson (1901), 82 Minn. 187, 84 N. W. 756; Cox *v.* Henry (1901), 113 Ga. 259, 38 S. E. 856; Southern Mut. Ins. Co. *v.* Turnley (1896), 100 Ga. 296, 27 S. E. 975; Walters *v.* Eaves (1898), 105 Ga. 584, 32 S. E. 609; Reed *v.* Equitable Trust Co. (1902), 115 Ga. 780, 42 S. E. 102; Savannah Ry. Co. *v.* Hardin (1900), 110 Ga. 433, 35 S. E. 681); Fitch *v.* Applegate (1901), 24 Wash. 25, 64 Pac. 147; Hays *v.* Dennis (1895), 11 Wash. 360, 39 Pac. 658 (recommending that the *better* practice is to state a cause of action in the body of the complaint without reference to exhibits): New Idea Pattern Co. *v.* Whelan (1903), 75 Conn. 455, 53 Atl. 953; Cranmer *v.* Kohn (1898), 11 S. D. 245, 76 N. W. 937; First Nat. Bank *v.* Dakota Fire Ins. Co. (1894), 6 S. D. 424, 61 N. W. 439; Davison *v.* Gregory (1903), 132 N. C. 389, 43 S. E. 916; Stephens *v.* Am. Fire Ins. Co. (1896), 14 Utah, 265, 47 Pac. 83; Hudson *v.* Scottish Union Ins. Co. (1901), 110 Ky. 722, 62 S. W. 513; Porter *v.* Allen (1902), — Idaho —, 69 Pac. 105. See also Am. Freehold Co. *v.* McManus (1900), 68 Ark. 263, 58 S. W. 250.

In Nebraska an exhibit is considered a part of the pleading only when it consists of an instrument for the unconditional payment of money only: First Nat. Bank *v.* Engelbercht (1899), 58 Neb. 639, 79 N. W. 556; Lincoln Mortgage & Trust Co. *v.* Hutchins (1898), 55 Neb. 158, 75 N. W. 538; Home Fire Ins. Co. *v.* Arthur (1896), 48 Neb. 461, 67 N. W. 440; Holt County Bank *v.* Holt Co. (1898), 53 Neb. 827, 74 N. W. 259.

In Indiana an exhibit is deemed a part of the pleading only when the instrument is one upon which the action is founded: Thompson *v.* Recht (1902), 158 Ind. 302, 63 N. E. 569; First Nat. Bank *v.* Greger (1901), 157 Ind. 479, 62 N. E. 21; Bird *v.* St Johns Episcopal Church (1899), 154 Ind. 138, 56 N. E. 129; Murphy *v.* Branaman (1900), 156 Ind. 77, 59 N. E. 274; Indiana, etc. Ass'n *v.* Plank (1898), 152 Ind. 197, 52 N. E. 991; Frankel *v.* Michigan Mutual Ins. Co. (1902), 158 Ind. 304, 62 N. E. 703; Miller *v.* Bottenberg (1895), 144 Ind. 312, 41 N. E. 804; Fitch *v.* Byall (1897), 149 Ind. 554, 49 N. E. 455; Forbes *v.* Union Central Life Ins. Co. (1898), 151 Ind. 89, 51 N. E. 84; Fuller *v.* Cox (1893), 135 Ind. 46, 34 N. E. 822.

The Indiana rule has been followed in Oklahoma: First Nat. Bank *v.* Jones (1894), 2 Okla. 353, 37 Pac. 824; Dunham *v.* Holloway (1895), 3 Okla. 244, 41 S. W. 140; Grimes *v.* Cullison (1895), 3 Okla. 268, 41 S. W. 355.

On the other hand, some courts have held that the exhibit cannot avail to aid the averments of the pleading: Hickory County *v.* Fugate (1898), 143 Mo. 71, 44 S. W. 789 (see also Cooms Commission Co. *v.* Block (1895), 130 Mo. 668, 32 S. W. 1139); Estate of Cook (1902), 137 Cal. 184, 69 Pac. 1124 (may aid formal but not substantial defects); Palmer *v.* Lavigne (1894), 104 Cal. 30, 37 Pac. 775; Savings Bank *v.* Burns (1894), 104 Cal. 473, 38 Pac. 102); Cave *v.* Gill (1900), 59 S. C. 256, 37 S. E. 817 (may aid formal defects); Hartford Fire Ins. Co. *v.* Kahn (1893), 4 Wyo. 364, 34 Pac. 895; Altemus *v.* Asher (1903), Ky., 74 S. W. 245 (where merely filed with and referred to in a pleading). But see Gardner *v.* Continental Ins. Co. (1903), Ky., 75 S. W. 283, where the court said: "The rule is that an exhibit will not cure a defective pleading or supply averments omitted in the pleading. But it is also the rule that

ence is established.[1] I have purposely refrained from using the

in a suit on a written contract, if the contract shows that no cause of action exists, the court on demurrer will consider the exhibit. In other words, while an exhibit cannot make a pleading good, it may make it bad."]

[1] People *v.* Ryder, 12 N. Y. 433, 487; Hill *v.* Barrett, 14 B. Mon. 83; Green *v.* Palmer, 15 Cal. 411, 414; Rogers *v.* Milwaukee, 13 Wis. 610, 611; Bird *v.* Mayer, 8 Wis. 362, 367; Horn *v.* Ludington, 28 Wis. 81, 83; Groves *v.* Tallman, 8 Nev. 178; Pier *v.* Heinrichoffen, 52 Mo. 333, 335; Wills *v.* Wills, 34 Ind. 106, 107; De Graw *v.* Elmore, 50 N. Y. 1; Cowin *v.* Toole, 31 Iowa, 513, 516; Singleton *v.* Scott, 11 Iowa, 589; Bowen *v.* Aubrey, 22 Cal. 566, 569; Pfiffner *v.* Krapfel, 28 Iowa, 27, 34; White *v.* Lyons, 42 Cal. 279, 282; Louisville & P. Canal Co. *v.* Murphy, 9 Bush, 522, 527; Gates *v.* Salmon, 46 Cal. 361, 379; King *v.* Enterprise Ins. Co., 45 Ind. 43, 55; Lytle *v.* Lytle, 37 Ind. 281; Van Schaick *v.* Farrow, 25 Ind. 310; Chicago & S. W. R. Co. *v.* N. W. U. Packet Co., 38 Iowa, 377, 382; Bowen *v.* Emmerson, 3 Ore. 452; Cline *v.* Cline, 3 Ore. 355, 358; Oates *v.* Gray, 66 N. C. 442, 443; Farron *v.* Sherwood, 17 N. Y. 227; Coryell *v.* Cain, 16 Cal. 567, 571. The opinion of Marvin J. in People *v.* Ryder is exceedingly instructive, and covers most of the subordinate questions that arise in connection with the general topic. He said (p. 437): "This rule (§ 142 of the New York Code) is substantially as it existed, prior to its enactment, in actions at law. Chitty says: 'In general, whatever circumstances are necessary to constitute the cause of complaint or ground of defence must be stated in the pleadings, and all beyond is surplusage; facts only are to be stated, and not arguments or inferences or matter of law, in which respect pleadings at law appear to differ materially from those in equity.' (1 Ch. Pl. 245.) At page 266 he says: 'It is a most important principle of the law of pleading, that in alleging the fact it is unnecessary to state such circumstances as tend to prove the truth of it. The dry allegation of the fact, without detailing a variety of minute circumstances which constitute the evidence of it, will suffice. The object of the pleadings is to arrive at a specific issue upon a given and material fact; and that is attained although the evidence of such fact to be laid before a jury be not specifically developed in the pleadings.' I have supposed it safe, and a compliance with the code, to state the facts constituting the cause of action substantially in the same manner in which they were stated in the old system in a *special* count. By that system the legal issuable facts were to be stated, and the evidence by which those facts were to be established was to be brought forward upon the trial. This position will not embrace what were known as the common counts. . . . It has been supposed that a wider latitude should be allowed in equity pleading, and that evidence may to some extent be incorporated in the statement. The rule of the code is broad enough for all cases; and it permits a statement of facts and circumstances as contradistinguished from the evidence which is to establish those facts. But in all equity cases the facts may be more numerous, more complicated, more involved; and the pleader may state all these facts in a legal and concise form which constitute the cause of action, and entitle him to relief. The rule touching the statement of facts constituting the cause of action is the same in all cases; and the rules by which the sufficiency of pleadings is to be determined are prescribed by the code." How far the positions quoted from Mr. Chitty are correct is shown in the preceding paragraphs of this section. No more accurate exposition of the fundamental doctrine announced by the codes is to be found in the books than the foregoing opinion of Mr. Justice Marvin. In several of the cases to be cited the discussion has been confined to legal actions, and general statements have been made in reference to the "material" or "issuable" facts which are plainly erroneous when applied to suits brought for equitable relief. The principle as formulated by Mr. Justice Marvin embraces both species of actions, and brings them both within the purview of the statutory provision. In Green *v.* Palmer, the Supreme Court of California laid down the rules in respect to the kinds

common formula, "facts which constitute the *cause of action*," in

of facts which should be averred, and defined the nature of "material" or "issuable" facts in a most exhaustive manner. From the elaborate opinion of Field C. J. the following extracts are taken (p. 414): "First rule. Facts only must be stated. This means the facts as contradistinguished from the law, from argument, from hypothesis, and from evidence of the facts. The facts must be carefully distinguished from the evidence of the facts. The criterion to distinguish the facts from the evidence is, — Second rule. Those facts, and those alone, must be stated which constitute the cause of action, the defence, or the reply. Therefore (1) each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. The plaintiff, on his part, must allege all that he will have to prove to maintain his action; the defendant, on his part, all that he must prove to defeat the plaintiff's title after the complaint is admitted or proved. (2) He must allege nothing affirmatively which he is not required to prove. This is sometimes put in the following form: viz., 'that those facts, and those only, should be stated which the party would be required to prove.' But this is inaccurate, since negative allegations are frequently necessary, and they are not to be proved. The rule applies, however, to all affirmative allegations, and, thus applied, is universal. Every fact essential to the claim or defence should be stated. If this part of the rule is violated, the adverse party may demur. In the second place, nothing should be stated which is not essential to the claim or defence; or, in other words, none but 'issuable' facts should be stated. If this part of the rule be violated, the adverse party may move to strike out the unessential parts. An unessential, or what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient, and, of course, need not be proved or disproved. The following question will determine in every case whether an allegation be material: Can it be made the subject of a material issue? In other words, If denied, will the failure to prove it decide the case in whole or in part? If it will not, then the fact alleged is not material (issuable); it is not one of those which constitute the cause of action, defence, or reply." This opinion was adopted, and the mode of distinguishing "material" or "issuable" allegations was approved by the Supreme Court of Oregon in Cline *v.* Cline, 3 Ore. 355, 358, 359. The criterion thus proposed by Mr. Chief Justice Field is perfect in its application to legal actions, but is hardly broad enough to include all cases where equitable relief is demanded, unless it was intended to embrace such cases in the language "decide the case in whole or *in part*." If such was the intention, the manner of stating the rule is somewhat obscure, and it clearly needs amplification and explanation. I return to this question in a subsequent paragraph of the text. In Pier *v.* Heinrichoffen, 52 Mo. 333, which was an action against the indorsers of a note, the petition alleged a demand of payment at maturity, and notice of nonpayment given to the defendants. At the trial the plaintiff proposed to prove facts excusing such demand and notice; and, the evidence being rejected, a verdict was rendered against him. This ruling was sustained by the Supreme Court, Ewing J., after saying that the plaintiff's mode of pleading would have been proper under the common-law system, proceeds (p. 335): "As the vice of the old system of pleading was its prolixity, its general averments and general issues, and the delay and expense inseparable from it the new system which we have adopted has little claim to be considered a reform, unless it avoids such defects, and furnishes rules by which the great object of all pleadings is attained; viz., to arrive at a material, certain, and single issue. Hence the great improvement of our code consists in requiring the pleadings to contain a plain and concise statement of the *facts constituting* the cause of action, or matter of defence. Facts and not evidence nor conclusions of law, must be stated. Every fact which the plaintiff must prove to maintain his suit is *constitutive* in the sense of the code." The petition in this case, it was held, should

order that the principle might be expressed in its most comprehensive manner, and might include equitable as well as legal actions. As will be shown in the sequel, it is only in legal actions that the material or issuable facts which are to be averred "constitute the cause of action" in the strict sense of the term; while in equitable actions facts may be material, and must be alleged, which, while they form the basis of or modify the remedy demanded, do not properly constitute the cause of action. This distinction will be fully developed in subsequent paragraphs which discuss the mode of pleading in equitable actions. This single and simple principle lies at the foundation of the entire reformed method introduced by the codes. When fully comprehended, it will be found to involve all the other requisites of the system. It distinguishes the new pleading from each of the three types which formerly prevailed, and which have already been described; from the modes used in the equity and the civil-law courts, by wholly dispensing with any statements of probative matter, and by limiting the averments to the fundamental facts which constitute the cause of action or the grounds of relief; and from the mode used in the common-law courts, by discarding all fictions, all technicalities, all prescribed formulas, and by requiring the material facts to be alleged as

have averred the matters of excuse sought to be proved. The description here given of issuable or "constitutive" facts is appropriate to legal actions only, and must be modified in its terms in order to meet the characteristic features of many equitable suits. Wills *v.* Wills, 34 Ind. 106, is also very instructive, and contains a principle of wide application which distinguishes the present from the former theory of pleading. In Pfiffner *v.* Krapfel, 28 Iowa, 27, 34, Cole J. very truly said: "Our system of pleading is essentially a fact system, intended to require the parties in judicial proceedings to state the facts of their claims, and advise the opposite party of the true nature and object of the suit. It is against the spirit and plain intent of our code to allow parties to claim as fruits of their litigation that which was not by the fair and obvious import of the pleadings put in issue and litigated between them." In the very recent case of Louisville & P. Canal Co. *v.* Murphy, 9 Bush, 522, 527, the Kentucky Court of Appeals stated the general doctrine in the following manner: "While the ancient forms of pleading are abolished, still every fact necessary to enable the plaintiff in the action to recover must be alleged, and every essential averment required to make a declaration good at the common law upon general demurrer must be made in the petition. The facts must be alleged so as to enable the opposite party to know what is meant to be proved, and also that an issue may be framed in regard to the subject-matter of dispute, and to enable the court to pronounce the law upon the facts stated. The dry allegation of the facts in the petition, without setting forth the evidence of the truth of the statements made, is all that is required." See, as further examples, Clark *v.* Bates, 1 Dak. 42; Clay Cy. *v.* Simonsen, 1 id. 403, 430; Scott *v.* Robards, 67 Mo. 289; Dunn *v.* Remington, 9 Neb. 82; Ingle *v.* Jones, 43 Iowa, 286.

they actually existed, and not their legal effect, and still less the legal conclusions inferred from them. In discussing this fundamental principle, and developing from it the subordinate doctrines and practical rules which are involved in its general terms, its component elements must be separately examined, and the full import of each must be carefully ascertained. This analysis will lead me (1) to define the legal meaning of the term "cause of action" as used in the codes, and to point out the somewhat different senses which must be given to the phrase when it is applied to legal and to equitable actions; (2) to determine the nature of the facts which "constitute the cause of action" in each of its two significations, and in this connection to point out the difference between the "issuable facts" averred in legal actions and the facts material to the remedy but not strictly "issuable" sometimes necessary to be alleged in equitable actions, and to explain the distinction in this respect which inheres in the modes of pleading employed in these two classes of suits; and (3) to discuss the requirement that these material facts should be stated as they actually occurred or existed, and not their legal effect and meaning, and to display its full force and significance. The result of this analysis will then be applied in developing the various general rules which make up the reformed system of pleading.

§ 412. *518. **The Term "Cause of Action."** The term "cause of action" is employed by the framers of the codes in several different connections; but it must be assumed that in each of them it was intended to have the same signification, that, wherever used, it was designed to describe the same elements or features of the judicial proceeding called an action. The courts have never, so far as I have been able to discover, attempted any thorough and exhaustive discussion of the phrase, and determined its meaning by any general formula or definition; and little or no aid will therefore be obtained in this inquiry from judicial interpretation. The few decided cases which venture upon a partial description were quoted in the last preceding section. In another instance, not there referred to, in which the plaintiff alleged that the legal title to certain lands was vested in the defendant, but that these lands were held by him in trust for the plaintiff, and demanded an execution of the trust by conveyance, etc., the cause of action was decided to be "the trust;" the court declar-

ing that in every money demand on contract "the debt" is the cause of action, and holding that, in the case before them, the cause of action itself — the trust — was stated in the complaint, but that the facts constituting it were not averred.[1]

§ 413. *519. **True Signification of the Term.** The true signification of the term "cause of action" was carefully examined and determined in the second section of the present chapter; and I shall not repeat the course of discussion there pursued, but shall simply recapitulate the conclusions which were reached. Every action is based upon some primary right held by the plaintiff, and upon a duty resting upon the defendant corresponding to such right. By means of a wrongful act or omission of the defendant, this primary right and this duty are invaded and broken; and there immediately arises from the breach a new remedial right of the plaintiff, and a new remedial duty of the defendant. Finally, such remedial right and duty are consummated and satisfied by the remedy which is obtained through means of the action, and which is its object. Now, it is very plain, that, using the words according to their natural import and according to their technical legal import, the "cause of action" is what gives rise to the remedial right, or the right of remedy, which is evidently the same as the term "right of action" frequently used by judges and text-writers. This remedial right, or right of action, does not arise from the wrongful act or omission of the defendant — the delict — alone, nor from the plaintiff's primary right, and the defendant's corresponding primary duty alone, but from these two elements taken together. The "cause of action," therefore, must always consist of two factors, (1) the plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate, person, character, property, or contract; and (2) the delict, or wrongful act or omission of the defendant, by which the primary right and duty have been violated. Every action when analyzed will be found to contain these two separate and distinct elements, and in combination they constitute the "cause of action." The primary right and duty by themselves are not the cause of action, because when existing by themselves, unbroken by the defendant's wrong, they do not give rise to any action. For this reason, that definition is clearly erroneous

[1] Horn *v.* Ludington, 28 Wis. 81, 83.

which pronounced the "debt" in an action on contract, or the "trust" in a suit to enforce a trust, to be the "cause of action." Much less can the delict or wrong by itself be the cause of action, because, without the primary right and duty of the parties to act upon, it does not create any right of action or remedial right as I have used the phrase. It is very clear from this analysis that the "cause of action" mentioned in the codes includes and consists of these two branches or elements in combination, — the primary right and duty of the respective parties, and the wrongful act or omission by which they are violated or broken.

§ 414. *520. **Complete Statement of Entire Cause of Action would include Legal Rules and Rights and Duties.** The first of these branches must always, from the nature of the case, be a conclusion of law. The law by its commands creates a rule applicable to certain facts and circumstances, by the operation of which, when these facts and circumstances exist, a right arises, and is held by the plaintiff, and a corresponding duty arises and devolves upon the defendant. While this first factor of the "cause of action" is therefore always a conclusion or proposition of law, and results from the command of the supreme power in the State as its *cause*, it necessarily presupposes the existence of certain facts and events as the *occasion* of its coming into operation. A complete and exhaustive exhibition of it would thus require a statement of the legal rule itself applicable to the given condition of facts and circumstances, and of the primary right and duty arising therefrom; and also an allegation that the facts and circumstances themselves to which the rule applies, and on the occasion of which the right and duty arise, do actually exist or have existed. If this principle were adopted in pleading, every cause of action would demand a mingled averment of legal rules, of the facts and events to which they apply, and of the rights and duties resulting from the operation of the given rule upon the existing facts. In the second branch of the cause of action, there is, on the other hand, no element whatever of the law: it is simply and wholly matter of fact. It consists entirely of affirmative acts wrongfully done, or of negative omissions wrongfully suffered by the defendant; and its statement in a pleading can be nothing more than a narrative of such acts or omissions. A primary right existed in favor of the plaintiff, and a corresponding duty devolved upon the defendant, of which an

integral element is a legal rule: this right and this duty, if positive, called upon the defendant to do some act towards the plaintiff, the nature of which depended upon the nature of the right and duty; if negative, they called upon the defendant to forbear from doing some act towards the plaintiff, the nature of which was determined in like manner. In the one case, the defendant's delict consists in his not doing the act which his duty obliged him to do; and in the other case, in doing the act which his duty forbade him to do. In both instances, therefore, the wrong which constitutes the second factor or branch of the cause of action is a fact more or less complex, and not either wholly or partially a legal conclusion or rule.

§ 415. *521. **Term as Applied to Legal Actions.** Such being the general nature and signification of the term "cause of action," its different phases of meaning, when applied either to legal or to equitable actions, will next be pointed out and described. These differences do not extend to its essential elements; they are wholly formal, and they result entirely from the external differences sometimes subsisting between legal and equitable primary rights and between legal and equitable remedies. In a legal cause of action, the primary right of the plaintiff and duty of the defendant are generally *simple* in their nature as contra-distinguished from complex; that is, they call for some single, simple, and complete act or forbearance on the part of the defendant; and when broken by the defendant's delict, the remedial right and duty which arise always demand a single, simple, and complete act to be done by the defendant; namely, either the payment of a sum of money as debt or damages, or the delivery of possession of a specific chattel, or the delivery of possession of a specific tract of land, which constitute the only remedies that can be obtained by a legal action. It follows, therefore, from the nature of a legal primary right and duty and of a legal remedy, that the cause of action in a legal suit is always simple, and can be stated, and must necessarily be stated, in such a manner, that the remedial right, if it exists at all, will be shown at once in its completeness and certainty. Furthermore, the legal primary right must necessarily depend upon a few facts; and these being all indispensable to its existence, the absence of even a single one will entirely invalidate the whole cause of action, and will show that no remedial right whatsoever has arisen.

§ 416. *522. **Term as Applied to Equitable Actions.** The foregoing description does not apply to equitable actions generally, although it undoubtedly does to some. In very many, and indeed in most, equitable causes of action, not merely the facts which are the occasion of the right, but the primary rights and duties themselves of the parties, are complex: it cannot be said of them that they must either wholly exist, or must be entirely denied; they do not, in other words, demand a single specific act or omission on the part of the defendant, but a series, and often a very complicated series, of acts and omissions. In determining these primary rights and duties of the respective parties to an equitable suit, there must frequently be a settlement and adjustment of opposing claims; one must be modified by another; and, as the result, a collection of rights and duties is established inhering in each of the litigants, and embracing a great variety of particulars. In certain classes of equitable actions it cannot be properly said that any wrong or delict has been committed by the defendant, or any violation of the plaintiff's primary rights, unless an ignorance of those rights by all the parties, and a consequent hesitation on the part of all to act, can be deemed a technical wrong. These classes of suits are prosecuted, not because there has been any denial of right or duty, but because in the absence of an accurate knowledge of their rights, or of power to arrange and adjust them by voluntary proceedings, an appeal to the courts becomes necessary in order to solve the problem or to accomplish the adjustment. An action brought to construe a will may be mentioned as an illustration of the first class, and the ordinary suit for partition as an example of the second. Again: the remedies furnished by equity are seldom the single, simple, and complete awards of pecuniary sums, or of possession of lands or of chattels, as is the case with all legal judgments. They are complex and involved; they often consist in an adjustment and award of partial reliefs to each of the parties; they may provide for future and contingent emergencies; and they are sometimes nothing more than an authoritative determination by the court of the primary rights themselves belonging to the plaintiffs and the defendants. This sketch shows very plainly that an equitable cause of action is often very different, in its external form at least, from any legal cause of action; and although the same general principle of pleading

applies to each, yet it must undergo some modification in that application. The facts constituting the cause of action are to be stated in an equitable as well as in a legal action; but facts do not constitute the equitable cause of action in the same sense nor in the same manner that they constitute the legal cause of action.

§ 417. *523. **Nature of the Facts Constituting a Cause of Action when Term is applied to both Legal and Equitable Suits.** The result thus reached leads to the second subdivision of the present inquiry; namely, the nature of the facts which constitute the cause of action when that term is applied both to legal and to equitable suits. As has already been remarked, the first branch or division of the cause of action contains three distinct elements, two of them legal, and the other of fact; the second branch consists wholly of facts; while the remedial right which flows from the two is of course a conclusion of law. If the theory of pleading required that all these elements should be expressed, then the plaintiff's complaint or petition would always comprise the following averments: (1) The rule of law applicable to certain facts from which his primary right and the defendant's primary duty arise; (2) the existence of the facts to which such rule applies, and which are the occasion of the right and duty; (3) the primary right and duty themselves which spring from the operation of such rule upon the given facts, — these three subdivisions forming the first branch of the "cause of action;" (4) the facts constituting the violation of the primary right and duty; that is, the wrongful acts or omissions of the defendant, — this statement being the second branch of the "cause of action;" (5) the remedial right held by the plaintiff, and the remedial duty devolving upon the defendant, which result from the "cause of action," and are wholly conclusions of law. In this manner everything which enters into the plaintiff's case, fact and law, would be spread upon the record. A bill of complaint in chancery, prior to any statutory modification, was substantially constructed upon this plan, although the various subdivisions were not so logically separated and arranged. The mode of pleading which prevailed in the superior courts of Scotland seems to have been in complete conformity with this theory.[1]

[1] [The Supreme Court of Connecticut in New York, etc. R. R. Co. *v.* Hungerford (1902), 75 Conn. 76, 52 Atl. 487, compared an action at law to a syllogism,

§ 418. *524. **Elements Omitted and Retained when Cause of Action is set forth in the Complaint.** The reformed system, following in this respect the common-law method, dispenses with several of these elements which make up the plaintiff's entire ground for relief: it wholly rejects all the subdivisions which are mere legal rules or conclusions, and admits only those that consist of the facts to which the legal rules apply, and which are the occasion whence the conclusions arise. It assumes that the courts and the parties are familiar with all the doctrines and requirements of the law applicable to every conceivable condition of facts and circumstances, so that, when a certain condition of facts and circumstances is presented to them, they will at once perceive and know what are the primary and the remedial rights and duties of both the litigants; and this knowledge being complete and perfect, it is a useless incumbrance of the record to spread out upon it the legal propositions and inferences with which every one is assumed to be acquainted. A complaint or petition, therefore, drawn in accordance with this theory, must omit (1) the legal rule which is the direct cause of the primary right and duty, (2) the primary right and duty themselves which are the results of this rule acting upon the given facts, and (3) the remedial right and duty which accrue to the plaintiff; and it must only state (1) the *facts* which enter into the first branch of the cause of action and are the occasion of the primary right and duty, and (2) the *facts* which constitute the defendant's wrongful act or omission, — that is, the delict which is the second branch of the cause of action. As will be seen in the sequel, a statement of the legal rule, or of the primary legal right and duty *without* the facts to which they apply, and which are the occasion for their existence, is insufficient: it alleges no cause of action, and cannot be made the basis of an issue; while such a statement *in addition to* those facts is surplusage, and, if the rules of pleading are strictly enforced, will be struck out on

using the following language: "The major premise is a proposition of law, as, for instance, whoever does certain specified acts to the injury of another is bound to pay that other the damages thus inflicted. This proposition is not pleaded, but is necessarily involved in stating the facts alleged in the complaint. The minor premise is a statement of facts, as, for instance, the defendant has done certain acts (being the acts referred to in the proposition of law) to the damage of the plaintiff. These facts are alleged in the complaint. The conclusion is the judgment or sentence of the law, which necessarily follows the establishment of the truth of the two premises."]

motion, and will, at all events, be wholly disregarded. We thus arrived at the first general doctrine in relation to the facts constituting the cause of action; namely, the facts which are among the elements of the cause of action, that is, those which are the occasion for the primary right and duty to arise, and those which form the breach of such right and duty must be alleged, to the entire exclusion of the other elements that enter into the cause of action, — the legal rules, and the legal rights and duties of the parties.

§ 419. * 525. **Cases where Facts Showing Primary Right are omitted because presumed.** Before proceeding to the second general doctrine, I shall notice an apparent modification of or departure from the one just announced, which occurs in a certain class of actions. In a very great majority of instances, the complaint or petition must narrate in an express manner those facts, which, as I have shown, form an element of the first branch or division of the cause of action, — those facts to which the general rule of law applies in order to create the primary right and duty of the parties. In these cases, therefore, the pleading does actually contain, in direct and positive terms, the allegations of two distinct groups of facts: *first*, those which are the occasion of the primary right and duty; and *secondly*, those which are the breach of such right and duty, — the wrong or delict. There is nothing of fact left to be understood or assumed. In another class of cases, however, the first group of facts is not expressly averred; it is omitted; it is assumed to exist in the same manner that the legal rules are assumed; and the complaint or petition actually contains only those facts which constitute the breach, — the wrongful act or omission of the defendant. The peculiar class of actions thus mentioned do not, however, depart from or violate the theory of pleading before described, but are constructed in exact conformity with it. The facts upon which the primary right and duty of the parties depend are omitted, because they are in accordance with the universal experience of mankind, and must therefore be presumed to exist, so that their averment, like the averment of legal rules, is unnecessary. A simple and familiar illustration is the action to recover damages for an assault and battery. The primary right of the plaintiff is the right to his own person, free from molestation or interference by any one. This right, being a

legal conclusion, is of course not averred. The fact upon which it depends is simply that the plaintiff is a human being, existing and possessing the common faculties and attributes of humanity. Since this fact conforms to the universal experience, its averment in the complaint or petition is needless; it is tacitly assumed; and the pleading consists wholly in statements of the wrongful trespass committed by the defendant. Another illustration is the action for slander or libel. The facts upon which the primary right and duty of the parties depend is the existence of the plaintiff as a member of society, and as possessing a character among his fellow-men. Although the common-law declaration contained averments of the plaintiff's reputation, they are unnecessary, and the complaint or petition may contain merely an account of the defamatory words spoken or published by the defendant and the other elements of the wrong. It may be stated as a general proposition, that, in actions brought for injuries to the plaintiff's own person or character, the facts which enter into the first branch of the cause of action, and are the occasion whence the primary right and duty of the parties arise, need not be expressly averred; they are assumed to exist, and nothing but the delict need be alleged. Notwithstanding this abridgment, the pleading in such cases is based upon the same theory and governed by the same rules as the pleading in all other classes of actions.

§ 420. *526. **Only Ultimate Facts are to be alleged.** The second of the general doctrines included within the principle under consideration is, that, in stating the two required groups of facts, those important and substantial facts alone should be alleged which either immediately form the basis of the primary right and duty, or which directly make up the wrongful acts or omissions of the defendant, and not the details of probative matter or particulars of evidence by which these material elements are to be established. This doctrine applies to all classes of actions, and if strictly enforced it would render the pleadings simple, and the legal issues at least clear, certain, and single. The courts have been unanimous in their announcement of the rule, and the decisions already quoted, as well as those to be cited in subsequent paragraphs, will show the variety of circumstances, allegations, and issues to which it has been applied. There can be no real difficulty, if the action is legal, in distin-

guishing between the facts which are material and issuable and should therefore be averred, and those which are merely probative or evidentiary and should be omitted. Since the *legal* primary right and duty are always simple, and demand from the defendant the performance or the omission of some single and well-defined act, they will always depend, for their occasion, upon a few positive, determined, and certain facts, all of which are necessary to their existence, so that neither of these facts could be modified, and much less could be omitted, without entirely defeating the right and duty, and with them the cause of action itself. The same is true of the facts which make up the defendant's delict or wrong. In order, therefore, that any given legal cause of action should exist, in order that any given remedial right or right of action should arise, these determinate, unchanged, and positive elements of fact must all conspire to produce that result, and must be alleged; they literally "constitute" the cause of action, and form the "material" or "issuable" averments spoken of by the courts. The subordinate facts, on the other hand, which make up the probative matter and the details of evidence, may vary indefinitely in their nature; and so long as they perform their function of establishing the "issuable" averments, the cause of action will not be affected. To illustrate by a very familiar example: In an action to recover damages for the breach of a written contract, the allegation that the defendant executed the agreement is material and issuable; it cannot be modified, and much less abandoned, without destroying the whole cause of action. Its denial raises a direct issue, to maintain or disprove which evidence can be offered. The subordinate probative matter by which this averment is established may vary according to the exigencies of the case, and a resort to or failure with one method will not prevent the use of another. The plaintiff might rely upon the defendant's admissions that he executed the paper, or upon the testimony of a witness who saw him sign it, or upon the opinions of persons who are acquainted with his handwriting, and who testify that the signature is his. One or the other, or even all, of these means might be resorted to, and the material fact to be proved would remain the same. If, however, instead of directly averring that the defendant executed the written contract, the plaintiff should allege that the defendant had admitted his signature to be genuine, or that a specified indi-

vidual asserts that he saw the instrument signed, or that persons familiar with his handwriting declare the signature to be his, it is plain that neither of these statements would present a material issue; that is, an issue upon which the cause of action would depend. This familiar illustration covers the whole field of legal actions. The allegations must be of those principal, determinate, constitutive facts, upon the existence of which, as stated, the entire cause of action rests, so that, when denied, the issue thus formed with each would involve the whole remedial right.[1] Every legal cause of action will include two or more distinct and separate facts; and in order that these facts may be issuable, the failure to prove any one of them when denied must defeat a recovery. If this fundamental doctrine of the reformed pleading is fairly and consistently enforced in actual practice, the issues presented for trial must necessarily be simple and single. Singleness and simplicity of issues do not require that the cause should contain but one issue for the jury to decide, one affirmation and denial the determination of which disposes of the whole controversy. This result of the common-law special pleading is often described by enthusiastic admirers of the ancient system, but it was seldom if ever met with in the actual administration of justice. The issues are single when each consists of one and only one material fact asserted by the plaintiff and controverted by the defendant, of such a nature that its affirmative decision is essential to the cause of action, while its negative answer defeats a recovery. The reformed theory of pleading contemplates and makes provision for such issues; and if its provisions are faithfully carried out, the disputed questions of fact would be as sharply defined, and as clearly presented for decision to juries, as can be done by any other possible method.

§ 421. *527. **The Doctrine as Applied to Equitable Suits.** The discussion thus far of this particular doctrine has been confined to legal actions; are any modifications necessary to be made in its statement when applied to equitable suits? The differences in form between legal causes of action and remedies on the one side and equitable causes of action and reliefs on the other have been described, and need not be repeated. By virtue of these inherent differences, the material facts which must be alleged in an equitable suit are often, in their nature and effects, quite unlike the

[1] [Nichols *v.* Nichols (1896), 134 Mo. 187, 35 S. W. 577, quoting the text.]

"issuable" facts which constitute a legal cause of action. In the legal action the issuable facts are few; in the equitable suit the material facts upon which the relief depends, or which influence and modify it, are generally numerous, and often exceedingly so: in the former they are simple, clearly defined, and certain; in the latter they may be and frequently are complicated, involved, contingent, and uncertain. These are mere differences of external form, but there is another much more important, and which more nearly affects their essential nature. The legal cause of action so completely rests for its existence upon the issuable facts, that if any one of them when denied fails to be established by proof, the plaintiff's entire recovery is defeated thereby, a result which is recognized by all the judicial decisions as involved in the very definition of a legal issuable fact. An equitable cause of action *may* undoubtedly rest in like manner upon a given number of determinate facts. In general, however, as has already been fully explained, facts may exist material to the recovery in a certain aspect, or in a certain contingency, or to a certain extent, and which therefore enter into the cause of action, but which are not indispensable to some kind or measure of relief being granted to the plaintiff. These facts if established will determine the character, extent, and completeness of the remedy conferred by the court; but if they are not established, the remedy is not thereby wholly defeated; it is only in some particulars modified, limited, or abridged. Since these classes of facts assist in determining the nature, amount, and details of the relief to be awarded, they in part at least "constitute the cause of action" within the true meaning of the term, and must be alleged. While the material facts of an equitable cause of action differ in the manner thus described from the issuable facts of a legal cause of action, the single and comprehensive principle of the reformed procedure embraces and controls both classes of suits. Mere evidence, probative matter as contradistinguished from the principal facts upon which the remedial right is based, are no more to be spread upon the record in an equitable than in a legal action. A distinction inheres in the nature of the causes of action, and from this distinction the facts material to the recovery in an equitable suit may be numerous, complicated, affecting the right of recovery partially instead of wholly, modifying rather than defeating the remedy if not

established; but still they are the *material* facts constituting the cause of action, and not mere details of evidentiary or probative matter.[1]

§ 422. *528. **This Distinction between Material Facts in Legal and Equitable Actions Sustained by the Courts.** The existence and necessity of this distinction between the material facts to be alleged in legal and equitable actions are fully recognized and admitted by judicial opinions of the highest authority.[2] It also prevails, I believe, universally in practice. By no judge has it been more accurately and exhaustively discussed than by Mr. Justice S. L. Selden in two early cases which, although without the binding authority of precedents, have the force of cogent and unanswerable reasoning.[3] With the practical conclusions in reference to the nature of the material facts that should be averred in an equitable complaint or petition at which Mr. Justice Selden arrives, I entirely concur; his course of argument upon which those conclusions are based is the same in substance which has been pursued in the foregoing paragraphs. I wholly dissent, however, from his inference that these results are not contemplated by and embraced within the single and comprehensive principle announced by the codes, that the facts constituting the cause of action, and they alone, must be stated. This inference does not follow from his argument, nor from the final positions which he reaches; it is wholly unnecessary; and it has been rejected by judges who have accepted and maintained the very doctrines concerning the nature of equitable pleading under the code which he so ably supports. It is only by giving to the phrase "facts constituting the cause of action" a narrow interpretation, which it was plainly not intended to receive, that the material facts of an equitable cause of action can be thus widely separated from the issuable facts of a legal one. Both are aptly described by the phrase which is found in all the codes. The averment of issuable facts in one class of cases, and of the material facts affecting the remedy in the other class, without the details of evidence or probative matter relied upon to establish

[1] [See Smith *v.* Smith (1897), 50 S. C. 54, 27 S. E. 545, where the court quotes with approval almost the entire section of the text relative to the difference between material facts in equity and issuable facts at law.]

[2] See People *v.* Ryder, 12 N. Y. 433, 437; Horn *v.* Ludington, 28 Wis. 81, 83; White *v.* Lyons, 42 Cal. 279, 282.

[3] Rochester City Bank *v.* Suydam, 5 How. Pr. 216; Wooden *v.* Waffle, 6 How. Pr. 145.

either, is a necessary consequence of the single comprehensive principle which underlies the whole reformed system.

§ 423. *529. **Facts should be alleged as they actually existed or occurred, not their Legal Effect.** The third and last point remains to be considered in this general discussion. The issuable facts in a legal action, and the facts material to the relief in an equitable suit, should not only be stated to the complete exclusion of the law and the evidence, but they should be alleged as they actually existed or occurred, and not their legal effect, force, or operation. This conclusion follows as an evident corollary from the doctrine that the rules of law and the legal rights and duties of the parties are to be assumed, while the facts only which call these rules into operation, and are the occasion of the rights and duties, are to be spread upon the record. Every attempt to combine fact and law, to give the facts a legal coloring and aspect, to present them in their legal bearing upon the issues rather than in their actual naked simplicity, is so far forth an averment of law instead of fact, and is a direct violation of the principle upon which the codes have constructed their system of pleading. The peculiar method which prevailed at the common law has been fully described; it was undoubtedly followed more strictly and completely in certain forms of action than in others; in a few instances — as in a special action on the case — the declaration was framed in substantial conformity with the reformed theory. But in very many actions, and those in constant use, the averments were almost entirely of legal conclusions rather than of actual facts. The familiar allegations that the plaintiff had "bargained and sold," or "sold and delivered," that the defendant "was indebted to the plaintiff," or "had and received money to the plaintiff's use," and very frequently even the averment of a promise made by the defendant, may be taken as familiar illustrations from among a great number of other similar phrases which were found in the ordinary declarations. Rejecting as it does the technicalities, the fictions, the prescribed formulas, and the absurd repetitions and redundancies, of the ancient common-law system, the new pleading radically differs from the old in no feature more important and essential than this, that the allegations must be of dry, naked, actual facts, while the rules of law applicable thereto, and the legal rights and duties arising therefrom, must be left entirely

to the courts. While this doctrine has been uniformly recognized as correct when thus stated in an abstract and general manner, it has sometimes been overlooked or disregarded in passing upon the sufficiency and regularity of particular pleadings. Whether those decisions which have permitted the common counts to be used as good complaints or petitions, and those which have required the promise implied by law to be expressly averred as though actually made, are in conformity with this doctrine, will be considered in subsequent paragraphs, and the various cases bearing upon the question will be cited and discussed. It is sufficient for my present purpose to state the doctrine in its general form, and to reserve its application for another portion of the chapter.

§ 424. *530. **Cases Supporting Doctrine that Facts, not Legal Conclusions, are to be stated.** As the foregoing analysis has been exclusively based upon the text of the codes, I shall now test the correctness of its conclusions, and illustrate the extent and application of its general doctrines, by a reference to the decided cases, following in the arrangement of the subject-matter the order already adopted. The rule that facts alone are to be stated, to the exclusion of law and of the legal rights and duties of the parties, has been uniformly accepted by the courts, and has been enforced in every variety of issues and of special circumstances. In a very recent decision, this general doctrine was expressed in the following language: "Matter of law is never matter to be alleged in pleading. No issue can be framed upon an allegation as to the law. Facts only are pleadable, and upon them without allegation the courts pronounce and apply the law. This is true alike in respect to statutes and to the common law."[1]

[1] People *v.* Marlboro H. Com'rs, 54 N. Y. 276, 279. The question was as to the validity of a certain statute. The defendants, in their pleading, had admitted its validity, and that they were required by it to do the acts sought to be enforced by the action, and had nowhere raised any objection on the record. The adverse party claimed that this admission precluded the defendants from raising the question at the argument. Johnson J. said: "The objection to its [this question] being raised is that the defendants have, in pleading, admitted the obligation of the law," and then adds the language quoted in the text. See also Commonwealth *v.* Cook, 8 Bush, 220, 224; Clark *v.* Lineberger, 44 Ind. 223, 228, 229. The material, issuable *facts*, not mere *legal* or other conclusions, — as illustrations see Pittsburgh, C. & St. L. Ry. Co. *v.* Keller, 49 Ind. 211 (in a complaint in an action against a railroad for killing plaintiff's cattle which got on the track, it is not sufficient to allege, in reference to the fencing of the track, "that the said railroad was not at the time and place said animals were killed fenced in by said de-

Among the allegations which have been condemned as legal conclusions, and for that reason as forming no material issue, and which have been rejected as failing to state any element of a cause of action, the following are given as illustrations: in an action to dissolve a partnership, for an accounting, etc., the averment that on a day named, and for a long time previous thereto, the defendant and the plaintiffs "were partners doing business under the firm name of T. & C.;"[1] in an action to restrain the removal of a county seat under a statute which was claimed to be special and therefore void, the allegation that "said act is a special law in a case where a general law of uniform operation throughout the State exists, and can be made applicable;"[2] in an action apparently to recover damages for the wrongful interference with the plaintiff's possession of certain

fendant in manner and form as in the statute provided"); Tronson *v.* Union Lumb. Co., 38 Wis. 202 (in an action of replevin the averments that "the taking [by defendant] was wrongful, and the detention unjust," are mere propositions of law); Page *v.* Kennan, 38 Wis. 320 (in an action to quiet title to land the complaint alleged that defendant claimed under certain deeds, and that her "claim is without foundation in law," and "that she has no legal claim or lien upon or title or interest in or to the land;" *held*, a mere legal conclusion, and insufficient to show the invalidity of defendant's title); Surginer *v.* Paddock, 31 Ark. 528; Schilling *v.* Rominger, 4 Col. 100; Clay Co *v.* Simonsen, 1 Dak. 403, 430; Scott *v.* Robards, 67 Mo. 289; Botey *v.* Griswold, 2 Mont. 447; Peterson *v.* Roach, 32 Ohio St. 374; Pittsburgh, C. & St. L. R. Co. *v.* Moore, 33 id. 384; Scott *v.* B. & S. W. R. Co., 52 Iowa, 18; Cooper *v.* French, 52 id. 531; Ockenden *v.* Barnes, 43 id. 615; Northern Kan. T. Co. *v.* Oswald, 18 Kan. 336; Sheridan *v.* Jackson, 72 N. Y. 170, 173; Stack *v.* Beach, 74 Ind. 571; Leach *v.* Rhodes, 49 Ind. 291 (in action on a contract a general averment that there was a full and valuable consideration, is a mere conclusion of law, and not sufficient; *sed qu.* is not this *the issuable* allegation of fact?); Moore *v.* Hobbs, 79 N. C. 535; Estate of David Gharky, 57 Cal. 274; Payne *v.* McKinley, 54 id. 532; Fite *v.* Orr's Ass'n (Ky. 1886), 1 S. W. Rep. 582; McEntee *v.* Cook, 76 Cal. 187; Bowers *v.* Smith (Mo. 1892), 20 S. W. Rep. 101; Johnson *v.* Vance, 86 Cal. 128 (allegation that plaintiff is "owner in fee simple" of property in dispute is statement of an ultimate fact, not of a conclusion of law); Going *v.* Dinwiddie, 86 Cal. 633; Mitchell *v.* Clinton, 99 Mo. 153. The complaint need never anticipate any defences which may be set up in the answer, nor contain allegations to meet them. Caflin *v.* Taussig, 7 Hun, 223; Metrop. L. Ins. Co. *v.* Meeker, 85 N. Y. 614; Cohen *v.* Continental L. Ins. Co., 69 id. 300, 304; Roth *v.* Palmer, 27 Barb. 652; Kayser *v.* Sichel, 34 id. 89; Bliss *v.* Cottle, 32 id. 322; Wygand *v.* Sichel, 3 Keyes, 120.

[1] Groves *v.* Tallman, 8 Nev. 178. A general demurrer to the complaint was sustained, the court holding that this allegation was a mere conclusion of law, and that the executed agreement of partnership should have been set forth. The decision, as it seems to me, is entirely wrong: the plaintiff had stated the issuable fact, while the court demanded the evidence: there may have been no written contract of partnership. See Kelsey *v.* Henry, 48 Ind. 37, which fully sustains the views expressed in this note.

[2] Evans *v.* Job, 8 Nev. 322, the court further holding that, when the complaint alleges a mere conclusion of law, no answer to such allegation is necessary.

land, the averment that the plaintiff "was entitled to the exclusive possession of" the premises in question;[1] in an action against a subscriber to the stock of a corporation to be organized, brought to recover the amount of his subscription, an averment that the "company was legally organized, into which organization the defendant entered."[2]

§ 425. *531. **Same Subject.** Also, in an action to recover on a policy of fire insurance, by the terms of which the sum assured did not become payable until certain acts had been done by the plaintiff as conditions precedent, an averment merely "that the whole of said sum is now due;"[3] in an action to restrain the collection of a tax on the plaintiff's land, an allegation that the land "is by the laws of the State exempt from taxation;"[4] in a suit to recover a stock subscription to a corporation, an allegation that the party became a subscriber to the capital stock "by signing and delivering" a specified agreement;[5] an allegation "that the title of the plaintiff to said lots by virtue of said tax sale is invalid, from an irregularity in the notice of such tax sale;"[6] in an action to set aside a judgment for a tax, an allegation "that no notice was given of the said proceedings, or any of them," which resulted in the tax;[7] in an action brought to recover land claimed by inheritance from a former owner, the allegation that the plaintiff was "one of the heirs of" such

[1] Garner *v.* McCullough, 48 Mo. 318. The petition did not state that the plaintiff was or had ever been in possession, and failed to disclose the nature of his claim or the source of his right, the allegation quoted being the sole assertion of a right in the land. It was held that no cause of action was stated, and all evidence should be excluded at the trial, although the defendant had answered.

[2] Hain *v.* N. W. Gravel R. Co., 41 Ind. 196. This averment was held to have raised no issue, citing Indianapolis, C. & L. R. Co. *v.* Robinson, 35 Ind. 380.

[3] Doyle *v.* Phœnix Ins. Co., 44 Cal. 264, 268. The court having decided that the complaint did not sufficiently aver a performance of the conditions precedent by the plaintiff, and so failed to state a cause of action, added: "The allegation that 'the sum is now due' may be laid out of the case, inasmuch as that is a conclusion of law merely."

[4] Quinney *v.* Stockbridge, 33 Wis. 505. There was no other statement showing that the land was exempt; and, in order that it should be so, certain special circumstances must have existed. The averment was held to be of no force whatever, unless accompanied by allegations of the proper facts; and a preliminary injunction was therefore dissolved upon the complaint alone.

[5] Wheeler *v.* Floral Mill Co., 9 Nev. 254, 258. In an action against the company, it set up the demand mentioned in the text as a set-off or counter-claim, alleging the plaintiff's liability in the manner described. A judgment in favor of the defendant was reversed, because there was no averment in the answer which made out a cause of action, citing Barron *v.* Frink, 30 Cal. 486; Burnett *v.* Stearns, 33 Cal. 473.

[6] Webb *v.* Bidwell, 15 Minn. 479, 485.

[7] Stokes *v.* Geddes, 46 Cal. 17.

former owner;[1] in an action on a contract where the defendant's liability depended upon the performance of certain conditions precedent by a third person, the mere allegation, without stating any performance by such person, that "the defendant neglected and refused" to perform the stipulated act on his part "according to the terms of said agreement."[2] The law of another State or country, however, is regarded, for purposes of pleading, as matter of fact, and must be averred with so much distinctness and particularity that the court may, from the statement alone, judge of its operation and effect upon the issues presented in the cause. Thus, in an action upon a note executed and made payable in Illinois, the allegation, "that by the law of Illinois the defendant was indebted to the plaintiff in the amount of such note," was held insufficient to admit evidence of what the Illinois law is in reference to the subject-matter.[3] In Indiana the averment, that the defendant "is indebted" to the plaintiff in a specified amount, is held to be sufficient. This ruling, however, is not based upon the general principles of pleading announced by the codes, but upon certain short forms authorized by the legislature, which were copied from the ancient common counts in assumpsit.[4] Examples similar to the foregoing might be indefinitely multiplied; but these are sufficient to illustrate the action of the courts, and to show how firmly they have adhered to the doctrine that facts, and not law, must be alleged, and that the averments of legal conclusions without the facts from which they have arisen form no issues, state no causes of action, admit no evidence, and do not even support a verdict or judgment, — in short, that they are mere nullities.[5]

[1] Larue *v.* Hays, 7 Bush, 50, 53. This allegation was held not to be admitted by a failure to deny it, citing Banks *v.* Johnson, 4 J. J. Marsh. 649; Currie *v.* Fowler, 5 J. J. Marsh. 145.

[2] Wilson *v.* Clark, 20 Minn. 367, 369. This was declared to be a mere conclusion of law; and as no facts were stated from which it could be inferred, it was a nullity.

[3] Roots *v.* Merriwether, 8 Bush, 397, 401. As a foreign law is a matter of fact, the court does not take judicial notice of it, and if different from that of the forum, and if it must be invoked in order to make out the cause of action, the particular doctrine or rule relied upon must be fully and accurately stated in the pleading. See Woolsey *v.* Williams, 34 Iowa, 413, 415.

[4] Johnson *v.* Kilgore, 39 Ind. 147. These statutory forms, in my opinion, violate the fundamental principles of pleading adopted by the reformed procedure, more so even than the ancient common counts. This question will be particularly examined in a subsequent paragraph.

[5] [***Facts, not Legal Conclusions, should be pleaded.***

Upon this general proposition, and in support thereof, see the following cases:

§ 426. *532. Cases Supporting Doctrine that Material, not Probative, Facts are to be stated. Pursuing the order before indi-

Wabaska Electric Co. *v.* City of Wymore (1900), 60 Neb. 199, 82 N. W. 626; Woodward *v.* State (1899), 58 Neb. 598, 79 N. W. 164; State *ex rel. v.* Osborn (1900), 60 Neb. 415, 83 N. W. 357; Blakeslee *v.* Missouri Pac. Ry. Co. (1894), 43 Neb. 61, 61 N. W. 118; Robinson *v.* Berkey (1896), 100 Ia. 136, 69 N. W. 433; Dennis *v.* Nelson (1893), 55 Minn. 144, 56 N. W. 589; Foland *v.* Town of Frankton (1895), 142 Ind. 546, 41 N. E. 1031; Davis *v.* Clements (1897), 148 Ind. 605, 47 N. E. 1056; Lanier *v.* Union Mortgage Co. (1897), 64 Ark. 39, 40 S. W. 466; Mallinckrodt Chemical Works *v.* Nemnich (1902), 169 Mo. 388, 69 S. W. 355; Livingstone *v.* Ruff (1903), 65 S. C. 284, 43 S. E. 678; First Nat. Bank *v.* Myers (1895), 44 Neb. 306, 62 N. W. 459.

But a pleading is not rendered insufficient because in addition to averments of fact there are also conclusions of law: Nourse *v.* Weitz (1903), — Ia. —, 95 N. W. 251.

An averment of a legal conclusion is not admitted by demurrer nor by failure to deny it: Lanier *v.* Union Mortgage Co. (1897), 64 Ark. 39, 40 S. W. 466; Greer *v.* Latimer (1896), 47 S. C. 176, 25 S. E. 136; State *v.* Ramsey (1897), 50 Neb. 166, 69 N. W. 758; Markey *v.* School District (1899), 58 Neb. 479, 78 N. W. 932; Hoyer *v.* Ludington (1898), 100 Wis. 441, 76 N. W. 348; Knapp *v.* St. Louis (1900), 156 Mo. 343, 56 S. W. 1102; Bogaard *v.* Ind. Dist. of Plainview (1895), 93 Ia. 269, 61 N. W. 859; Peake *v.* Buell (1895), 90 Wis. 508, 63 N. W. 1053; Edwards *v.* Smith (1897), 102 Ga. 19, 29 S. E. 129.

The objection that some of the allegations of the complaint are mere legal conclusions is one of form rather than substance, and does not render the pleading subject to a demurrer for want of facts: Harris *v.* Halverson (1901), 23 Wash. 779, 63 Pac. 549. But in Mallinckrodt Chem. Works *v.* Nemnich (1902), 169 Mo. 388, 69 S. W. 355, it was held that a legal conclusion rendered a pleading obnoxious to attack by general demurrer. Same rule stated in Ryan *v.* Holliday (1895), 110 Cal. 335, 42 Pac. 891, but this case was expressly overruled by Penrose *v.* Winter (1901), 135 Cal. 289, 67 Pac. 772. See also Smith *v.* Kaufman (1895), 3 Okla. 568, 41 Pac. 722. A legal conclusion renders the pleading liable to attack by motion to make more definite and certain: Griffith *v.* Wright (1899), 21 Wash. 494, 58 Pac. 582. A pleading containing only conclusions of law is to be regarded as irrelevant, interposed for delay only, and may be stricken out on motion: Dennis *v.* Nelson (1893), 55 Minn. 144, 56 N. W. 589.

A mixed statement of fact and legal conclusion may properly be pleaded: Livingstone *v.* Ruff (1903), 65 S. C. 284, 43 S. E. 678, quoting with approval Clarke *v.* Railroad Co., 28 Minn. 71. So, also, facts, together with the conclusion which the law implies from them, may both properly be pleaded: Wetmore *v.* Crouch (1899), 150 Mo. 671, 51 S. W. 738. But it was held in Manry *v.* Waxelbaum Co. (1899), 108 Ga. 14, 33 S. E. 701, that where a written instrument is sued upon, allegations in the petition which merely sought to construe it were properly stricken out.

Facts or conclusions which are presumed or necessarily implied from facts pleaded, need not be alleged: City of Brookfield *v.* Tooey (1897), 141 Mo. 619, 43 S. W. 387; Hartford Fire Ins. Co. *v.* Kahn (1893), 4 Wyo. 364, 34 Pac. 895; Bishop *v.* Middleton (1894), 43 Neb. 10, 61 N. W. 129; Henke *v.* Eureka Endowment Ass'n (1893), 100 Cal. 429, 34 Pac. 1089; McMurray-Judge, etc. Co. *v.* City of St. Louis (1896), 138 Mo. 608, 39 S. W. 467; Lord *v.* Russell (1894), 64 Conn. 86, 29 Atl. 242; Pyle *v.* Peyton (1896), 146 Ind. 90, 44 N. E. 925.

Conclusions of Fact. Allegations of conclusions of fact cannot avail unless they are accompanied by statements of the facts themselves from which the court may draw the conclusions: Longshore Printing Co. *v.* Howell (1894), 26 Ore. 527, 38 Pac. 547; Bordeaux *v.* Greene (1899), 22 Mont. 254, 56 Pac. 218. When so accompanied they are useful as indicating the pleader's theory of his case: Robinson *v.* Berkey (1896), 100 Ia. 136, 69 N. W. 433. Conclusions do not limit the evidence which is admissible: Allend *v.* Spokane Falls, etc Ry. Co. (1899), 21 Wash. 324,

cated, the following cases will explain and illustrate the second doctrine that the principal, material, and issuable facts must be

58 Pac. 244. Specific facts control general statements of fact: Frain *v.* Burgett (1898), 152 Ind. 55, 50 N. E. 873.

Instances of Allegations Held to be Conclusions of Law.

That money is due: Creecy *v.* Joy (1901), 40 Ore. 28, 66 Pac. 295; Penrose *v.* Winter (1901), 135 Cal. 289, 67 Pac. 772; Ryan *v.* Holliday (1895), 110 Cal. 335, 42 Pac. 891; Richards *v.* Lake View Land Co. (1897), 115 Cal. 642, 47 Pac. 683; Baldwin *v.* Burt (1895), 43 Neb. 245, 61 N. W. 601. "That a note is a wife's separate estate:" Leahy *v.* Leahy (1895), 97 Ky. 59, 29 S. W. 852. That a wife, as sole heir of her husband, owns a cause of action: Buttles *v.* De Baun (1903), 116 Wis. 323, 93 N. W. 5. The allegations in the petition that the ordinance in question was passed, "without any legal warrant or authority therefor;" that "the passage of said ordinance was a violation by the city of its duties as trustee;" that "the use by the chemical company of the vacated portions of the street is wholly illegal;" that "plaintiff has no adequate remedy at law;" that the "damages of plaintiff are irreparable," are merely conclusions of law and not averments of facts: Knapp *v.* St. Louis (1900), 156 Mo. 343, 56 S. W. 1102. See also State *ex rel. v.* Wood (1900), 155 Mo. 425, 56 S. W. 474, where same rule is stated respecting allegation of irreparable injury. That there was no legal and sufficient levy of taxes: Weston *v.* Meyers (1895), 45 Neb. 95, 63 N. W. 117. That the tax deed under which defendant claims is void, because the officers who made the assessment and executed the deed were legally disqualified, and failed to publish proper notice: O'Hara *v.* Parker (1895), 27 Ore. 156, 39 Pac. 1004; Shannon *v.* Portland (1900), 38 Ore. 382, 62 Pac. 50. An allegation, in an action to enjoin the collection of a certain tax, that "the said board of directors has no jurisdiction or power to appropriate said money for said proposed highway:" Bogaard *v.* Jud. Dist. of Plainview (1895), 93 Ia. 269, 61 N. W. 859. That a sale was made fraudulently for the purpose of hindering, delaying and defrauding creditors: Cone *v.* Ivinson (1893), 4 Wyo. 203, 33 Pac. 31. That a judgment was procured by fraud and is contrary to law: Thomas *v.* Markmann (1895), 43 Neb. 823, 62 N. W. 206. That the execution of a deed was procured by fraud: First Nat. Bank of Sutton *v.* Grosshans (1901), 61 Neb. 575, 85 N. W. 592. In an action by a mortgagor to recover a surplus left in the hands of the sheriff, an allegation that "the remaining $51 arising from said sale, as aforesaid, is surplus payable to plaintiff, who is entitled to the same as mortgagor, and by virtue of a deed of conveyance of said property so sold, to her made and delivered by said Arthur W. Clyde:" Clyde *v.* Johnson (1894), 4 N. D. 92, 58 N. W. 512. That it was defendant's duty to erect and maintain guards over a certain window: Peake *v.* Buell (1895), 90 Wis. 508, 63 N. W. 1053. That a pole, which caused personal injuries, was "too near the track:" Blackstone *v.* Central of Georgia Ry. Co. (1898), 105 Ga. 380, 31 S. E. 90. That the plaintiff had "used all the diligence he could:" Edwards *v.* Smith (1897), 102 Ga. 19, 29 S. E. 129. That a certain fence is liable to be blown over on plaintiff's buildings: Bordeaux *v.* Greene (1899), 22 Mont. 254, 56 Pac. 218.

That a corporation is the successor of another, assumed all its liabilities, and is liable for the payment of the obligations sued on: Rhorer *v.* Middlesboro Co. (1898), 103 Ky. 146, 44 S. W. 448. That the "said P. W. Smith is not now or never has been legally appointed assignee for J. A. Newkirk:" Smith *v.* Kaufman (1895), 3 Okla. 568, 41 Pac. 722. That defendant's refusal to transmit the message tendered was "without reasonable grounds:" Kirby *v.* Western Union Tel. Co. (1893), 4 S. D. 463, 57 N. W. 202. That defendant put it absolutely out of his power to perform his contract: Garberius *v.* Roberts (1895), 109 Cal. 125, 41 Pac. 857. That "plaintiff is not an innocent holder for value of said note:" Voorhees *v.* Fisher (1893), 9 Utah, 303, 34 Pac. 64. That plaintiff has a lien on certain cattle: Hill *v.* Campbell Commission Co. (1898), 54 Neb. 59, 74 N. W. 388. That plaintiff has a special ownership in certain property: Griffing *v.* Curtis (1897), 50 Neb.

pleaded, and not the details of evidentiary or probative matter from which the existence of the final facts is inferred. The language employed by the court in an action brought to restrain the execution of tax deeds of the plaintiff's land, on account of illegality in the proceedings, furnishes a very instructive example of such averments: "The plaintiff relied upon the absence of preliminary proceedings essential to the validity of the tax sales. But instead of averring, either of his own knowledge or upon information and belief, that such proceedings were not had, he only averred that he had searched in the proper offices for the evidence that they were had, and failed to find it. The only issue that could be made upon such an allegation would be whether he had searched and found the evidence or not, which would be entirely immaterial."[1] In pleading certain classes of

334, 69 N. W. 964. That certain acts of an agent were within the apparent scope of his employment: Hoyer *v.* Ludington (1898), 100 Wis. 441, 76 N. W. 348. That a contract was not one for the sale of goods, but merely an agreement as to prices which should be paid for goods ordered from time to time: Gipps Brewing Co. *v.* De France (1894), 91 Ia. 108, 58 N. W. 1087. That plaintiff is lessee of premises and entitled to possession and to the rents payable from tenants: Harris *v.* Halverson (1901), 23 Wash. 779, 63 Pac. 549. That certain assessments were duly levied: Harlow *v.* Supreme Lodge (1901), Ky., 62 S. W. 1030. That a plat did not contain a dedication to the public use of certain streets, etc.: Bellevue Imp. Co. *v.* Kayser (1903), — Neb. —, 95 N. W. 499. That the Constitution requires every bill to be read by sections on three several days, unless the several readings are dispensed with by two-thirds vote: Landes *v.* State (1903), — Ind. —, 67 N. E. 189.

Instances of Allegations Held not to be Conclusions of Law.

That defendant waived the non-payment of the entire stock: MacFarland *v.* West Side Improvement Ass'n (1898), 56 Neb. 277, 76 N. W. 584. In a suit to enforce payment of city warrants, an allegation that the warrants "were registered for payment according to law by the" city treasurer "at the dates of their respective presentations:" Freeman *v.* City of Huron (1897), 10 S. D. 368, 73 N. W. 260. "That the plaintiff is the owner and that the property is her sole and separate property:" Kemp *v.* Folsom (1896), 14 Wash. 16, 43 Pac. 1100. That "he waived demand and notice:" Bay View Brewing Co. *v.* Grubb (1901), 24 Wash. 163, 63 Pac. 1091. That title to land is in the United States and is not subject to taxation: Mo. Pac. Ry. Co. *v.* Henrie (1901), 63 Kan. 330, 65 Pac. 665; Security Co. *v.* Harper County (1901), 63 Kan. 351, 65 Pac. 660. That defendant unlawfully procured the arrest of plaintiff: Reynolds *v.* Price (1900), Ky., 56 S. W. 502. That an assessment was duly made and that notice thereof was duly given to the assured: Miles *v.* Mutual Reserve Fund Life Ass'n (1901), 108 Wis. 421, 84 N. W. 159, criticising Am. M. A. Soc. *v.* Helburn, 85 Ky. 1, where the contrary was held. That a warrant was duly and legally signed: Stephens *v.* Spokane (1895), 11 Wash. 41, 39 Pac. 266. That the debt sued on is the same debt evidenced by a certain note: Shirley *v.* Stephenson (1898), 104 Ky. 518, 47 S. W. 581.]

[1] Rogers *v.* Milwaukee, 13 Wis. 610, 611. If the plaintiff had alleged that the proceedings in question had been omitted, the facts stated by him would have been proper evidence in support of the averment. This case exhibits very clearly the distinction between the ultimate issuable fact which cannot be changed in order to make out a given cause of action, and the probative matter by which such fact

issues, it is undoubtedly difficult sometimes to discriminate between the final facts and the probative matter. This is especially true in charging fraud, which must almost invariably consist of many different circumstances, some affirmative and some negative; but the rule should nevertheless be applied. "It is not necessary nor proper for the pleader to set out all the *minute* facts tending to establish the fraud; the ultimate facts, and not the evidence, should be pleaded."[1] An allegation of mere evidentiary matter, and not an ultimate or issuable fact, is surplusage; it need not be controverted, and is not admitted by a failure to deny. As was said in a recent decision, "the matter averred is not an ultimate fact; that is to say, a fact which is required to be stated in a complaint, and which, if not denied by the answer, would stand as admitted; but it is merely matter of evidence which might be stricken out of the complaint."[2] If in addition to the issuable or material facts the pleading also contains the details of evidence tending to establish them, these latter averments should be stricken out on motion as surplusage.[3]

is established, and which may vary according to the exigencies of the case. Of course the omission of the preliminary proceedings *must* be proved, but it could be proved by many different kinds of evidence. This distinction is a certain test by which to determine whether any given fact is issuable and material, or is only probative.

[1] Cowin *v.* Toole, 31 Iowa, 513, 516; Singleton *v.* Scott, 11 Iowa, 589.

[2] Gates *v.* Salmon, 46 Cal. 361, 379. See also, as further illustrations, Clay Cy. *v.* Simonsen, 1 Dak. 403, 430; Scott *v.* Robards, 67 Mo. 289; Terry *v.* Musser, 68 id. 477; Cook *v.* Putnam Co., 70 id. 668; Kansas Pac. Ry. Co. *v.* McCormick, 20 Kan. 107; Harris *v.* Hillegass, 54 Cal. 463; Elder *v.* Spinks, 53 id. 293; Dambman *v.* White, 48 id. 439; Schilling *v.* Rominger, 4 Colo. 100 (mode of allegation in equitable actions). The complaint need not anticipate and meet expected defences. Claflin *v.* Taussig, 7 Hun, 223, and cases cited; Metrop. Life Ins. Co. *v.* Meeker, 85 N. Y. 614; Cohen *v.* Continental Life Ins. Co., 69 id. 300, 304.

[3] King *v.* Enterprise Ins. Co., 45 Ind. 43; Van Schaick *v.* Farrow, 25 Ind. 310; Lytle *v.* Lytle, 37 Ind. 281.

[***Ultimate, not Probative Facts, to be alleged.***

In support of this general proposition, see the following cases: Stewart *v.* Anderson (1900), 111 Ia. 329, 82 N. W. 770; Durell *v.* Abbott (1895), 6 Wyo. 265, 44 Pac. 647; Markey *v.* School District (1899), 58 Neb. 479, 78 N. W. 932; Bee Publishing Co. *v.* World Publishing Co. (1900), 59 Neb. 713, 82 N. W. 28; McCarville *v.* Boyle (1895), 89 Wis. 651, 62 N. W. 517; Stephens *v.* Spokane (1895), 11 Wash. 41, 39 Pac. 266.

What are Ultimate Facts?

Meyer *v.* School District (1893), 4 S. D. 420, 57 N. W. 68: "An ultimate or issuable fact in a pleading is one essential to the claim or defence, and which cannot be stricken from the pleading without leaving it insufficient. Such issuable facts quite frequently involve a legal proposition also." Atkinson *v.* Wabash R. R. Co. (1895), 143 Ind. 501, 41 N. E. 947: The test of the materiality of averments is whether they tend to constitute a cause of action or defence. Culbertson Irrigating, etc. Co. *v.* Cox (1897), 52 Neb. 684, 73 N. W. 9: "A material allegation is one essential to a claim or defence which

There is a class of allegations which are necessary, but which are not issuable in the ordinary meaning of this term as already defined, — that is, the cause of action is not defeated by a failure to prove them as averred, and an omission to deny them does not admit their truth, but still they must be stated, and a complaint or petition would be insufficient, or at least incomplete, without them. This class includes in general the statements of time,[1]

cannot be stricken from the pleading without leaving it insufficient." McLean *v.* City of Lewiston (1902), Idaho, 69 Pac. 478: In actions for negligence, "the pleader must state all facts necessary to inform the defendant of all acts or omissions that are charged against the defendant, so as to enable him to make a full and complete defence thereto."

"A material fact not alleged is presumed not to exist:" Stillings *v.* Van Allstine (1902), Neb., 89 N. W. 756.

Consequences of Pleading Evidence.

McCaughey *v.* Schuette (1897), 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088. Where ultimate facts are not pleaded but the complaint contains averments of such evidentiary facts as would, if proved, authorize the court in finding the ultimate facts, the complaint is bad on general demurrer for want of sufficient facts. The court say, "To uphold such a pleading is to encourage prolixity and a wide departure from that definiteness, certainty, and perspicuity which is one of the paramount objects sought to be enforced by the code system of pleading." This decision seems opposed to the current of authority and is not warranted by the previous decisions in California. The cases cited by the court do not go as far as this case.

But, for the contrary view, see Dillahunty *v.* Railway Co. (1894), 59 Ark. 629, 28 S. W. 657. In this case, where a fact material to the cause of action was not alleged as such in the complaint, but only evidence of such fact was alleged, a demurrer on the ground that it did not state facts sufficient to constitute a cause of action was overruled. It was held that the proper practice was to interpose a motion to make more definite and certain. So in Missouri Pac. Ry. Co. *v.* Hemingway (1902), 63 Neb. 610, 88 N. W. 673, it was held that the remedy for argumentative pleading was by motion, not demurrer.

Facts within Knowledge of Opposite Party.

In Brashear *v.* City of Madison (1895), 142 Ind. 685, 36 N. E. 252, the court said: "The true rule, as we understand it, is that facts peculiarly within the knowledge of the party against whom they should be pleaded, and not accessible to the pleader, may be dispensed with, but this may not be done without showing that such facts are so peculiarly within the knowledge of the opposite party, and not accessible to the pleader. . . . Under our code, the burden rests upon the pleader to state in a plain and concise manner the facts requiring the relief demanded, and to be excused from this duty he must allege that such facts are beyond his reach and not within his knowledge."]

[1] [Railway Co. *v.* State (1894), 59 Ark. 165, 26 S. W. 824. Where plaintiff alleged, in suing for a penalty, that on the *24th of February*, 1889, at about 11 o'clock A. M., the defendant on a certain engine of a *passenger train going south* failed to ring bell or sound whistle, and proved on the trial that in the *spring of* 1889, on a certain engine of a *freight train going north* the failure occurred, *held* that there was a total variance. The court discusses the allegation and proof of *time*, and holds that the plaintiff must make such allegation specific and establish it by proof, in order to advise the defendant what it is to meet on the trial. In the following cases it was held that the time was immaterial, and need not be proved as laid: Bancroft Co. *v.* Haslett (1895), 106 Cal. 151, 39 Pac. 602 (date of conversion); Carrier *v.* Bernstein (1898), 104 Ia. 572, 73 N. W. 1076 (date of illegal sale of intoxicating liquors in action for penalty);

place,[1] value,[2] quantity, amounts,[3] and the like; although, under peculiar circumstances, the allegation of any one of these matters may become in every sense of the term issuable and material. Ordinarily, however, this is not so. The rule thus given prevailed in the common-law pleading, and has not been changed by the new procedure. Thus, for example, in an action for the conversion of chattels, the statement of their value is not issuable; failure to deny does not admit its truth, nor exclude evidence as to the real value.[4]

§ 427. * 533. **Instances of Allegations Approved or Condemned by the Courts.** The decisions which follow in this and one or two subsequent paragraphs are cited in order to furnish some examples of allegations which have been judicially tested and pronounced sufficient or insufficient, as the case may be. A few such particular instances will better illustrate the general doctrine of the codes, and will more clearly explain the requisite form and nature of issuable and material averments than can be done by any other method, either of description or of argument. In an action upon a guaranty of a note, the objection was raised by the defendant that the complaint failed to state any cause of action. It set out a note payable to the defendant which fell due October 1, 1867, and alleged "that on the 9th of October, 1867 [after it was due], the defendant, for value received, transferred said note to the plaintiff, and then and there guaranteed the payment thereof by his written guaranty, indorsed thereon as follows: 'For value received, I hereby guarantee the payment of the within note when due, October 9, 1867;' and although said note became due and payable before the commencement of this action, yet the said makers of said note, nor the said defendant,

Delsman *v.* Friedlander (1901), 40 Ore. 33, 66 Pac. 297 (date of execution and indorsement of note sued on). See subject *Time*, in note on Necessity and Form of Particular Allegations, p. 687.]

[1] [For cases holding that there is no material variance where there is a difference between the place alleged and that proved, see Barrett *v.* Village of Hammond (1894), 87 Wis. 654, 58 N. W. 1053; Prewitt *v.* Missouri, etc. Ry. Co. (1896), 134 Mo. 615, 36 S. W. 667.

For cases holding that such difference does constitute a material variance, see Cincinnati, etc. Ry. Co. *v.* McLain (1897), 148 Ind. 188, 44 N. E. 306; Ausk *v.* Railway Co. (1901), 10 N. D. 215, 86 N. W. 719; Coulter *v.* Great Northern Ry. Co. (1896), 5 N. D. 568, 67 N. W. 1046.]

[2] [Plumb *v.* Griffin (1901), 74 Conn. 132, 50 Atl. 1; Derrick *v.* Cole (1894), 60 Ark. 394, 30 S. W. 760; Campbell *v.* Brosius (1893), 36 Neb. 792, 55 N. W. 215.]

[3] [Denn *v.* Peters (1900), 36 Ore. 486, 59 Pac. 1109.]

[4] Chicago & S. W. R. Co. *v.* N. W. U. Packet Co., 38 Iowa, 377, 382.

have paid the same, nor any part thereof; that the plaintiff is the owner and holder," etc., stating the amount due, and making the usual demand of judgment. The defendant claimed that the complaint did not state a cause of action because it failed to allege that the amount due is due on the note and guaranty or on the guaranty, or from the defendant to the plaintiff, and failed to allege that the maker had not paid the note; also because the guaranty being executed after the note became due, and stipulating payment *when due*, is impossible and void. After disposing of the last objection by holding that the guaranty was payable at once, the court, by applying the rule of favorable construction prescribed by the code, pronounced the complaint sufficient.[1] In an action against a railroad company for killing the plaintiff's horses, which had strayed upon the track and been run over, the only negligence charged upon the defendant at the trial was in reference to its construction and maintaining of its fences through which the animals escaped and reached the track. The sole allegation of the complaint was that the defendant "so carelessly and negligently ran and managed the said locomotive and cars, and the said railroad track, grounds, and fences, that its said locomotive and cars ran against and over the said horses." It was not even stated that the animals escaped through the fences. In pronouncing upon the sufficiency of this averment, it was said by the court that the best possible construction for the plaintiff which could be put upon the language was "that the defendant so negligently managed the *fences* that its train ran over the horses," and that, even under the liberal rule prescribed by the codes, this could not be taken as alleging a cause of action for negligently constructing the fences,

[1] Gunn *v.* Madigan, 28 Wis. 158, 163, 164. The opinion of the court, after stating the positions of the defendant's counsel, proceeded: "The rule practically applied by him is, that a pleading must be construed most strictly against the pleader. He seems to have forgotten that this stern rule of the common law is repealed by the code, and in its place a more beneficent one has been enacted. Looking at the complaint in the light of this new rule, it seems to us that it states a cause of action. Indeed, we are not quite sure that it is necessary to invoke the aid of that rule to enable us to hold that it is a good pleading. It sets out the contract and the alleged breach thereof, the interest of the plaintiff and the liability of the defendant, and demands the proper judgment. Ought we to demand more?" The only real defect of the pleading is, that, from the grammatical construction of a single clause, it does not allege that the note was not paid. "Yet the said makers of said note, nor the said defendant, have paid the same." It is thus made to aver that the makers *have* paid it.

or suffering them to be out of repair, so that the animals escaped through them on to the track.[1]

§ 428. *534. **Same Subject.** In an action for trespass to land, the petition stated that "plaintiff by virtue of a contract with one E. was entitled to the exclusive possession of" the premises, "that subsequently to this contract the premises were purchased by the defendant with knowledge of the plaintiff's rights, that the defendant forcibly took possession and excluded the plaintiff," but did not allege that the plaintiff was ever in possession, nor the relation which E. bore to the land, nor the terms of the contract with him, nor that defendant's acts were wrongful. This petition, it was held, stated no cause of action, and was properly dismissed at the trial.[2] In an action to foreclose a mortgage of land, the plaintiff obtained a preliminary injunction to restrain the removal of machinery which had been so affixed to the land as to become part of the freehold. A motion was made on the pleadings to dissolve the injunction on the ground that the complaint contained no allegations which could be made the basis of that relief. The clause relied upon by the plaintiff was the following: That the defendants had erected on the premises a manufacturing establishment, "and put therein machinery which had become part and parcel thereof," and that "among other machinery which they put therein was a steam-engine," etc., enumerating other articles. This was held to be a sufficient averment that the engine, etc., had become part of the realty. If the defendants desired a more explicit allegation they should have moved for that purpose, the manner of raising the objection which they had adopted being tantamount to a demurrer for want of sufficient facts.[3] The complaint, in an action on a note against the maker and indorsers, alleged several successive indorsements until it was thus indorsed and transferred to one M., but omitted to state an indorsement and transfer from him to the plaintiff. It contained, however, the following averment, "that the plaintiff is now the lawful owner and holder of

[1] Antisdel *v.* Chicago & N. W. Ry. Co., 26 Wis. 145, 147.

[2] Garner *v.* McCullough, 48 Mo. 318.

[3] Kimball *v.* Darling, 32 Wis. 675, 684. The allegation in question is an admirable illustration of the distinction between facts material to the remedy in equity suits and issuable facts in legal actions. A failure to prove this special averment would not defeat the cause of action; it would simply modify and limit the amount of relief to be obtained by the plaintiff; but it was certainly a necessary allegation for that purpose.

the said note, and the defendants are justly indebted to him thereon," etc. This was held to be a sufficient statement of the plaintiff's title; the defect, if any, was one which should be cured by motion to make the pleading more definite and certain.[1] The material portion of the complaint in an action for work and labor simply stated that the plaintiff performed work "for the defendant at an agreed price of $26 per month." It was objected on demurrer that no request on the part of the defendant was alleged, but the pleading was held to be sufficient under the rule of construction adopted by the codes.[2] In an action on a town treasurer's official bond, the complaint, after setting out the bond, averred the breach thereof in the following manner, simply negativing the conditions: "He has not duly and faithfully performed the duties of his office, and has not faithfully and truly accounted for and paid over according to law all the state and county taxes which came into his hands;" but it did not allege that any such taxes had ever come into his hands. This complaint was pronounced fatally defective on demurrer, as the facts constituting the breach should have been pleaded.[3]

§ 429. *535. **Same Subject.** The petition in an action against H. as maker and C. as indorser of a note set out the note made by H. payable to bearer and a guaranty thereon, "I guarantee the payment of the within note to C. E. [the plaintiff] or order," signed by C., and added: "The defendant H. is liable on said note as maker, and the defendant C. as indorser and guarantor. The plaintiff C. E. is the holder and owner of said note. There is due from the defendants to the plaintiff on said note the sum of," etc. On demurrer by the defendant C., he was held to be absolutely liable as a guarantor, and that under the liberal rule of construction the allegations of the complaint imported a cause of action, and were sufficient.[4] In an action by the vendee for

[1] Reeve *v.* Fruker, 32 Wis. 243.

[2] Joubert *v.* Carli, 26 Wis. 594, per Paine J.: "The allegation that one has performed work for another at an agreed price per month or per day, must be held to fairly import that the agreement was prior to the performance of the work, and that the work was done in pursuance of it."

[3] Wolff *v.* Stoddard, 25 Wis. 503, 505; Franklin Tp. Sup. *v.* Kirby, 25 Wis. 498. Dixon C. J. dissented in both cases.

[4] Clay *v.* Edgerton, 19 Ohio St. 549. The court, after stating that the defendant C. was absolutely liable as a guarantor, added that the allegations above stated implied a transfer of the note from him to the plaintiff, and a consideration by means of such transfer. C. is thus shown to be an indorser, and is, as it appears, therefore held liable as a guarantor. This decision, in my opinion, cannot be supported on principle. It is such ruling as this that destroys the scientific character

fraudulent representations made on a sale, the complaint must allege that the plaintiff relied upon them; and the absence of such an averment will not be supplied by a statement of mere evidentiary matter tending to show the existence of that material fact, unless the evidence so stated is conclusive.[1] In an action brought to recover damages for the conversion of chattels, the complaint was substantially as follows: That the plaintiff was on, etc., the owner of certain chattels; that he leased them to one S. by a written lease, in which he reserved the right to take possession of them, and to terminate the letting, whenever he should deem himself unsafe, or that the chattels were not well taken care of; that S. took possession under the lease; that the defendant, who is a United States marshal, seized them while thus in the possession of S. under a process in bankruptcy against S.; that plaintiff demanded them from the defendant, who refused, etc.; that the plaintiff demanded the possession from the defendant "on the ground that the plaintiff deemed himself unsafe, and did not think that the property was well taken care of;" and that the defendant had converted the same to his own use. The complaint did not contain any further or more express statement that the plaintiff did as a matter of fact deem himself unsafe. A demurrer for want of facts was sustained, and the pleading was held insufficient because it did not show a right of possession in the plaintiff when the action was brought, in that it failed to allege any fact entitling him to terminate the letting, and to resume possession of his property.[2] The petition in an action for conversion alleged that the defendant "had in his possession, and under his control, $5,000 in money, and $10,000 in hardware, stoves, etc., of the money and

and usefulness of the reformed system, and tends to bring it into discredit.

[1] Goings *v.* White, 33 Ind. 125. This decision assumes that, although in accordance with the general doctrine, the principal fact and not the evidence of it should be pleaded, yet a statement of the evidence *may* under certain circumstances be sufficient to raise a substantial issue. If the principal fact be not alleged, but the details of evidence are given, and these are positive and conclusive in their nature, the pleading will not be bad on demurrer, although it will be subject to amendment on a motion to make it more definite and certain.

[2] Hathaway *v.* Quinby, 1 N. Y. S. C. 386. The construction given to the complaint in this case was certainly severe and technical, and hardly in accordance with the rule laid down in the code. The objection is for incompleteness and indefiniteness of the allegation. The plaintiff certainly does state, although perhaps in a partial manner, that he deemed himself unsafe. A motion was certainly more appropriate than a demurrer.

property owned by the plaintiff," and converted the same. This was declared, on a motion to make the petition more definite and certain, to be a sufficient averment that the money and goods were the property of the plaintiff.[1] If an action is brought on a bail bond given in a criminal proceeding, the complaint should allege that the person was released from custody upon the execution and delivery of the undertaking, and a pleading omitting this statement was held bad.[2] Where a tender is essential to the plaintiff's cause of action, the complaint must either aver it in express terms, or must state a sufficient excuse for omitting it. In such a case the plaintiff alleged "that he has been ready and willing during all the time aforesaid, and has offered, to accept and take said conveyance, and to pay the balance of said purchase-money." This averment was pronounced to be insufficient, and the complaint was held bad on demurrer, as it neither stated a tender, nor an excuse for not making a tender.[3] In actions brought to recover damages, an allegation that damages have been sustained is indispensable. As was said by the Supreme Court of California in a late decision, "it is not alleged in the complaint that the plaintiff has sustained damages, and therefore he is not entitled to judgment for damages."[4]

[1] Sturman *v.* Stone, 31 Iowa, 115.

[2] Los Angeles Cy. *v.* Babcock, 45 Cal. 252.

[3] Englander *v.* Rogers, 41 Cal. 420, 422.

[4] Bohall *v.* Diller, 41 Cal. 532. See also Bradley *v.* Aldrich, 40 N. Y. 504, and *supra*, § * 84, note 3; and comp. Graves *v.* Spier, 58 Barb. 349, *supra*, § * 81, note 2. The following cases furnish illustrations of allegations held to be sufficient or insufficient in a variety of ordinary actions: of *fraud*, Smith *v.* Nelson, 62 N. Y. 286; Jones *v.* Frost, 51 Ind. 69; Arnold *v.* Baker, 6 Neb. 134; Nicolai *v.* Lyon, 8 Oreg. 56; Lafever *v.* Stone, 55 Iowa, 49; Ockenden *v.* Barnes, 43 id. 615; Pence *v.* Croar, 51 Ind. 329; Hess *v.* Young, 59 Ind. 379; Sacramento Sav. Bank *v.* Hynes, 50 Cal. 105; Hoester *v.* Sammelmann, 101 Mo. 619; of *negligence*, defendant's, Pittsburgh, C. & St. L. R. Co. *v.* Nelson, 51 Ind. 150; St. Louis & S. E. Ry. Co. *v.* Mathias, 50 id. 65; Smith *v.* Buttner, 90 Cal. 95; Pope *v.* Kansas City Cable Ry. Co., 99 Mo. 400; Le May *v.* Mo. Pac. Ry. Co., 105 Mo. 361; plaintiff's, Higgins *v.* Jeffersonville, etc. R. Co., 52 id. 110; Toledo, W. & W. Ry. Co. *v.* Harris, 49 id. 119; Hathaway *v.* Toledo, etc. Ry. Co., 46 id. 25; Jeffersonville, M. & R. Co. *v.* Bowen, 40 id. 545; Durgin *v.* Neal, 82 Cal. 595; Young *v.* Shickle, H. & H. Iron Co., 103 Mo. 324; Lafayette & I. R. Co. *v.* Huffman, 28 id. 287; Higley *v.* Gilmer, 3 Mont. 90; in *slander and libel*, Roberts *v.* Lovell, 38 Wis. 211; Hanning *v.* Bassett, 12 Bush, 361; Harris *v.* Zanone, 93 Cal. 59; of *damages*, Argotsinger *v.* Vines, 82 N. Y. 308; Ferguson *v.* Hogan, 25 Minn. 135; Johnson *v.* C., R. I. & P. R. Co., 50 Iowa, 25; Comer *v.* Knowles, 17 Kan. 436; Indianapolis, B. & W. R. Co. *v.* Milligan, 50 Ind. 393; Prescott *v.* Grady, 91 Cal. 518; Brown *v.* Hannibal & St. J. R. Co., 99 Mo. 310; *actions on express contracts*, performance of conditions, Preston *v.* Roberts, 12 Bush, 570; Averbeck *v.* Hall, 14 id. 505; Andreas *v.* Holcombe, 22 Minn. 339; Livesey *v.* Omaha Hotel Co., 5 Neb.

§ 430. * 536. **Attitude of Courts in Instances Cited largely Due to Liberal Rule of Construction.** The cases contained in the last three paragraphs, and from which quotations have been made, were not selected as examples of proper pleading according to the principles established by the reformed procedure; on the contrary, most of those which were sustained by the courts escaped condemnation only by applying the liberal rule of construction prescribed in the codes. These decisions are given rather to show how far a pleading may disregard the require-

50; Estabrook *v.* Omaha Hotel Co., 5 id. 76; Lowry *v.* Magee, 52 Ind. 107; Rhodes *v.* Alameda Co., 52 Cal. 350; Smith *v.* Mohn, 87 Cal. 489; Ehrlich *v.* Ætna L. Ins. Co., 103 Mo. 231; work and materials, Stephenson *v.* Ballard, 50 Ind. 176; Wolf *v.* Scofield, 38 id. 175; the consideration, Leach *v.* Rhodes, 49 id. 291; a written instrument, Waukon & Miss. R. Co. *v.* Dwyer, 49 Iowa, 121; Brown *v.* Champlin, 66 N. Y. 214, 218; Pettit *v.* Hamlyn, 43 Wis. 314; White *v.* Soto, 82 Cal. 654 (modification of written contract must be pleaded); McMenomy *v.* Talbot, 84 Cal. 279; non-payment, Roberts *v.* Treadwell, 50 Cal. 520; Grant *v.* Sheerin, 84 Cal. 197; Eliot *v.* Eliot, 77 Wis. 634; Tracy *v.* Tracy, 59 Hun, 1; 20 Civ. Pro. R. 98; Humphrey *v.* Fair, 79 Ind. 410; Singleton *v.* O'Blenis, 125 Ind. 151; indebtedness, Pine Valley *v.* Unity, 40 Wis. 632; *of a partnership*, Stix *v.* Matthews, 63 Mo. 371; Kilsey *v.* Henry, 48 Ind. 47; *for obtaining an injunction*, Wells, Fargo, & Co. *v.* Coleman, 53 Cal. 416; Boehme *v.* Sume, 5 Neb. 80; Thorn *v.* Sweeney, 12 Nev. 251; Portland *v.* Baker, 8 Ore. 356; *of time*, Balch *v.* Wilson, 25 Minn. 299; Leihy *v.* Ashland, etc. Co., 49 Wis. 165; Cohn *v.* Wright, 89 Cal. 86; of *compliance with statutory requirements*, Biron *v.* St. Paul Water Com'rs, 41 Minn. 519; *in miscellaneous cases*, Calvin *v.* Duncan, 12 Bush, 101 (action on vendor's lien); Mitchell *v.* Mitchell, 61 N. Y. 398 (of adultery); Rhodes *v.* Alameda Co., 52 Cal. 350 (against a county); Wiebbold *v.* Hermann, 2 Mont. 609 (name of party); Orr W. Ditch Co. *v.* Larcombe, 14 Nev. 53 (in interpleader); Broome *v.* Taylor, 9 Hun, 155 (against a married woman); Horn *v.* Chicago & N. W. Ry. Co., 38 Wis. 463 (a private statute); Pittsburgh, C. & St. L. R. Co. *v.* Theobald, 51 Ind. 246 (against a railroad for injury to a passenger); Crawford *v.* Neale, 56 Cal. 32 (a guardian *ad litem*); Darrah *v.* Gow, 77 Mich. 16 (defects in workmanship must be specified); York *v.* Rockwood, 132 Ind. 358 (action to set aside fraudulent conveyances); Nordholt *v.* Nordholt, 87 Cal. 552 (duress); Chicago & O. Coal, etc. Co. *v.* Norman (Ohio, 1892), 32 N. E. Rep. 857 (injury to employee by defective appliances); Brown *v.* Brown (Ind. 1893), 32 N. E. Rep. 1128 (partition). The following cases furnish examples of complaints or petitions in some common species of actions which have been sustained; *in ejectment*, Sears *v.* Taylor, 4 Col. 38; Johnston *v.* Pate, 83 N. C. 110; Thompson *v.* Wolfe, 6 Ore. 308; Bentley *v.* Jones, 7 id. 108; Austin *v.* Schluyster, 7 Hun, 275; *for a conversion*, Womble *v.* Leach, 83 N. C. 84; Johnson *v.* Oreg. Nav. Co., 8 id. 35; Pease *v.* Smith, 61 N. Y. 477; Johnson *v.* Ashland Co., 44 Wis. 119; *for breach of contract*, Partridge *v.* Blanchard, 23 Minn. 69; Usher *v.* Heatt, 18 Kan. 195; *on promissory notes*, Adams *v.* Adams, 25 Minn. 72; Harris Man. Co. *v.* Marsh, 49 Iowa, 11; Abiel *v.* Harrington, 18 Kan. 253; Durland *v.* Pitcairn, 51 Ind. 426; Green *v.* Southain, 49 id. 139; Friddle *v.* Crane, 68 id. 583; *in libel or slander*, Cary *v.* Allen, 39 Wis. 481; Stern *v.* Katz, 38 id. 136; Frank *v.* Dunning, 38 id. 270; Lipprant *v.* Lipprant, 52 Ind. 273; Shigley *v.* Snyder, 45 id. 541; Downey *v.* Dillon, 52 id. 442; Dorsett *v.* Adams, 50 id. 129; Schurick *v.* Kollman, 50 id. 336; *in replevin*, Crawford *v.* Furlong, 21 Kan. 698; Zitske *v.* Goldberg, 38 Wis. 216.

ments as to form and method, and may violate all the principles of logical order and precision of statement, and may yet be held sufficient on general demurrer, because the material facts constituting a cause of action can be discovered among the mass of confused or imperfect allegations. The principles and doctrines of pleading adopted and enforced by the courts are illustrated and explained by such examples as these, but the cases themselves are to be carefully avoided as precedents. The mode of correcting *imperfect* and *insufficient* averments as distinguished from those which state no cause of action, and the liberal rule of construction introduced by the code, will form the subject of a separate and careful discussion in a subsequent portion of this chapter.

§ 431. * 537. **Doctrine that Facts Pleaded should be stated as they occurred or existed. Two Questions Presented.** In considering the third general doctrine developed in the preceding analysis, — namely, that the facts pleaded should be stated as they actually occurred or existed, and not their mere legal aspect, effect, or operation, — two practical questions are presented, and the discussion will be mainly confined to them. These questions are, (1) whether in actions based upon the common-law notion of an implied contract the pleader should simply allege the facts as they really occurred from which the legal duty arises, without averring a promise which was never made, or whether he must or may, as in the common-law assumpsit, state a promise to have been expressly made which is the legal effect or operation of those facts; and (2) whether the ancient common counts, or allegations substantially identical therewith, fulfil the requirements of the new procedure, and can be used, in conformity with its fundamental principles, as complaints or petitions in the classes of actions to which they would have been appropriate under the former system. I shall take up these questions separately, first collecting and comparing the decisions bearing upon each; and, secondly, discussing them upon principle.

§ 432. * 538. **(1) Necessity or Propriety of Alleging a Promise in Actions upon Implied Promises.** There is a marked unanimity of opinion among the decisions which directly involve this question, since most of them accept the language of the codes, and fully recognize the radical change in principle effected by the

reformed procedure. In Farron *v.* Sherwood,[1] after sustaining a complaint substantially a general count in assumpsit for work and labor without any averment of a promise by the defendant, the New York Court of Appeals said: "It is not necessary to set out in terms a promise to pay; it is sufficient to state facts showing the duty from which the law implies the promise. That complies with the requirement that facts must be stated constituting the cause of action." This language was not a mere *dictum;* it was absolutely essential to the judgment, since the complaint contained no averment of a promise, and was nevertheless held sufficient. The decision must therefore be regarded as settling the doctrine for that State. In another action to recover compensation for work and labor, where the complaint stated various services performed by the plaintiff from which it was claimed a duty on the part of the defendant arose, but alleged no promise by him, the Supreme Court of New York adopted the same rule of pleading.[2] On the other hand, the Supreme Court of Wisconsin said by way of a *dictum* in an early case: "Good pleading requires that a promise which the law implies should be stated."[3] And in an action for services alleged in the petition to have been performed at the request of an agent of the defendant, the Supreme Court of Missouri held that either the promise must be averred, or the facts from which a promise will be inferred, as a matter of law.[4] In Montana, the rule is distinctly established

[1] Farron *v.* Sherwood, 17 N. Y. 227, 230. See also Mackey *v.* Auer, 8 Hun, 180; De la Guerra *v.* Newhall, 55 Cal. 21; Moore *v.* Hobbs, 79 N. C. 535; Jones *v.* Mial, 79 id. 164; Emslie *v.* City of Leavenworth, 20 Kan. 562; Stephenson *v.* Ballard, 50 Ind. 176.

[2] Cropsey *v.* Sweeney, 27 Barb. 310, 312, per Sutherland J., who delivered the following opinion: "Although the form of the action of assumpsit, and of the pleadings therein, has been abolished, yet the obligation of contracts and the distinction between an express and an implied assumpsit remain; and notwithstanding the code, in a large class of cases now as before the code, it is only on the theory of an implied assumpsit, inferred from the conduct, situation, or mutual relations of the parties, that justice can be enforced, and the performance of a legal duty compelled. It is no longer necessary, and perhaps not even proper, in such a case, for the plaintiff to allege in his complaint any promise on the part of the defendant, but he must state facts which, if true, according to well-settled principles of law, would have authorized him to allege, and the court to infer, a promise on the part of the defendant before the code. The form of assumpsit is no longer necessary, nor perhaps even proper, in such a case; but facts sufficient to raise it, and to put it on paper were it lawful to do so, are still necessary." He goes on to hold that the special facts alleged in the complaint raise no implied promise.

[3] Bird *v.* Mayer, 8 Wis. 362, 367. This remark was entirely *obiter*. The question before the court was, whether a warranty sued on was express or implied.

[4] Wells *v.* Pacific R. R. Co., 35 Mo. 164. The allegation of a performance at the request of an agent of the defendant

that the facts from which the promise is inferred should be pleaded, and not the promise itself; but that in an action on an express promise it must be alleged.[1] The Supreme Court of Indiana has held with evident reluctance that in such a case it is not necessary for the party to aver a promise, and that it is enough for him to state the facts from which the law implies it. The court added, however, after this concession, that it is better in all cases to allege a promise, saying: "It is always good pleading to state the legal effect of the contract whether it is written or oral."[2] And in another case, where the action was brought

was insufficient, being matter of evidence only.

[In Wetmore *v.* Crouch (1899), 150 Mo. 671, 51 S. W. 738, the court said: "If the contract relied on is express, it must be so pleaded, but if it is implied, the facts out of which it is claimed to arise must be pleaded." See also Warder *v.* Seitz (1900), 157 Mo. 140, 57 S. W. 537. In this case the petition stated that plaintiff told defendant at the time he was employed by her that "the customary fee for such services was five per cent if settled out of court and ten per cent if settled after suit, upon whatever amount she received, that defendant made no objection to said fee, but instructed plaintiff to take charge of her interests and proceed in the premises to secure a settlement by compromise, or failing in that, to bring a suit to break and set aside said will." The petition further alleged that the services were rendered at the special instance and request of the defendant and were reasonably worth five thousand dollars. "These are apt and appropriate averments in a suit upon a *quantum meruit*, and have no place in a petition based upon an express contract, and they clearly and unmistakably show the pleader's intention to rely upon a *quantum meruit* and not upon a contract."]

[1] Higgins *v.* Germaine, 1 Mont. 230.

[In Conrad Nat. Bank *v.* Great Northern Ry. Co. (1900), 24 Mont. 178, 61 Pac. 1, the court said: "It is not necessary to allege a promise to pay where the facts as alleged imply a promise, as where the board, food, lodgings, etc., are furnished to defendant upon request; but where the furnishing or delivery is to a third person, upon defendant's request, then, nothing further appearing, no promise on the part of the defendant to pay is implied; for a furnishing or delivery to a third party, though upon defendant's request, does not, as a matter of law, imply an undertaking by defendant to pay. . . . Either the express promise should be alleged, or the facts from which it may be implied, as that the credit was extended to the employer and not to the employee (Chitty on Pleading, pp. 308, 356); or the allegation should have been made generally that the food, board, lodging, and merchandise were furnished to the employer at its request." See also Voight *v.* Brooks (1897), 19 Mont. 374, 48 Pac. 549.]

[2] Wills *v.* Wills, 34 Ind. 106, 107, 108.

[In Cox *v.* Peltier (1902), 159 Ind. 355, 65 N. E. 6, it was held that a complaint on an undertaker's bill, which alleges that a coffin was furnished and services rendered "at the special instance and request" of the defendant, sufficiently charges an implied promise on defendant's part to pay the reasonable value thereof.

The Supreme Court of Minnesota, in Oevermann *v.* Loebertmann (1897), 68 Minn. 162, 70 N. W. 1084, said: "It is not necessary to plead implied promises." See also Hurlbut *v.* Leper (1900), 12 S. D. 321, 81 N. W. 631. Here it was held that a complaint alleging that "prior to the 22d day of March, 1896, the plaintiff performed work and labor as a teamster and laborer for the defendant, four and one-third months, at $40 per month," and claiming a balance of $92.65, with interest at seven per cent per annum, does not purport to allege an express contract but

for the value of goods sold, etc., the same court, while passing upon the sufficiency of a complaint which was substantially in the form of an old common count without a request or a promise averred, used the following language: "In all these instances the law implies the promise from the facts stated, and our statute simply requires the statement of facts; and if upon these facts the law implies a promise, the complaint would be good." [1]

§ 433. *539. **Case of Booth v. Farmers' and Mechanics' Bank (N. Y.).** The question was discussed by the Supreme Court of New York in a very recent decision; and the importance of the case, and the positions taken in the opinion, make it necessary to quote from the judgment at some length. The complaint contained two counts. The second was for money had and received to the plaintiff's use. The first set out the facts in detail, stating a liability which might be considered as resulting from the tortious acts of the defendant, or might be regarded as arising from an implied contract, but omitting to aver any promise. The defendant demurred on the ground that two causes of action had been improperly joined, one on contract, and the other for a tort, — an injury to property. The plaintiff, in answer to this position, claimed that he could elect under the circumstances to sue either for tort or on contract, and that the first cause of action should be treated as of the latter kind, so that there was no misjoinder. The court, however, entirely rejected this claim; and after stating that the ancient assumpsit and case were in many instances concurrent remedies for injuries to personal property; that in assumpsit the pleader must always have alleged that the defendant "undertook and promised," etc., and a breach of that promise, while in case the declaration was substantially the same except that the allegation of an undertaking and promise was omitted; that in the first count this averment is wanting, and "it is therefore *a count in case*," — proceeded as follows: "If the plaintiff is right in supposing that the law implied a promise by the bank not to satisfy the judgment after

only an implied contract. A recent Oregon case — Waite *v.* Willis (1902), 42 Ore. 288, 70 Pac. 1034 — holds that it is not necessary to allege a fictitious promise.

It was held in Bates-Farley Bank *v.* Dismukes (1899), 107 Ga. 212, 33 S. E. 175, that where one has received money which equitably belongs to another, an action lies in assumpsit, but such action is *not* founded upon the idea of a *contract*, but upon the idea of an *obligation* to refund, and no privity need be shown.]

[1] Gwaltney *v.* Cannon, 31 Ind. 227.

it was assigned to him, he was bound to allege that the bank undertook and promised not to satisfy, etc., in order to make it a count on contract. . . . The codifiers, while proposing to abolish the distinction between forms of action, found it impossible or impracticable in many cases to effect that object; and this case illustrates their failure in at least one class of cases. When case and assumpsit were at the common law concurrent remedies, the form of action that the pleader selected was determined, as I have shown, by the insertion or omission from the declaration of the allegation that the defendant 'undertook and promised.' This right of selection remains; and whether the action is tort or assumpsit must be determined by the same criterion. If this is not so, then the right of election is taken away. If taken away, which of the two is left? An action on contract cannot be joined with one in tort. How are we to determine whether the action is one on contract or in tort, unless the pleader by averment alleges the making of the contract, and demands damages for a breach in the one case, or by the omission of such an averment makes it an action in tort? I know of no more certain or convenient criterion by which to determine the class to which a cause of action belongs than the one suggested. If some such rule is not established, the question of misjoinder will arise in every case in which at the common law assumpsit and case were concurrent remedies."[1]

§ 434. *540. **Conclusions.** It is very evident from the foregoing collection of decisions that the courts have, by an overwhelming preponderance of authority, accepted the simple requirement of the codes, and have not destroyed its plain import by borrowing the notion of a fictitious promise from the common-law theory of pleading. The practical rule may be considered as settled, that, in all instances where the right of

[1] Booth *v.* Farmers' & Mech. Bk. of Rochester, 1 N. Y. S. C. 45, 49, 50, per Mullin J. It is very remarkable that the judge makes no reference whatever to the prior cases of Farron *v.* Sherwood and Cropsey *v.* Sweeney, which are decisive of the question involved. A promise need not be alleged, and if alleged a denial of it would raise no material issue, where the *facts* have been averred from which the liability, represented by the fiction of a promise, arises. De la Guerra *v.* Newhall, 56 Cal. 21; Mackey *v.* Auer, 8 Hun, 180; a *mere* allegation of indebtedness, however, is not sufficient: Moore *v.* Hobbs, 79 N. C. 535. When a party to an express contract may sue upon an implied contract, and the proper allegations in such case, see Emslie *v.* Leavenworth, 20 Kan. 562; action for labor and materials, see Stephenson *v.* Ballard, 50 Ind. 176; Jones *v.* Mial, 79 N. C. 164.

action is based upon a duty or obligation of the adverse party which the common law denominates an implied contract, it is no longer *necessary* to aver a promise, but it is enough to set out the ultimate facts from which the promise would have been inferred. This being so, we must go a step farther. If it is not *necessary* to make such an allegation, then it is not *proper* to do so; although some of the judicial opinions, from a failure to apprehend the true grounds of the rule, would seem to permit, while they do not require, the averment. A promise need not be alleged because none was ever made: the facts constituting the cause of action are alone to be stated, and this promise is not one of those facts; it is simply a legal inference, contrived for a very technical purpose to meet the requirements of form in the ancient legal actions. The same reason which shows that the averment is unnecessary demonstrates that it is improper, that it violates a fundamental doctrine of the new theory; and if an harmonious system is ever to be constructed upon the basis of the reform legislation, this doctrine should be strictly enforced.

§ 435. *541. **Criticism of Booth v. Farmers' and Mechanics' Bank.** The only recent case which is in direct conflict with these views is the one last quoted, Booth *v.* Farmers' and Mechanics' Bank; and it seems to demand some comment. Perhaps there cannot be found in the current reports a more striking example of exalting form above substance, and of repealing an express statutory provision by judicial construction, than is shown in this decision. The learned judge virtually admits that the text of the code is opposed to his conclusions, when he assumes that the codifiers failed to accomplish the results which they intended. It may be remarked that he speaks of the statute as though it were entirely the work of the "codifiers," and he seems to ignore the authority of the legislature which made it a law. But are the common-law notion of an implied undertaking and the arbitrary requisite of alleging this fictitious promise such necessary conceptions, are they so involved in the essential nature of jurisprudence, that it is impossible or impracticable for the legislature to change or to abolish them? The very suggestion is its own answer. Nothing in our ancient law was more thoroughly technical and arbitrary, more completely a mere matter of form, without even the shadow of substantial and necessary existence, than this very notion of a certain kind of legal liability being

represented as arising from an implied promise, and the accompanying rule that the promise thus imagined must be averred as though it were actually made. It was shown in a former part of this section that the action of assumpsit was not even invented as an instrument by which to enforce the liability thus conceived of; but the fiction of an implied promise was itself contrived in order that the liability might be enforced by the already existing action of assumpsit, in which the allegation of a promise was the distinctive feature. The error of the opinion under review is, that it treats these matters of arbitrary form, these fictitious contrivances of the old pleaders, as though they subsisted in the nature of things, and were beyond the reach of legislative action. The difficulty, suggested by the learned judge, of being unable to distinguish between an action of tort and one of contract, in order that an election might be made between them, exists only in imagination. If we will look at the matter as it really is, throwing aside the old technicalities and fictions, *there is plainly no necessity for any such distinction.* If the pleader unites a cause of action upon express contract with a cause of action consisting of facts, from which under the former system a promise might have been implied, he has already made his election, — all the election that is needed, — and there would be no possibility of any subsequent change in or departure from this original theory of his complaint. The only practical difference which could ever arise from treating his second cause of action as though founded upon tort would be the power sometimes given of arresting the defendant either on mesne or final process, and this power would plainly have been surrendered. To sum up the foregoing criticism, the whole course of reasoning pursued by the learned judge assumes that the most technical, arbitrary, and fictitious distinctions between the ancient *forms* of action are still subsisting; it does not merely ignore the legislation which has abrogated those distinctions, but it expressly denies the ability of the legislature to accomplish such a result. This is not interpreting, it is repealing, a statute. I have dwelt upon this case longer perhaps than it intrinsically merits; but I have done so because the principles announced in it, if generally followed, would sap the very foundations of the reformed procedure, and prevent the erection of any harmonious and symmetrical system upon the basis of its fundamental doctrines.

§ 436. *542. (2) **Common Counts under the Codes.** Is a complaint or petition, substantially the same in its form and its allegations with the old common or general count in assumpsit, in accordance with the fundamental principles of the new procedure, and can it now be regarded as a good pleading? The courts have almost unanimously answered this question in the affirmative, and have held that such complaints or petitions sufficiently set forth a cause of action in the cases where the declarations which they imitate would have been proper under the former practice.[1] Notwithstanding the imposing array of

[1] I have collected in this note the leading cases which sustain the position in the text. Allen *v.* Patterson, 7 N. Y. 476; Meagher *v.* Morgan, 3 Kan. 372; Clark *v.* Fensky, 3 Kan. 389; Carroll *v.* Paul's Ex., 16 Mo. 226; Brown *v.* Perry, 14 Ind. 32; Kerstetter *v.* Raymond, 10 Ind. 199; Farron *v.* Sherwood, 17 N. Y. 227, 229; Hosley *v.* Black, 28 N. Y. 438; Hurst *v.* Litchfield, 39 N. Y. 377; Green *v.* Gilbert, 21 Wis. 395; Evans *v.* Harris, 19 Barb. 416; Grannis *v.* Hooker, 29 Wis. 65, 66, 67; Cudlipp *v.* Whipple, 4 Duer, 610; Bates *v.* Cobb, 5 Bosw. 29; Adams *v.* Holley, 12 How. Pr. 326; Betts *v.* Bache, 14 Abb. Pr. 279; Sloman *v.* Schmidt, 8 Abb. Pr. 5; Goelth *v.* White, 35 Barb. 76; Stout *v.* St. Louis Tribune Co., 52 Mo. 342; Curran *v.* Curran, 40 Ind. 473; Johnson *v.* Kilgore, 39 Ind. 147; Bouslog *v.* Garrett, 39 Ind. 338; Wolf *v.* Schofield, 38 Ind. 175, 181; Noble *v.* Burton, 38 Ind. 206; Higgins *v.* Germaine, 1 Mont. 230; Gwaltney *v.* Cannon, 31 Ind. 227; Fort Wayne, J. & S. R. Co. *v.* McDonald, 48 Ind. 241, 243; Raymond *v.* Hanford, 6 N. Y. S. C. 312; Fells *v.* Vestvali, 2 Keyes, 152; Pavisich *v.* Bean, 48 Cal. 364; Wilkins *v.* Stidger, 22 Cal. 231; Abadie *v.* Carrillo, 32 Cal. 172; Merritt *v.* Gliddon, 39 Cal. 559, 564. That the common counts may still be used, see also Magee *v.* Kast, 49 Cal. 141; Ball *v.* Fullon, 31 Ark. 379; Jones *v.* Mial, 82 N. C. 252; 79 id. 164; Emslie *v.* Leavenworth, 20 Kan. 562; Jennings Cy. Com'rs *v.* Verbarg, 63 Ind. 107; Dashaway Ass'n *v.* Rogers, 79 Cal. 211; Castagnino *v.* Balletta, 82 Cal. 250; Leeke *v.* Hancock, 76 Cal. 127.

[The use of the common counts has been approved in the following cases: Johnson-Brinkman Co. *v.* Bank (1893), 116 Mo. 558, 22 S. W. 813; Fox *v.* Easter (1900), 10 Okla. 527, 62 Pac. 283; Willard *v.* Carrigan (1902), Ariz., 68 Pac. 538; Livingstone *v.* School District (1898), 11 S. D. 150, 76 N. W. 301; Brown *v.* Board of Education (1894), 103 Cal. 531, 37 Pac. 503; Snapp *v.* Stanwood (1898), 65 Ark. 222, 45 S. W. 546; Goodman *v.* Alexander (1901), 165 N. Y. 289, 59 N. E. 145; Hatch *v.* Leonard (1901), 165 N. Y. 435, 59 N. E. 270; Vanderbeek *v.* Francis (1903), 75 Conn. 467, 53 Atl. 1015; Messmer *v.* Block (1898), 100 Wis. 664, 76 N. W. 598; Burton *v.* Rosemary Co (1903), 132 N. C. 17, 43 S. E. 480; Kilpatrick-Koch Dry-Goods Co. *v.* Box (1896), 13 Utah, 494, 45 Pac. 629; Pleasant *v.* Samuels (1896), 114 Cal. 34, 45 Pac. 998; Jenney Electric Co. *v.* Branham (1896), 145 Ind. 314, 41 N. E. 448; Minor *v.* Baldridge (1898), 123 Cal. 187, 55 Cal. 783; Nichols *v.* Randall (1902), 136 Cal. 426, 69 Pac. 26; School Dist. No. 9 *v.* School Dist. No. 5 (1903), 118 Wis. 233, 95 N. W. 148.

See the following cases in respect to the proper method of pleading the common counts and implied contracts: Glover *v.* Henderson (1893), 120 Mo. 367, 25 S. W. 175; Fox *v.* Easter (1900), 10 Okla. 527, 62 Pac. 283; Hatch *v.* Leonard (1901), 165 N. Y. 435, 59 N. E. 270; Goodman *v.* Alexander (1901), 165 N. Y. 289, 59 N. E. 145; Warder *v.* Seitz (1900), 157 Mo. 140, 57 S. W. 537; Hurlbut *v.* Leper (1900), 12 S. D. 321, 81 N. W. 631; Conrad Nat. Bank *v.* Great Northern Ry. Co. (1900), 24 Mont. 178, 61 Pac. 1; Pioneer Fuel Co. *v.* Hager (1894), 57 Minn. 76, 58 N. W. 828; Thompson *v.* Town of Elton (1901), 109 Wis. 589, 85 N. W. 425; Farwell *v.*

judicial authority shown by the citations in the foot-note, the courts of one or two States have refused to follow this course of decision, and have pronounced such forms of complaint or petition to be in direct conflict with the correct principles of pleading established by the codes. Although these few cases cannot be regarded as shaking, or as throwing any doubt upon, the rule so firmly established in most of the States, they may be properly cited in order that all the light possible may be thrown upon this particular question of interpretation.[1]

Murray (1894), 104 Cal. 464, 38 Pac. 199.

The use of the common counts is peculiar in Connecticut. See the following cases in which the subject is discussed: Cummings *v.* Gleason (1900), 72 Conn. 587, 45 Atl. 353; McNamara *v.* McDonald (1897), 69 Conn. 484, 38 Atl. 54; New York Breweries Corporation *v.* Baker (1896), 68 Conn. 337, 36 Atl. 785.

The common counts are available in cases where they would have been so at common law: Barrere *v.* Somps (1896), 113 Cal. 97, 45 Pac. 177. They are available against a municipal corporation as well as against a private party: Brown *v.* Board of Education (1894), 103 Cal. 531, 37 Pac. 503. An action for money had and received may be maintained not only in case of the actual receipt by defendant of money belonging to the plaintiff, but where anything is received as, or in lieu of, money: Snapp *v.* Stanwood (1898), 65 Ark. 222, 45 S. W. 546.]

[1] Foerster *v.* Kirkpatrick, 2 Minn. 210, 212; Bowen *v.* Emmerson, 3 Ore. 452. The complaint in the first of these cases was, "that the above-named defendants are justly indebted to the plaintiff in the sum of, etc., on account for goods, wares, and merchandise sold and delivered by the plaintiff to the defendants at the special instance and request of the defendants, wherefore," etc.; and it will be noticed that this is fuller than several of the forms before quoted, since it alleges a request. In sustaining a demurrer to this complaint, the court held it defective, because it contained (1) no statement of the time of sale, and (2) no averment that the goods were of the price or value of the sum mentioned, or that the defendants promised to pay that sum, and laid down the general doctrine in the following manner: "In actions for goods sold and delivered, it is essential that one or the other of these allegations should be made. Without it the allegation of indebtedness is a mere conclusion of law unsupported by any fact. The defendant's liability grows out of the fact that the goods were either worth the amount of the claim, or else that they promised to pay that amount. If they were worth the amount, the law implies a promise. Without one or the other of these allegations, there appears no consideration to support the pretended indebtedness." In Bowen *v.* Emmerson the Supreme Court of Oregon pronounced the use of the general count in assumpsit to be entirely inconsistent with the reformed theory of pleading, and expressly refused to follow the decision made in Allen *v.* Patterson. The opinion is a clear and very strong argument in favor of the simple and natural modes of pleading provided by the codes.

[In the recent case of Hammer *v.* Downing (1901), 39 Ore. 504, 65 Pac. 17, the court said: "Under the code, as construed by this court, the mode of statement employed by the 'common counts' known to the common law is inappropriate and insufficient; it being deemed essential to set out the facts from which the cause of action arises, and the proofs must extend to and comprehend all the items going to the establishment of such accumulation."

In Minnesota, however, the court does not take so radical a position. In Pioneer Fuel Co. *v.* Hager (1894), 57 Minn. 76, 58 N. W. 828, the court said: "We are of opinion that the courts in the code States have sacrificed the principles of code

§ 437. *543. **Use Sanctioned also where Obligation is Express.** Not only have the courts in this manner sanctioned the use of the common counts as appropriate modes of setting forth the plaintiff's cause of action; they have also held that another rule of the old practice is still retained by the codes. The rule thus declared to be in force is the following: When the plaintiff has entered into an express contract with the defendant, and has fully performed on his part, so that nothing remains unexecuted but the defendant's obligation to pay, he may if he please sue upon the defendant's implied promise to make such payment, rather than upon the express undertaking of the original contract; and to that end he may resort to a complaint or petition identical with the ancient common counts; except, as has already been shown, the averment of a promise may, and according to

pleading more than they ought to have done in adopting this common-law formula at all, and that we should not outdo the common law itself by reducing the formula still more and making it still more in conflict with code principles. The complaint must at least be sufficient at common law, which it is not."

But in Nebraska the practice of using the common counts has been condemned. The court of that State said in Penn Mutual Life Ins. Co. *v.* Conoughy (1898), 54 Neb. 123, 74 N. W. 422, "The Code of Civil Procedure (sec. 92) requires a pleader to state the facts which constitute the cause of action or defence in ordinary and concise language; and the practice of adding a common count in a pleading is one not contemplated by the code."

Other courts have criticised the use of this form of pleading, but have nevertheless adhered to it. Thus the Supreme Court of California said, in Minor *v.* Baldridge (1898), 123 Cal. 187, 55 Cal. 783: "The mode of pleading is inconsistent with our code, and it may be a matter of regret that it was ever tolerated, but the innovation is not so great if such complaint must fall before a special demurrer, which is like a motion to require a pleader to make his pleadings more definite, which practice prevails in some States."

A similar view was expressed by the Supreme Court of Wisconsin in Thomson *v.* Town of Elton (1901), 109 Wis. 589, 85 N. W. 425: "At most the complaint was open to a motion to make more definite and certain. In a complaint for money had and received under the old system of pleading, the facts were pleaded according to their legal effect, and it has been repeatedly held that a statement of facts good at the common law in actions like this is sufficient under the code. . . . It is possible that the framers of the code did not contemplate such a result of their work when they said, 'The complaint shall contain a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition;' but such construction was adopted by the courts in the State from which we took the code, before its adoption here, though at a time when there was a strong inclination to hold on to old forms and ingraft them on to the new system as far as possible. That was done, and it is believed the courts went beyond reason in some cases."

And in Colorado the court held in Kimball *v.* Lyon (1893), 19 Colo. 266, 35 Pac. 44, that while pleading in the form of the common counts is not favored by the code, yet objection can be made thereto only by special demurrer, by motion for a copy of the account sued on or for a bill of particulars.]

the better opinion *should*, be omitted.[1] This doctrine is sup-

[1] Farron *v.* Sherwood, 17 N. Y. 227, 229; Hosley *v.* Black, 28 N. Y. 438; Hurst *v.* Litchfield, 39 N. Y. 377; Atkinson *v.* Collins, 9 Abb. Pr. 353; Evans *v.* Harris, 19 Barb. 416; Green *v.* Gilbert, 21 Wis. 395, an action to recover for the part performance of an express contract, the plaintiff having been prevented by sickness from completing; Carroll *v.* Paul's Ex., 16 Mo. 226; Brown *v.* Perry, 14 Ind. 32; Kerstetter *v.* Raymond, 10 Ind. 199; Stout *v.* St. Louis Tribune Co., 52 Mo. 342; Friermuth *v.* Friermuth, 46 Cal. 42; Raymond *v.* Hanford, 6 N. Y. S. C. 312; Fells *v.* Vestvali, 2 Keyes, 152; Ashton *v.* Shepherd, 120 Ind. 69. In Sussdorf *v.* Schmidt, 55 N. Y. 319, 324, the complaint alleged an agreed compensation for services; but, at the trial, the plaintiff was permitted to prove their value as upon a *quantum meruit*, and this was held no error, or at most an immaterial variance; but, *per contra*, in Davis *v.* Mason, 3 Ore. 154, it was held that in an action for services, the complaint stating an express contract to pay a stipulated sum, the plaintiff cannot prove and recover their value upon a *quantum meruit*. In Farron *v.* Sherwood, which is, perhaps, the leading case, the doctrine was thus announced by Strong J. (p. 229): "The case is therefore within the well-settled rule, that when there is a special agreement, and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either upon this implied assumpsit, or on the express agreement. A new cause of action, upon such performance, arises from this legal duty in like manner as if the act done had been done upon a general request, without an express agreement. This rule is not affected by the code. The plaintiff might, as he has done, rest his action on the legal duty, and his complaint is adapted to and contains every necessary element of that cause of action." In Kerstetter *v.* Raymond, the Supreme Court enumerated the instances in which the general or common count was a proper means of suing upon an express contract between the parties, and declared that they were all retained by the codes. These instances are, (1) when the plaintiff has fully executed, and the time of payment is passed, the measure of damages being the stipulated price; (2) when the special contract has been altered or deviated from by common consent; (3) when the plaintiff has performed a part, and has been prevented from performing the whole by the act of the defendant, or by the act of the law; (4) when the plaintiff has not fully complied with the terms of the contract, but, professing to act under it, has done for or delivered to the other party something of value to him which he has accepted. This last doctrine is not universally accepted in the broad terms here stated; but it is the settled rule in Indiana. See Lomax *v.* Bailey, 7 Blackf. 599.

[Held, in Jenney Electric Co. *v.* Branham (1896), 145 Ind. 314, 41 N. E. 448, that a recovery may be had upon the common counts notwithstanding the evidence shows a special contract. But in Duncan *v.* Gray (1899), 108 Ia. 599, 79 N. W. 362, no recovery was allowed where an implied promise was alleged and an express promise proved. So in Roche *v.* Baldwin (1902), 135 Cal. 522, 65 Pac. 459, where a complaint was drawn upon a *quantum meruit*, and evidence produced upon the trial established a contract whereby certain persons named were to fix the amount to be paid for the services rendered, it was held a fatal variance. The *probata* and *allegata* do not at all correspond. See also, to the same effect, McCormick *v.* Interstate, etc. Ry. Co. (1900), 154 Mo. 191, 55 S. W. 252; Burton *v.* Rosemary Co. (1903), 132 N. C. 17, 43 S. E. 480.

In accord with Jenney Electric Co. *v.* Branham (*supra*), it was held in West *v.* Eley (1901), 39 Ore. 461, 65 Pac. 798, that where a complaint is founded upon a *quantum meruit*, the only effect of proving an express contract fixing the price is that the stipulated price becomes the *quantum meruit* in the case. It is not a question of variance, but only of the mode of proof of the allegations of the pleadings. The same rule was applied in Vanderbeek *v.* Francis (1903), 75 Conn. 467, 53 Atl. 1015; Hecla Gold Mining Co. *v.* Gisborn (1899), 21 Utah, 68, 59 Pac. 518; Roberts *v.* Leak (1899), 108 Ga. 806, 33 S. E. 995.

Where an express contract is alleged in

ported by numerous decisions in various States, and it seems to be regarded as still operative in all the circumstances to which it was applicable under the former system.

§ 438. *544. **Criticism of Doctrine.** In the face of this overwhelming array of authority, it may seem almost presumptuous even to suggest a doubt as to the correctness of the conclusions that have been reached with so much unanimity. I cannot, however, consistently with my very strong convictions, refrain from expressing the opinion that, in all these rulings concerning the use of the common counts, the courts have overlooked the fundamental conception of the reformed pleading, and have abandoned its essential principles. This position of inevitable opposition was clearly, although unintentionally, described by one of the judges in language already quoted, when he says, "We are inclined to sanction the latter view, and to hold that the *facts* which, in the judgment of the law, create the indebtedness or liability, need *not* be set forth in the complaint." Now, the "facts which create the liability" are the "facts constituting the cause of action" which the codes expressly require to be alleged; the two expressions are synonymous; and the direct antagonism between what the court says need not be done, and what the statute says must be done, is patent. But the objection to the doctrine of these decisions does not chiefly rest upon such verbal criticism; it is involved in the very nature of the new theory when contrasted with the old methods. In every species of the common count, the averments, by means of certain prescribed formulas, presented what the pleader conceived to be the legal effect and operation of the facts instead of the facts themselves, and the most important of them was always a pure conclusion of law. The count for money had and received well illustrates the truth of this proposition. In the allegation that "the defendant was indebted to the plaintiff for money had and received by him to the plaintiff's use," the distinctive element

the pleading, and the proof shows only an implied contract, no recovery can be had: Pearson *v.* Switzer (1898), 98 Wis. 397, 74 N. W. 214; Walker *v.* Irwin (1895), 94 Ia. 448, 62 N. W. 785; Harrison *v.* Pusteoska (1896), 97 Ia. 166, 66 N. W. 93; Birlant *v.* Cleckley (1896), 48 S. C. 298, 26 S. E. 600; Newton's Executor *v.* Field (1895), 98 Ky. 186, 32 S. W. 623; Price *v.* Price's Executor (1897), 101 Ky. 28, 39 S. W. 429; Huston *v.* Tyler (1897), 140 Mo. 252, 36 S. W. 654; Maddox *v.* Wagner (1900), 111 Ga. 146, 36 S. E. 609. *Contra*, Burgess *v.* Helm (1898), 24 Nev. 242, 51 Pac. 1025; Livingstone *v.* Wagner, 23 Nev. 53, 42 Pac. 290.]

was the phrase "money had and received to the plaintiff's use." This technical expression was not the statement of a *fact*, in the sense in which that word is used by the codes; if not strictly a pure conclusion of law, it was at most a symbol to which a certain peculiar meaning had been given. The circumstances under which one person could be liable to another for money had and received were very numerous, embracing contracts express or implied, and even torts and frauds. The mere averment that the defendant was indebted for money had and received admitted any of these circumstances in its support, but it did not disclose nor even suggest the real nature of the liability, the actual cause of action upon which the plaintiff relied. The reformed theory of pleading was expressly designed to abrogate forever this general mode of averment, which concealed rather than displayed the true cause of action; it requires the facts to be stated, the facts as they exist or occurred, leaving the law to be determined and applied by the court. The same is true of the common count in every one of its phases. A careful analysis would show that the important and distinctive averments were either naked conclusions of law, or the legal effect and operation of the facts expressed in technical formulas to which a particular meaning had been attached, and which were equally applicable to innumerable different causes of action. The rule which permitted the general count in assumpsit to be sometimes used in an action upon an express contract was even more arbitrary and technical, and was wholly based upon fictitious notions. The conception of a second implied promise resulting from the duty to perform the original express promise has no foundation whatever in the law of contract, but was invented, with great subtlety, in order to furnish the ground for a resort to general assumpsit instead of special assumpsit in a certain class of cases. All the reasons in its support were swept away by the legislation which abolished the distinctions between the forms of action, since it was in such distinctions alone that those reasons had even the semblance of an existence. My space will not permit this discussion to be pursued any farther, although much more might be added to the foregoing suggestions. If the principles of pleading heretofore developed in the text are true expressions of the reformed theory, the legislature certainly intended that the facts constituting each cause of action should be alleged as they actually happened, not

by means of any technical formulas, but in the ordinary language of narrative; and it is, as it appears to me, equally certain that the use of the common counts as complaints or petitions is a violation of these fundamental principles.

§ 439. *545. **Further Rules of Pleading to be considered. Outline of Discussion.** From the few general principles which thus constitute the simple foundation of the reformed pleading, there result as corollaries certain subordinate doctrines and practical rules, to the development and illustration of which the remaining portion of the present section will be devoted. The immediate object of these special rules is to enforce in complaints or petitions and answers a conformity with the essential principles upon which the system is based, and at the same time to procure a decision of judicial controversies upon their merits, and not upon any mere technical requirements as to form and mode. They relate to the practical methods which must be pursued in setting forth the causes of action and the defences; and the particular subjects with which they deal are (1) insufficient, incomplete, or imperfect allegations, (2) immaterial and redundant allegations, (3) the doctrine that the cause of action or the defence proved must correspond with the one alleged. Connected with and subsidiary to these topics are the remedies provided for each, and particularly that of amendment, which the codes expressly authorize with the utmost freedom, and also the power of electing between the two modes of setting forth the same cause of action under certain circumstances either as *ex contractu* or as *ex delicto*. Preliminary, however, to the discussion thus outlined, I shall state and very briefly explain a principle which will necessarily affect its whole course, and largely determine its results, — the principle of construction as applied to the pleadings themselves.

§ 440. *546. **Strict Construction of Pleadings Superseded by Liberal Construction.** It was a rule of the common law firmly established and constantly acted upon, — that, in examining and deciding all objections involving either form or substance, every pleading was to be construed strongly against the pleader; nothing could be presumed in its favor; nothing could be added, or inferred, or supplied by implication, in order to sustain its sufficiency. This harsh doctrine, unnecessary and illogical in its original conception, and often pushed to extremes that were

simply absurd, was the origin of the technicality and excessive precision, which, more than any other features, characterized the ancient system in its condition of highest development. All the codes contain the following provision, or one substantially the same: "In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."[1] The evident intent of the legislature in this clause was to abrogate at one blow the ancient dogma, and to introduce in its place the contrary principle of a liberal and equitable construction; that is, a construction in accordance with the general nature and design of the pleading as a whole. This mode of interpretation does not require a leaning *in favor* of the pleader in place of the former tendency against him; it demands a natural spirit of fairness and equity in ascertaining the meaning of any particular averment or group of averments from their relation and connection with the entire pleading and from its general purpose and object. The courts have uniformly adopted this view of the provision; and although in particular instances they may sometimes have departed from it, yet, in their announcement of the *theory*, they have unanimously conceded that the stern doctrine of the common law has been abolished, and that, instead thereof, an equitable mode of construction has been substituted. From the multitudes of decisions which maintain this position with more or less emphasis I select a few examples, and other illustrations will be subsequently given.

§ **441.** *547. **Judicial Approval of Liberal Construction.** The New York Court of Appeals, while construing a complaint, said: "The language is clearly susceptible of this interpretation; and if so, that interpretation should be given in preference to [another which was stated]. If the language admits of the latter interpretation, it may be said to be ambiguous, and that is all. It is not true that under the code, if there be uncertainty in respect to the nature of the charge, it is to be construed strictly against the pleader. By § 159, in the construction of a pleading, its allegations must be liberally construed with a view to substantial justice."[2] The language used by the Supreme Court of Wisconsin in a similar case is still stronger: "Contrary to the common-law rule, every reasonable intendment and presumption is to be made

[1] [See § *434, note 1.]

[2] Olcott *v.* Carroll, 39 N. Y. 436, 438.

in favor of the pleading."[1] The same interpretation is given to the provision in Iowa; the old dogma of leaning against the pleader is abandoned, and a liberal and equitable construction is now the rule.[2] The practical force and operation of this principle, and how much effect it actually produces in the judicial process of construing pleadings, can best be seen by an examination of the decisions in which it has been invoked. A few of them have therefore been selected, and placed in the foot-note.[3]

[1] Morse *v.* Gilman, 16 Wis. 504, 507. See also Hazleton *v.* Union Bk. of Columbus, 32 Wis. 34, 42, 43, which holds that greater latitude of presumption is admitted to sustain a complaint, when objection to it is not made until the trial, after issues have been formed by an answer.

[2] Shank *v.* Teeple, 33 Iowa, 189, 191; Foster *v.* Elliott, 33 Iowa, 216, 223; Gray *v.* Coan, 23 Iowa, 344; Doolittle *v.* Green, 32 Iowa, 123, 124.

[3] McGlasson *v.* Bradford, 7 Bush, 250, 252; Joubert *v.* Carli, 26 Wis. 594; Clay *v.* Edgerton, 19 Ohio St. 549; *supra*, § * 535; Gunn *v.* Madigan, 28 Wis. 158, 164; Robson *v.* Comstock, 8 Wis. 372, 374, 375; Morse *v.* Gilman, 16 Wis. 504. As further examples, see Bushey *v.* Reynolds, 31 Ark. 657; Thompson *v.* Killian, 25 Minn. 111; Ferguson *v.* Va. & T. R. Co., 13 Nev. 184; Childers *v.* Verner, 12 S. C. 1; Wilkins *v.* Moore, 20 Kan. 538; Strong *v.* Hoos, 41 Wis. 659; Whitman *v.* Watry, 44 id. 491; Evans *v.* Neale, 69 Ind. 148; Moore *v.* Moore, 56 Cal. 89; Wilcox *v.* Hausch, 57 id. 139; McAllister *v.* Welker, 39 Minn. 535; Isaacs *v.* Holland, 1 Wash. 54.

[*Construction of Pleadings.*

Pleadings are to be construed liberally with a view to substantial justice between the parties: Guy *v.* McDaniel (1897), 51 S. C. 436, 29 S. E. 196; Cone *v.* Ivinson (1893), 4 Wyo. 203, 31 Pac. 31; McArthur *v.* Clarke Drug Co. (1896), 48 Neb. 899, 67 N. W. 861; Hartzell *v.* McClurg (1898), 54 Neb. 313, 74 N. W. 625; Miller *v.* Bayer (1896), 94 Wis. 123, 68 N. W. 869; South Bend Chilled Plow Co. *v.* Geo. C. Cribb Co. (1897), 97 Wis. 230, 72 N. W. 749; Benolkin *v.* Guthrie (1901), 111 Wis. 554, 87 N. W. 466; Sage *v.* Culver (1895), 147 N. Y. 241, 41 N. E. 513; Dailey *v.* Burlington, etc. Ry. Co. (1899), 58 Neb. 396, 78 N. W. 722; Roberts *v.* Samson (1897), 50 Neb. 745, 70 N. W. 384; Wenk *v.* City of New York (1902), 171 N. Y. 607, 64 N. E. 509; Coatsworth *v.* Lehigh Valley Ry. Co. (1898), 156 N. Y. 451, 51 N. E. 301; Kain *v.* Larkin (1894), 141 N. Y. 144, 39 N. E. 9; United States Saving Co. *v.* Harris (1895), 142 Ind. 226, 40 N. E. 1072; Strong *v.* Weir (1896), 47 S. C. 307, 25 S. E. 157; Waggy *v.* Scott (1896), 29 Ore. 386, 45 Pac. 774; Hood *v.* Nicholson (1896), 137 Mo. 400, 38 S. W. 1095; Vogelgesang *v.* City of St. Louis (1897), 139 Mo. 127, 40 S W. 653; Baird *v.* Citizens' Ry. Co. (1898), 146 Mo. 265, 48 S. W. 78; Ingraham *v.* Lyon (1894), 105 Cal. 254, 38 Pac. 892 (but see California cases cited *infra*, holding that pleadings are to be construed most strongly against the pleader); Hall *v.* Woolery (1898), 20 Wash. 440, 55 Pac. 562, holding that in the absence of a demurrer, a complaint is entitled to a liberal construction; Blumenthal *v.* Pacific Meat Co. (1895), 12 Wash. 331, 41 Pac. 47, to same effect.

The case of Cone *v.* Ivinson (*supra*), 4 Wyo. 203, has a very elaborate discussion of the question of construction. Pomeroy, Bliss, Swan, and Maxwell are all copiously quoted, and the authorities are thoroughly reviewed, a strong dissenting opinion being filed. Upon a rehearing being granted, the case was thoroughly reargued, the court adhering to its original position.

A pleading must be held to allege all the facts that can be implied by fair and reasonable intendment from the facts expressly stated: Sage *v.* Culver (1895), 147 N. Y. 241, 41 N. E. 513; Kain *v.* Larkin (1894), 141 N. Y. 144, 39 N. E. 9; Coatsworth *v.* Lehigh Valley Ry. Co. (1898), 156 N. Y. 451, 51 N. E. 301; Wenk *v.* City of New York (1902), 171 N. Y. 607, 64 N. E. 509; Roberts *v.* Samson (1897),

In a very small number of cases, however, the courts seem to have overlooked this change made by the statute, and have

50 Neb. 745, 70 N. W. 384; Dailey *v.* Burlington, etc. R. R. Co. (1899), 58 Neb. 396, 78 N. W. 722; Miller *v.* Bayer (1896), 94 Wis. 123, 68 N. W. 869.

Where a pleading is assailed for the first time by a demurrer *ore tenus*, it will be construed liberally: National Fire Ins. Co. *v.* Eastern Building & Loan Ass'n (1902), 63 Neb. 698, 88 N. W. 863; First Nat. Bank *v.* Pennington (1899), 57 Neb. 404, 77 N. W. 1084; Holtz *v.* Hanson (1902), 115 Wis. 236, 91 N. W. 663; Werner *v.* Ascher (1893), 86 Wis. 349, 56 N. W. 869; Phillips *v.* Carver (1898), 99 Wis. 561, 75 N. W. 432; Winkler *v.* Racine Wagon, etc. Co. (1898), 99 Wis. 184, 74 N. W. 973.

A pleading attacked for the first time in the Supreme Court on the ground that it does not state a cause of action, will be liberally construed: Omaha Nat. Bank *v.* Kiper (1900), 60 Neb. 33, 82 N. W. 102; Fowler *v.* Phœnix Ins. Co. (1899), 35 Ore. 559, 57 Pac. 421; Roseburg Ry. Co. *v.* Nosler (1900), 37 Ore. 299, 60 Pac. 904. See also First Nat. Bank *v.* Tompkins (1903), — Neb. —, 94 N. W. 717.

When a complaint is attacked after judgment for want of facts to state a cause of action, it must be liberally construed: Mosher *v.* Bruhn (1896), 15 Wash. 332, 46 Pac. 397; Cobb *v.* Lindell Ry. Co. (1899), 149 Mo. 135, 50 S. W. 310; Merrill *v.* Equitable Farm & Stock, etc. Co. (1896), 49 Neb. 198, 68 N. W. 365; American Fire Ins. Co. *v.* Landfare (1898), 56 Neb. 482, 76 N. W. 1068. A decree for plaintiff will cure the inadvertent omission of the word "not" in a complaint: Wyatt *v.* Wyatt (1897), 31 Ore. 531, 49 Pac. 855. See also Montesano *v.* Blair (1895), 12 Wash. 188, 40 Pac. 731; State *ex rel. v.* Renshaw (1902), 166 Mo. 682, 66 S. W. 953; Milner *v.* Harris (1903), — Neb. —, 95 N. W. 682.

Imperfect allegations have frequently been held to be aided by verdict or judgment. See Hall *v.* Southern Pac. Co. (1899), Ariz., 57 Pac. 617; Ades *v.* Levi (1893), 137 Ind. 506, 37 N. E. 388; Philomath *v.* Ingle (1902), 41 Ore. 289, 68 Pac. 803; Chan Sing *v.* City of Portland (1900), 37 Ore. 68, 60 Pac. 718; Mass. Benefit Ass'n *v.* Richart (1896), 99 Ky. 302, 35 S. W. 541; Louisville, etc. R. R. Co. *v.* Lawes (1900), Ky., 56 S. W. 426; Hill *v.* Ragland (1902), — Ky. —, 70 S. W. 634; Salmon Falls Bank *v.* Leyser (1893), 116 Mo. 51, 22 S. W. 504; People's Bank *v.* Scalzo (1894), 127 Mo. 164, 29 S. W. 1032; Nicolai *v.* Krimbel (1896), 29 Ore. 76, 43 Pac. 865; Miller *v.* Hirschberg (1895), 27 Ore. 522, 40 Pac. 506. But it has been held that such aider does not take place where the complaint is radically defective: Nye *v.* Bill Nye Min. Co. (1903), 42 Ore. 560, 71 Pac. 1043. Compare Gustin *v.* Concordia Ins. Co. (1901), 164 Mo. 172, 64 S. W. 128.

When objection is made for the first time on the trial that the complaint does not state facts constituting a cause of action, the pleading will be sustained if possible: Johnston *v.* Spencer (1897), 51 Neb. 198, 70 N. W. 982; Chicago, Burlington, etc. R. R. Co. *v.* Spirk (1897), 51 Neb. 167, 70 N. W. 926; Peterson *v.* Hopewell (1898), 55 Neb. 670, 76 N. W. 451; Butts *v.* Kingman & Co. (1900), 60 Neb. 224, 82 N. W. 854; Anderson *v.* Alseth (1895), 6 S. D. 566, 62 N. W. 435; Whitbeck *v.* Sees (1898), 10 S. D. 417, 73 N. W. 915; Broyhill *v.* Norton (1903), 175 Mo. 190, 74 S. W. 1024; Seibert *v.* Minneapolis, etc. Ry. Co. (1894), 58 Minn. 39, 59 N. W. 822; Commonwealth Title Ins. Co. *v.* Dokko (1898), 71 Minn. 533, 71 N. W. 891.

When objections are made to the introduction of evidence on the ground that the petition fails to state a cause of action, the pleading will be liberally construed: Zug *v.* Forgan (1902), Neb., 90 N. W. 1129; Fire Ass'n of Philadelphia *v.* Ruby (1900), 60 Neb. 216, 82 N. W. 629; Norfolk Beet Sugar Co. *v.* Hight (1898), 56 Neb. 162, 76 N. W. 566.

Under the liberal rule of construction the word "wages" was construed as though it read "damages" when the latter should have been used: Tiffin Glass Co. *v.* Stoehr (1896), 54 O. St. 157, 43 N. E. 279; the word "pain" was construed to mean "paid:" Connor *v.* Becker (1901), 62 Neb. 856, 87 N. W. 1065; the complaint

expressly declared that the construction must be adverse to the pleader, thus recognizing the ancient rule as still in force;[1]

and reply were read together to determine the intent of the pleader: Lavery *v.* Arnold (1899), 36 Ore. 84, 58 Pac. 524; "where a complaint contains words which, if properly arranged, might state two causes of action, it will be construed as stating only the one principally intended:" Santa Fe, etc. Ry. Co. *v.* Hurley (1894), Ariz., 36 Pac. 216; where a complaint may be treated as setting out a cause of action either *ex contractu* or *ex delicto*, and the action would be barred if treated as *ex delicto*, it will be treated as *ex contractu*: St. Louis, etc. R. R. Co. *v.* Sweet (1897), 63 Ark. 563, 40 S. W. 463; the words "entered into" were construed to equal "executed," and the allegation of the execution of a bond was held to include the performance of every act essential to the making and approval of the bond: Fire Ass'n of Philadelphia *v.* Ruby (1900), 60 Neb. 216, 82 N. W. 629; an allegation that a child was six years of age, held to include an allegation that said child was unmarried, in an action for the death of an unmarried minor child: Baird *v.* Citizens' Ry. Co. (1898), 146 Mo. 265, 48 S. W. 78; facts not conclusions control in construction of pleading: Spargur *v.* Romine (1893), 38 Neb. 736, 57 N. W. 523; where it is not clear whether the action is legal or equitable, it should be so construed as to maintain the jurisdiction of the court: Adams *v.* Hayes (1897), 120 N. C. 383, 27 S. E. 47; a pleading in the form of an indictment will be considered as a complaint if the necessary facts are alleged: St. Louis, etc. R. R. Co. *v.* State (1901), 68 Ark. 561, 60 S. W. 654.

The Supreme Court of Missouri, in the case of Hood *v.* Nicholson (1896), 137 Mo. 400, 38 S. W. 1095, used the following language respecting the limits applicable to the liberal construction of pleadings: "Courts, to prevent delays and avoid hardships, will disregard all defects in pleadings which do not affect the substantial rights of the adverse party, and will disregard form and look to the substance and at all times give such interpretation to language used as fairly appears to have been intended by its author; yet it is not authorized to rob, by construction, language of its plain and obvious meaning, or of the fair, reasonable, and obvious conclusion to be deduced therefrom, to enable its author to relieve himself from a position of embarrassment where by its use he has voluntarily placed himself."

In Chicago, etc. R. R. Co. *v.* Haywood (1897), 102 Ia. 392, 71 N. W. 358, the court said: "Where the right of recovery is based upon a written contract, as in this case, and the averment of facts constituting another cause of action is necessary to bring the remedy sought within the terms of the contract, then it will be assumed that only one cause of action was intended. In other words, parties are presumed to follow the requirements of statute in preparing their pleadings, and a single count or division of a petition will not be construed to state two causes of action unless the purpose of the pleader so to do clearly appears."]

[1] Commonwealth *v.* Cook, 8 Bush, 220, 224; Wright *v.* McCormick, 67 N. C. 27. And see Rogers *v.* Shannon, 52 Cal. 99; Henley *v.* Wilson, 77 N. C. 216 (common-law rule applied; ambiguous language strictly construed against the pleader; no intendments in his favor); Jaffe *v.* Lilienthal, 86 Cal. 91; Loehr *v.* Murphy, 45 Mo. App. 519.

[In the following cases it is held that the pleadings are to be construed most strongly against the pleader: Mays *v.* Carman (1902), Ky., 66 S. W. 1019; Friend *v.* Allen (1900), Ky., 56 S. W. 418; Goff *v.* Marsden Co. (1900), Ky., 56 S. W. 667; Fox *v.* Mackey (1899), 125 Cal. 54, 57 Pac. 672; California Navigation Co. *v.* Union Transp. Co. (1898), 122 Cal. 641, 55 Pac. 591; Siskiyon Lumber Co. *v.* Rostel (1898), 121 Cal. 511, 53 Pac. 1118; Heller *v.* Dyerville Mfg. Co. (1897), 116 Cal. 127, 47 Pac. 1016; Callahan *v.* Loughran (1894), 102 Cal. 476, 36 Pac. 835 (but see Ingraham *v.* Lyon (1894), 105 Cal. 254, 38 Pac. 892, where the liberal view is announced); Holt *v.* Pearson (1895), 12 Utah, 63, 41 Pac. 560 (expressly overruled in Mangum *v.* Bullion, etc. Co. (1897), 15 Utah, 534, 50 Pac. 834); Johnston *v.* Meaghr (1897), 14 Utah, 426, 47 Pac. 861, holding that, on demurrer, pleadings are

while in some others the judicial action was clearly based upon that old doctrine, although it was not formally announced in the opinions.[1] Under the light of this beneficent but new principle, that pleadings are to be construed fairly, equitably, and liberally, with a view to promote the ends of justice, and not enforce any arbitrary and technical dogmas, I shall proceed to consider, in the order already indicated, the several practical rules mentioned above, which regulate the manner of setting forth the cause of action or the defence.

§ 442. *548. **I. Insufficient, Imperfect, Incomplete, or Informal Allegations, and the Mode of Objecting to and Correcting them. Distinction between Imperfect and wholly Deficient Allegations.** The codes clearly intend to draw a broad line of distinction between an entire failure to state any cause of action or defence, on the one side, which is to be taken advantage of either by the general demurrer for want of sufficient facts, or by the exclusion of all evidence at the trial, and the statement of a cause of action or a defence in an insufficient, imperfect, incomplete, or informal manner, which is to be corrected by a motion to render the pleading more definite and certain by amendment. The courts have, in the main, endeavored to preserve this distinction, but not always with success; since averments have sometimes been treated as merely incomplete, and the pleadings containing them have been sustained on demurrer, which appeared to state no cause of action or defence whatever; while, in other instances, pleadings have been pronounced wholly defective and therefore bad on demurrer, or incapable of admitting any evidence, the allegations of which appear to have been simply imperfect or incomplete. It is undoubtedly difficult to discriminate between

to be construed most strongly against the pleader, but, after trial, in the pleader's favor; Oregon & Cal. R. R. Co. *v.* Jackson County (1901), 38 Ore. 589, 64 Pac. 307, holding that, when tested by demurrer, the allegations of a pleading are to be construed most strongly against the pleader, but after pleading over all intendments must be indulged in favor of its sufficiency; Mellott *v.* Downing (1901), 39 Ore. 218, 64 Pac. 393 (to the same effect); Patterson *v.* Patterson (1902), 40 Ore. 560, 67 Pac. 664 (to same effect); Conrad Nat. Bank *v.* Great Northern Ry. Co. (1900), 24 Mont. 178, 61 Pac. 1; Fidelity & Casualty Co. *v.* Vandyke (1896), 99 Ga. 542, 27 S. E. 709.

In Blumenthal *v.* Pacific Meat Co. (1895), 12 Wash. 331, 41 Pac. 47, the court seems to favor a somewhat strict construction when the pleading is attacked by motion or demurrer.]

[1] For examples, see Hathaway *v.* Quinby, 1 N. Y. S. C. 386; Doyle *v.* Phœnix Ins. Co., 44 Cal. 264; Scofield *v.* Whitelegge, 49 N. Y. 259, 261; Holmes *v.* Williams, 16 Minn. 164, 168.

these two conditions of partial and of total failure; and it is utterly impossible to frame any accurate general formula which shall define or describe the insufficiency, incompleteness, or imperfectness of averment intended by the codes, and shall embrace all the possible instances within its terms. By a comparison of the decided cases, some notion, however, may be obtained of the distinction, recognized if not definitely established by the courts, between the absolute deficiency which renders a pleading bad on demurrer or at the trial, and the incompleteness or imperfection of allegation which exposes it to amendment by motion; and in this manner alone can any light be thrown upon the nature of the insufficiency which is the subject of the present inquiry.

§ 443. *549. **Motion the Proper Method of Attacking Pleadings which are merely Imperfect.** The true doctrine to be gathered from all the cases is, that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective, such insufficiency pertaining, however, to the form rather than to the substance, the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment.[1] From the citations in

[1] People *v.* Ryder, 12 N. Y. 433; Prindle *v.* Caruthers, 15 N. Y. 425; Flanders *v.* McVickar, 7 Wis. 372, 377; Robson *v.* Comstock, 8 Wis. 372, 374, 375; Kuehn *v.* Wilson, 13 Wis. 104, 107, 108; Morse *v.* Gilman, 16 Wis. 504, 507; Kimball *v.* Darling, 32 Wis. 675, 684; Reeve *v.* Fraker, 32 Wis. 243; Hazleton *v.* Union Bk. of Columbus, 32 Wis. 34, 42, 43; Horn *v.* Ludington, 28 Wis. 81, 83 (a motion made and granted, — a good illustration of defective allegations added to); Clay *v.* Edgerton, 19 Ohio St. 549; Winter *v.* Winter, 8 Nev. 129 (statement of a material fact by way of recital); Saulsbury *v.* Alexander, 50 Mo. 142, 144; Corpenny *v.* Sedalia, 57 Mo. 88 (a motion in arrest of judgment not proper when a cause of action is stated however defectively); Pomeroy *v.* Benton, 57 Mo. 531, 550; Hale *v.* Omaha Nat. Bank, 49 N. Y. 626, 630; Barthol *v.* Blakin, 34 Iowa, 452; Russell *v.* Mixer, 42 Cal. 475; Slattery *v.* Hall, 43 Cal. 191 (objection that a complaint is ambiguous cannot be raised under a general demurrer); Blasdel *v.* Williams, 9 Nev. 161; Smith *v.* Dennett, 15 Minn. 81; Lewis *v.* Edwards, 44 Ind. 333, 336; Snowden *v.* Wilas, 19 Ind. 10; Lane *v.* Miller, 27 Ind. 534; Johnson *v.* Robinson, 20 Minn. 189, 192; Mills *v.* Rice, 3 Neb. 76, 86, 87; School Trs. *v.* Odlin, 8 Ohio St. 293, 296. A quotation from a few of these cases will show the exact position taken by the courts in reference to the extent of defect which can and must be cured by motion; and I select from among those which have discussed the subject in the most general manner. In Prindle *v.* Caruthers, 15 N. Y. 425, the complaint set out a copy of a written contract made by defendant, and reciting that, "for value received," he "promised to pay H. C. or E. C.," etc.; but it did not, in any other manner, allege a consideration. It also stated that "the con-

the foot-note, it is clear that the courts have, with a considerable degree of unanimity, agreed upon this rule, and have in most

tract is, and was prior to, etc., the property of the plaintiff by purchase," but did not disclose from whom the transfer was made, nor the consideration. The defendant demurring for want of sufficient facts, the court held that the copy of the contract as set forth contained a sufficient allegation of a consideration, and added: "The remedy for all defects of this nature is by motion to make the faulty pleading more definite and certain; that proceeding has taken the place of demurrers for want of form." Robson *v.* Comstock, 8 Wis. 372, was an action for malicious prosecution. The complaint merely alleged that the defendant, maliciously and without probable cause, procured the plaintiff to be arrested and to be imprisoned, to his damage, etc., but did not state the nature of the indictment, nor in what the charge consisted, nor even that it was false, nor that there had been a trial, nor that the plaintiff had been discharged or acquitted. The defendant answered by a general denial; and, at the trial, the plaintiff had a verdict. On appeal from the judgment, the court, by Cole J., held (pp. 374, 375) that the complaint was exceedingly defective and informal in its manner of setting out the cause of action; but it was cured by the verdict. The plaintiff must have proved a discharge or acquittal, or else he could not have obtained a verdict. The code requires a liberal construction; and the defendant should have moved that the pleading be made definite and certain by supplying the omitted averments. In Morse *v.* Gilman, 16 Wis. 504, the complaint alleged that defendant entered into a written contract with one Merrick for grading at a specified price per cubic yard; that the work had been completed by M. according to the agreement; that there was due thereon a certain named sum; and that the demand had been assigned by M. to the plaintiff; but it did not to any further extent state the provisions of the contract. At the trial, all evidence on the part of the plaintiff was excluded, and the complaint was dismissed. In reversing this ruling, the court, by Dixon C. J., said (p. 507): "That the contract between M. and the defendant is not set out, as it undoubtedly should have been, is not an objection which can be taken in this way. The remedy of the defendant for this defect is by motion to require the complaint to be made more definite and certain by amendment. A complaint to be overthrown by demurrer, or by objection to evidence, must be wholly insufficient. If any portion of it, or to any extent it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially these facts may be presented, or however defective, uncertain, or redundant may be the mode of their treatment. Contrary to the common-law rule, every reasonable intendment and presumption is to be made in favor of the pleading; and it will not be set aside on demurrer unless it be so fatally defective, that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever;" citing and approving Cudlipp *v.* Whipple, 4 Duer, 610; Graham *v.* Camman, 5 Duer, 697; Broderick *v.* Poillon, 2 E. D. Smith, 554; Elfrank *v.* Seiler, 54 Mo. 134; Russell *v.* State Ins. Co., 55 Mo. 585; Biddle *v.* Ramsey, 52 Mo. 153. The court, in Mills *v.* Rice, 3 Neb. 76, 86, 87, said that when a petition is uncertain or indefinite in its allegations, when it attempts to set up a good cause of action, but the defect does not go to the length of omitting to state any cause of action, the defendant must move to correct; he cannot take advantage of it by demurrer. The following cases are additional examples, and they generally sustain the distinction stated in the text and the rule there laid down. Ball *v.* Fulton Cy., 31 Ark. 379 (the rule of the text, § * 549, quoted, approved, and followed); Kalckhoff *v.* Zoehrlaut, 40 Wis. 427; Lash *v.* Christie, 4 Neb. 262; Surginer *v.* Paddock, 31 Ark. 528; Aull *v.* Jones, 5 Neb. 500; Farrar *v.* Triplet, 7 id. 237; Dorsey *v.* Hall, 7 id. 460; State *v.* North. Belle Min. Co., 15 Nev. 385; Coon Dist. Tp. *v.* Providence Dist. Tp.

instances applied it to defects and mistakes having the same general features, and have sometimes severely strained the doctrine of liberal construction in order to enforce it. Thus, if instead of alleging the issuable facts the pleader should state the evidence of such facts, or even a portion only thereof, unless the omission was so extensive that no cause of action at all was indicated, or if he should aver conclusions of law, in place of fact, the resulting insufficiency and imperfection would pertain to the form rather than to the substance, and the mode of correction would be by a motion, and not by a demurrer. It is virtually impossible, however, to lay down a dividing-line, so that on the one side shall fall all the errors which are venial, and on the other all those which are fatal. While in most instances the courts have held that a motion is the only means of removing the defect, and therefore that a neglect to make a motion waives all objection without any reference to the stage of the cause, yet in some cases a considerable stress has been laid upon the effect of a verdict in curing the error.[1] And in certain decisions the language of the judges tends to create an unnecessary confusion, and to incorporate an additional element of doubt into the rule,

Dir., 52 Iowa, 287; McCormick *v.* Basal, 46 id. 235; Bradley *v.* Parkhurst, 20 Kan. 462; Walter *v.* Fowler, 85 N. Y. 621; Marie *v.* Garrison, 83 id. 14, 23; Calvo *v.* Davies, 73 id. 211; Kaster *v.* Kaster, 52 Ind. 531; Brookville & C. Turnp. Co. *v.* Pumphrey, 59 id. 78; U. S. Express Co. *v.* Keefer, 59 id. 263; Evansville *v.* Thayer, 59 id. 324; Pennsylvania Co. *v.* Sedwick, 59 id. 336; Rees *v.* Cupp, 59 id. 566; Shaw *v.* Merchants' Nat. Bk., 60 id. 83; Boyce *v.* Brady, 61 id. 432; Sebbitt *v.* Stryker, 62 id. 41; Barrett *v.* Leonard, 66 id. 422; Wiles *v.* Lambert, 66 id. 494; Proctor *v.* Cole, 66 id. 576; Dale *v.* Thomas, 67 id. 570; Earle *v.* Patterson, 67 id. 503; Milroy *v.* Quinn, 69 id. 406; Lee *v.* Davis, 70 id. 464; Smith *v.* Freeman, 71 id. 229; Trayser Piano Co. *v.* Kerschner, 73 id. 183; Ohio & Miss. R. Co. *v.* Collarn, 73 id. 261; Snyder *v.* Baber, 74 id. 47; Gentz *v.* Martin, 75 id. 228; Drais *v.* Hogan, 50 Cal. 121; Jameson *v.* King, 50 id. 132; Los Angeles *v.* Signoret, 50 id. 298; St. Louis & S. F. Ry. Co. *v.* Snaveley, 47 Kan. 637 (motion generally too late when not made until after the case is called for trial); Sukforth *v.* Lord, 87 Cal. 399; Bush *v.* Cella, 52 Ark. 378; Sweet *v.* Desha Lumber, etc. Co. (Ark. 1892), 20 S. W. Rep. 514; Newport Light Co. *v.* Newport (Ky. 1892), 19 S. W. Rep. 188; Sheeks *v.* Erwin, 130 Ind. 31; De Hart *v.* Etnire, 121 Ind. 242; Cockerill *v.* Stafford, 102 Mo. 571.

[1] See Robson *v.* Comstock, 8 Wis. 372, 374, 375; Hazleton *v.* Union Bk. of Columbus, 32 Wis. 34, 42, 43; Clay *v.* Edgerton, 19 Ohio St. 549; Saulsbury *v.* Alexander, 50 Mo. 142, 144; Corpenny *v.* Sedalia, 57 Mo. 88; Pomeroy *v.* Benton, 57 Mo. 531, 550; Blasdel *v.* Williams, 9 Nev. 161; Smith *v.* Dennett, 15 Minn. 81. In Missouri, and in a few other States, a motion in arrest of judgment is permitted by the practice under some circumstances, and the above cases, cited from that State, hold that such a motion is not proper when the petition is simply defective and imperfect in its statement of the cause of action, and should only be made when it wholly fails to set forth any cause of action; the mere imperfection is cured by the verdict.

which is not at best, from its very nature, capable of absolute certainty. In the cases referred to, the courts have declared that if the defendant omits to move to make the pleading more definite and certain, *or to demur*, but answers and goes to trial, the objection is waived.[1] This form of expression is a plain departure from the rule as given above, and is self-contradictory. The very distinctive feature of the class of defects under consideration is, that they do not render a pleading demurrable, but only expose it to amendment by motion. A failure to demur is therefore entirely immaterial; it does not waive anything, because the demurrer if resorted to would have accomplished nothing. Doubt and obscurity alone as to the true meaning and the exact force of the rule can arise from this careless use of language.[2]

[1] Pomeroy *v.* Benton, 57 Mo. 531, 550; Blasdel *v.* Williams, 9 Nev. 161; Smith *v.* Dennett, 15 Minn. 81; Johnson *v.* Robinson, 20 Minn. 189, 192.

[2] [*Imperfect, Incomplete, and Informal Allegations.*

Indefiniteness and uncertainty in a petition are properly reached by motion and not by demurrer: McAdam *v.* Scudder (1894), 127 Mo. 345, 30 S. W. 168; Guthrie *v.* Shaffer (1898), 7 Okla. 459, 54 Pac. 698; Seaboard Air Line Ry. Co. *v.* Main (1903), — N. C. —, 43 S. E. 930; Allen *v.* Carolina Cent. Ry. Co. (1897), 120 N. C. 548, 27 S. E. 76; Rutherford *v.* Johnson (1897), 49 S. C. 465, 27 S. E. 470; Garrett *v.* Weinberg (1897), 50 S. C. 310, 27 S. E. 770; State *ex rel. v.* Jeter (1901), 59 S. C. 483, 38 S. E. 124; Lockwood *v.* Bridge Co. (1901), 60 S. C. 492, 38 S. E. 112; Smith *v.* Bradstreet (1902), 63 S. C. 525, 41 S. E. 763; Sheeks *v.* State (1900), 156 Ind. 508, 60 N. E. 142; Coddington *v.* Canaday (1901), 157 Ind. 243, 61 N. E. 567; Frain *v.* Burgett (1898), 152 Ind. 55, 50 N. E. 873; Clow *v.* Brown (1897), 150 Ind. 185, 48 N. E. 1034; Garard *v.* Garard (1893), 135 Ind. 15, 34 N. E. 442; Cleveland, etc. Ry. Co. *v.* Berry (1898), 152 Ind. 607, 53 N. E. 415; Olson *v.* Phœnix Mfg. Co. (1899), 103 Wis. 337, 79 N. W. 409; Johnston *v.* Northwestern Live Stock Ins. Co. (1896), 94 Wis. 117, 68 N. W. 868; Allen *v.* Chicago & Northwestern Ry. Co. (1896), 94 Wis. 93, 68 N. W. 873; Fitch *v.* Applegate (1901), 24 Wash. 25, 64 Pac. 147; Fares *v.* Gleason (1896), 14 Wash. 657, 45 Pac. 314; Stewart *v.* Bole (1901), 61 Neb. 193, 85 N. W. 33; Kyd *v.* Cook (1898), 56 Neb. 71, 76 N. W. 524; First Nat. Bank *v.* Smith (1893), 36 Neb. 199, 54 N. W. 254; Street Ry. Co. *v.* Stone (1894), 54 Kan. 83, 37 Pac. 1012; Sanford *v.* Lichtenberger (1901), 62 Neb. 501, 87 N. W. 305; Murrell *v.* Henry (1902), 70 Ark. 161, 66 S. W. 647; City of Santa Barbara *v.* Eldred (1895), 108 Cal. 294, 41 Pac. 410.

Where a material fact can be only vaguely inferred from the allegations of a complaint, a motion to make more definite and certain will lie: McFadden *v.* Stark (1893), 58 Ark. 7, 22 S. W. 884; City of Santa Barbara *v.* Eldred (1895), 108 Cal. 294, 41 Pac. 410.

Demurrer Held Proper in some States. By statute in California, Colorado, Idaho, Montana, Nevada, and Utah, it is made a ground of demurrer that the complaint is ambiguous, unintelligible, and uncertain. See note to § *433, where the statutes are given. As to the form of the demurrer, it was held in Jacob Sultan Co. *v.* Union Co. (1895), 17 Mont. 61, 42 Pac. 109, that a demurrer which merely states in the language of the statute that the complaint is ambiguous, unintelligible, and uncertain, should be disregarded. It ought to specify wherein the ambiguity, etc. consists. See also Herbst Importing Co. *v.* Hogan (1895), 16 Mont. 384, 41 Pac. 135.

In California, in Greenebaum *v.* Taylor (1894), 102 Cal. 624, 36 Pac. 957, it was

§ 444. *550. Demurrer, or Dismissal of Petition at the Trial, Proper when Allegations are wholly Deficient. It has even been held that a demurrer to a complaint on the ground that it is ambiguous, unintelligible, and uncertain, for the reason that it does not contain a sufficient description of the property sued for, should be overruled. The complaint was clearly neither unintelligible nor ambiguous, and if uncertain merely the demurrer did not reach it. But see Field *v.* Andrada (1895), 106 Cal. 107, 39 Pac. 323, where a demurrer was filed on these three grounds conjunctively, but the only specifications were on the ground of uncertainty, and the court sustained the demurrer as one on the latter ground only. See also Henke *v.* Eureka Endowment Ass'n (1893), 100 Cal. 429, 34 Pac. 1089, where it was said that allegations which constitute matters of inducement cannot render a complaint bad on demurrer on the ground that the complaint is ambiguous, uncertain, or unintelligible.

In Georgia, where no such statute exists, uncertainty is held to be a ground for special demurrer: McClendon *v.* Hernando Co. (1896), 100 Ga. 219, 28 S. E. 152; East Georgia R. R. Co. *v.* King (1893), 91 Ga. 519, 17 S. E. 939; Mayor *v.* Cameron (1900), 111 Ga. 110, 36 S. E. 462.

Objections going to Formal Defects in a pleading cannot be raised by demurrer, but must be raised by motion: Grant *v.* Commercial Nat. Bank (1903), — Neb. —, 93 N. W. 185; Forbes *v.* Petty (1893), 37 Neb. 899, 56 N. W. 730; Cone *v.* Ivinson (1893), 4 Wyo. 203, 33 Pac. 31; Livingstone *v.* Lovgren (1902), 27 Wash. 102, 67 Pac. 599; Street Ry. Co. *v.* Stone (1894), 54 Kan. 83, 37 Pac. 1012; Johnson *v.* Douglass (1894), 60 Ark. 39, 28 S. W. 515. But in Connecticut a question of formal defects must be raised by demurrer: Levy *v.* Metropolis Mfg. Co. (1900), 73 Conn. 559, 48 Atl. 429.

Alternative Allegations. It is provided by statute in Kentucky that "a party may allege alternatively the existence of one or another fact, if he states that one of them is true and that he does not know which of them is true." But the general rule is that a pleading in the alternative is subject to attack by motion: Daniels *v.* Fowler (1897), 120 N. C. 14, 26 S. E. 635; Pender *v.* Mallett (1898), 123 N. C. 57, 31 S. E. 351. In construing the Kentucky statute, in Brown *v.* Ill. Cent. R. R. Co. (1897), 100 Ky. 525, 38 S. W. 862, the court held that it applies solely to alleging facts in the alternative, not parties, and does not authorize an allegation that the loss and damage occurred "by reason of the negligence of one or the other of defendants, or of both defendants, and as to which plaintiffs are unable to say as to whether one or the other, or both, but one of these alternatives is true." Such averment is insufficient against either of the defendants. To same effect see Louisville, etc R. R. Co. *v.* Ft. Wayne Elec. Co. (1900), 108 Ky. 113, 55 S. W. 918. Each alternative pleaded should be a complete cause of action: Cumberland Valley Bank's Assignee *v.* Slusher (1897), 102 Ky. 415, 43 S. W. 472; Wehmhoff *v.* Rutherford (1895), 98 Ky. 91, 32 S. W. 288.

Clerical Error. An obvious clerical error in a pleading will be disregarded: Gibbs *v.* Southern (1893), 116 Mo. 204, 22 S. W. 713.

Form of Motion. It is not error to overrule a motion to make a pleading more certain when it does not point out wherein the uncertainty consists: Grimes *v.* Cullison (1895), 3 Okla. 268, 41 Pac. 355; Jacobs Sultan Co. *v.* Union Co. (1895), 17 Mont. 61, 42 Pac. 109 (special demurrer); Wortham *v.* Sinclair (1896), 98 Ga. 173, 25 S. E. 414 (special demurrer); Brown *v.* Baker (1901), 39 Ore. 66, 65 Pac. 799.

Limitation on Use of Motion. A motion to make a pleading more definite and certain cannot be used to compel the party to plead his evidence: Bowers *v.* Schuler (1893), 54 Minn. 99, 55 N. W. 817. A motion to strike will not lie where a pleading is indefinite and uncertain, but the remedy is by motion to make more definite and certain: Computing Scales Co. *v.* Long (1903), — S. C. —, 44 S. E. 963.

Consequence of Failure to make Motion. In Spires *v.* South Bound R. R. Co. (1896), 47 S. C. 28, 24 S. E. 992; the court said: "When a complaint is general in its allegations of negligence, and the

held that where a cause of action is so defectively set out that a defendant desires to know upon what particular acts of negligence the plaintiff relies to sustain his action, it is the duty of the defendant to make a motion to have the complaint made more definite and certain; and, when this is not done, the plaintiff has the right to introduce any competent evidence tending to show negligence on the part of the defendant."

Hypothetical Pleading. It was held in Emison *v.* Owyhee Ditch Co. (1900), 37 Ore. 577, 62 Pac. 13, that hypothetical pleading is bad, but whether the objection should be taken by motion to make more definite and certain (6 Ency. Pl. & Pr. 269); or by motion to strike out (Bliss on Code Pl. § 317) was not decided. See also Daniells *v.* Fowler (1897), 120 N. C. 14, 26 S. E. 635, and Pender *v.* Mallett (1898), 123 N. C. 57, 31 S. E. 351, where it is held that motion, not demurrer, is the proper remedy.

Facts should be alleged positively. The material facts of a cause of action or defence should be alleged unequivocally, and will not be considered sufficient where they are stated as contingent or conjectural: Atchison, T. & S. F. Ry. Co. *v.* Atchison Grain Co. (1902), — Kan. —, 70 Pac. 933.

General Pleading. In Chicago, St. Louis, etc. R. R. Co. *v.* Wolcott (1894), 141 Ind. 267, 39 N. E. 451, the court held that in civil cases it is the rule that where a subject comprehends multiplicity of matter, and a great variety of facts, there, in order to avoid prolixity, the law allows general pleading. Quoted from 1 Chitty's Pleading 235, and approved. And it was held in Equitable Ins. Co. *v.* Stout (1893), 135 Ind. 444, 33 N. E. 623, that a general allegation is ordinarily sufficient when the matters to be pleaded tend to indefiniteness and multiplicity, but the complaint must show by allegation the extended and complicated character of the books, accounts, etc., or other allegations from which the rule may be applied.

Although a general averment may be sufficient, if the pleader alleges, in addition thereto, specific facts, the latter will control the general averment: Louisville, etc. Ry. Co. *v.* Kemper (1896), 147 Ind. 561, 47 N. E. 214; Fitzpatrick *v.* Simonson Bros. (1902), 86 Minn. 140, 90 N. W. 378; Carlson *v.* Presbyterian Board (1897), 67 Minn. 436, 70 N. W. 3; Gowan *v.* Bensel (1893), 53 Minn. 46, 54 N. W. 934; Chesapeake, etc. Ry. Co. *v.* Hanmer (1902), Ky., 66 S. W. 375; Sebree Deposit Bank *v.* Moreland (1894), 96 Ky. 150, 28 S. W. 153.

Necessity of Motion. In Sidway *v.* Missouri Land, etc. Co. (1901), 163 Mo. 342, 63 S. W. 705, the court said: "In order to raise the question of the indefiniteness of a pleading, however, it is by no means necessary to file a motion to make it more definite and certain; and this is so for two reasons:" 1st. The duty of requiring the pleadings to be definite and certain devolves on the court; 2d. The *onus* of making the pleading definite and certain is on the party drawing it.

Pleading by Way of Recital. It is a well-recognized general rule that material facts, essential to the cause of action, should be alleged directly and not by way of recital. In Berry *v.* Dole (1902), 87 Minn. 471, 92 N. W. 334, it was held that a pleading which offended against this rule was bad on general demurrer. The same doctrine was announced by the Supreme Court of Indiana, in Erwin *v.* Cent. Union Tel. Co. (1897), 148 Ind. 365, 46 N. E. 667. The rule was very instructively applied, in McElwaine-Richards Co. *v.* Wall (1902), 159 Ind. 557, 65 N. E. 752, to a complaint by a servant for an injury suffered from a fall consequent upon his being sent to work in an insecure and unsafe place. Also in Leadville Water Co. *v.* Leadville (1896), 22 Colo. 297, 45 Pac. 362, it was held that allegations by way of recital are insufficient, and objection thereto may be taken by general demurrer, for the reason that an allegation by way of recital cannot be denied, and no issue concerning it can ever be raised. The court cites the text, §§ *549, *550. For the contrary doctrine see City of Santa Barbara *v.* Eldred (1895), 108 Cal. 294, 41 Pac. 410.

Pleading on Information and Belief. In Missouri allegations upon information and belief are not deemed proper. In Nichols & Shepard Co. *v.* Hubert (1899), 150 Mo. 620, 51 S. W. 1031, the court

demurrer for want of sufficient facts would have been sustained, said: "While the first four paragraphs of the petition state and aver facts, the form of averment is changed in the fifth, and the pleader then alleges that he is informed and believes the facts therein recited, and as these recited facts are essential to plaintiff's cause of action the defect is fatal unless this form of averment is permissible under the code. The statute requires in a petition a plain and concise statement of the facts constituting the cause of action. A statement of information and belief as to facts is not within the meaning of this statute."

In Iowa, however, in the case of Robinson *v.* Ferguson (1903), — Ia. —, 93 N. W. 350, they were held sufficient in the absence of a motion attacking the pleading on that ground. In Minnesota the court has gone still further. In State *ex rel. v.* Cooley (1894), 58 Minn. 514, 60 N. W. 338, after referring to the statute requiring that the verification of pleadings shall be to the effect that the same are true to the knowledge of the person making them, except as to those matters stated on information and belief, and, as to those matters, that he believes them to be true, the court said: "This language is not confined merely to the denials in the answer of the controverted allegations in the complaint, but applies to all pleadings, including matters stated in the complaint on information and belief. Why else should the party be required or allowed to verify the matters stated in the complaint upon information and belief, unless he is allowed to insert such matters in that form? Evidently, this section of the statute contemplates that such allegations may be inserted in any of the pleadings; and we believe that such has been the usual practice in this State ever since its admission into the Union in 1858. It would be a great misfortune for us now to declare that practice invalid, and we refuse so to do."

The objection that the averments in a complaint are made on information and belief is not a ground for demurrer: Carpenter *v.* Smith (1894), 20 Colo. 39, 36 Pac. 739; Jones *v.* Pearl Min. Co. (1894), 20 Colo. 417, 38 Pac. 700.

Predicating Error as to Formal Defects. Tipton Light, etc. Co. *v.* Newcomer (1900), 156 Ind. 348, 58 N. E. 842: It is the right of a defendant to have the plaintiff state specifically the facts constituting alleged negligence, and where the motion to make more specific is well taken the court has no discretion. Failure to sustain such a motion when properly made is reversible error.

But see Chicago, B. & Q. R. Co. *v.* Oyster (1899), 58 Neb. 1, 78 N. W. 359: "One cannot predicate error on the refusal to require the pleading of the opposite party to be made more definite and certain where prejudice has not resulted from the ruling." The same rule seems to obtain in Wisconsin. See Adamson *v.* Raymer (1896), 94 Wis. 243, 68 N. W. 1000, where it was held that an order directing a pleading to be made more definite and certain is discretionary, and is not appealable unless there has been an abuse of discretion. To the same effect is Crowley *v.* Hicks (1898), 98 Wis. 566, 74 N. W. 348. And in Washington, in Green *v.* Tidball (1901), 26 Wash. 338, 67 Pac. 84, it was held that in order to cause a reversal there must be not only technical defects in the pleading but also some substantial injury resulting therefrom to the complaining party. See also St. Louis & S. F. Ry. Co. *v.* French (1896), 56 Kan. 584, 44 Pac. 12.

Pleading over after a motion is overruled, is a waiver of the right to have the ruling reviewed: Rinard *v.* Omaha, etc. Ry. Co. (1901), 164 Mo. 270, 64 S. W. 124; State *ex rel. v.* Merchants' Bank (1901), 160 Mo. 640, 61 S. W. 676; Sanguinett *v.* Webster (1900), 153 Mo. 343, 54 S. W. 563; Kelly *v.* Town of West Bend (1897), 101 Ia. 669, 70 N. W. 726; Wattels *v.* Minchen (1895), 93 Ia. 517, 61 N. W. 915; Manwell *v.* Burlington, etc. Ry. Co. (1894), 89 Ia. 708, 57 N. W. 441; Banker's Reserve Life Ass'n *v.* Finn (1902), 64 Neb. 105, 89 N. W. 672.

Standing on Pleading after Motion Sustained. McAdam *v.* Scudder (1894), 127 Mo. 345, 30 S. W. 168: Where the court, on motion of defendant, requires the petition to be made more definite and certain, and plaintiff elects to stand on the petition, the cause may properly be dismissed by the court. Same rule stated in Sidway

but the adverse party answers instead, and goes to trial, the objection to the pleading is thereby waived, and evidence in its

v. Missouri Land, etc. Co. (1901), 163 Mo. 342, 63 S. W. 705.

Test of Definiteness. In American Book Co. *v.* Kingdom Publishing Co. (1898), 71 Minn. 363, 73 N. W. 1089, the court said: "If the court can see the meaning of the different allegations, and the cause of action or the defence intended to be set forth by them, the pleading is not indefinite." See also City of Logansport *v.* Kihm (1902), 159 Ind. 68, 64 N. E. 595, where a complaint is instructively analyzed and shown not to set forth the facts constituting the cause of action in such a manner as to enable a person of common understanding to know what was intended.

Waiver of Formal Defects. Larsen *v.* Utah Loan & Trust Co. (1901), 23 Utah, 944, 65 Pac. 208: Where allegations of fraud are general and no objection is made thereto in the trial court, the defect is waived. Bennett *v.* Minott (1896), 28 Ore. 339, 44 Pac. 283: The objection of uncertainty in a complaint comes too late after judgment. Holman *v.* De Lin (1897), 30 Ore. 428, 47 Pac. 708: A motion to strike out parts of an answer is waived by the subsequent filing, hearing, and determining of a demurrer thereto. Graves *v.* Barrett (1900), 126 N. C. 267, 35 S. E. 539: A defective statement of a good cause of action is waived when it is apparent from the answer that the defendants were fully apprised of the subject-matter of the suit. See also Mizzell *v.* Ruffin (1896), 118 N. C. 69, 23 S. E. 927. Ashton *v.* Stoy (1895), 96 Ia. 197, 64 N. W. 804: Overruling a motion for more specific statement is not waived where no subsequent pleading is filed. Zion Church *v.* Parker (1901), 114 Ia. 1, 86 N. W. 60: A defect appearing on the face of the pleadings is waived if no objection is taken in the lower court.

Warthen *v.* Himstreet (1900), 112 Ia. 605, 84 N. W. 702: The court said: "We have held that a defendant may be concluded by a default when the facts stated in the petition do not state a good cause of action at law, or when the petition is so defective as to be vulnerable to a demurrer. Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Ia. 590, and cases cited. Doubtless, if no cause of action is stated, a default has no such effect. Bosch *v.* Kassing, 64 Ia. 312. But Himstreet did state a cause of action. The defect in his petition was in matter of form only, and this the defendants could waive, and by their nonappearance did waive." Fenner *v.* Crips (1899), 109 Ia. 455, 80 N. W. 526: Where defendant asks an instruction based on a fact not averred with sufficient distinctness in plaintiff's petition, he thereby waives the defect. Van Etten *v.* Medland (1898), 53 Neb. 569, 74 N. W. 33: "The filing of a demurrer to a petition is a waiver of the right to insist that the allegations of the pleading shall be made more definite and certain." Mangum *v.* Bullion, etc. Co. (1897), 15 Utah, 534, 58 Pac. 834: Failure to allege specific facts constituting causes of action or special defences is waived by failure to demur or object to evidence, hence cannot be taken advantage of after judgment. Same rule adhered to in Maynard *v.* Locomotive, etc. Ass'n (1897), 16 Utah, 145, 51 Pac. 259.

Young *v.* Severy (1897), 5 Okla. 630, 49 Pac. 1024: An allegation, though indefinite and uncertain and otherwise defective, of a material matter, is sufficient when first questioned by an objection to the introduction of any testimony thereunder. So, in Frobisher *v.* Fifth Ave. Transp. Co. (1897), 151 N. Y. 431, 45 N. E. 839, it was held that an objection to the introduction of any evidence because the allegations of the complaint were too general, was not available on appeal, when the defendant failed to move to make more specific. Whitlock *v.* Uhle (1903), 75 Conn. 423, 53 Atl. 891: Where a complaint asserts necessary facts in an insufficient manner, the defect cannot be taken advantage of, in the absence of demurrer, after trial and judgment on the merits.

City of South Bend *v.* Turner (1900), 156 Ind. 418, 60 N. E. 271: Mere uncertainty or inadequacy of averment will be deemed waived by proceeding to trial without objection. Courts do not look

support must be admitted.[1] Other cases are directly opposed to this position, and expressly declare that if the complaint or petition fails to state any cause of action the objection is not waived, and all evidence should be excluded at the trial, even though the defendant has answered; and this ruling is in exact conformity with the provisions of all the codes regulating the use of demurrers.[2] The doctrine first stated is clearly erroneous, and the *dicta* or decisions which sustain it ought to be wholly disregarded; it violates the section of the codes which enacts that the absence of sufficient facts as a ground of demurrer is not abandoned by an omission to demur; and it utterly ignores the established distinction between a failure to state any cause of action and the statement of a cause of action in an imperfect and defective manner. It is only when the answer itself by some of its averments supplies the omission in a complaint or petition otherwise demurrable, that the fault is cured and the objection waived by answering; *mere* answering instead of demurring

with favor on the practice of attacking pleadings at the trial: Haseltine *v.* Smith (1900), 154 Mo. 404, 55 S. W. 633.

By filing an answer defendant waives all objections of form in the petition: Gelatt *v.* Ridge (1893), 117 Mo. 553, 23 S. W. 882; McCall *v.* Porter (1903), 42 Ore. 49, 71 Pac. 926; Hughes *v.* McCollough (1901), 39 Ore. 372, 65 Pac. 85; Lovejoy *v.* Isbell (1900), 73 Conn. 368, 47 Atl. 682; Welsh *v.* Burr (1898), 56 Neb. 361, 76 N. W. 905 (reply). But defendant may, in his answer, expressly reserve the right to insist on a motion to make more definite and certain when duly noticed: Whaley *v.* Lawton (1898), 53 S. C. 580, 31 S. E. 660.

Cases where Pleadings have been held Uncertain. Dodds *v.* McCormick Harvesting Mach. Co. (1901), 62 Neb. 759, 87 N. W. 911: a petition declaring on a promissory note; Kyd *v.* Cook (1898), 56 Neb. 71, 76 N. W. 524: a petition in an action for wrongful attachment; Olson *v.* Phœnix Mfg. Co. (1899), 103 Wis. 337, 79 N. W. 409: a complaint against three contractors for negligence; Buist *v.* Melchers (1894), 44 S. C. 46, 21 S. E. 449: a complaint against several successive boards of directors of a corporation for omission of duty; Koboliska *v.* Swehla (1898), 107 Ia. 124, 77 N. W. 576: petition in action for money paid at request of defendant; Hall *v.* Law Guarantee, etc. Co. (1900), 22 Wash. 305, 60 Pac. 643: complaint in replevin; Union Nat. Bank *v.* Cross (1898), 100 Wis. 174, 75 N. W. 992: answer in action on promissory note; Koepke *v.* Milwaukee (1901), 112 Wis. 475, 88 N. W. 238: complaint against city for negligent injury; McFadden *v.* Stark (1893), 58 Ark. 7, 22 S. W. 884: complaint in action to enforce a mechanic's lien; Maine *v.* Chicago, etc. R. R. Co. (1899), 109 Ia. 260, 80 N. W. 315: petition in action for negligent injuries; Atchison, etc. Ry. Co. *v.* Potter (1899), 60 Kan. 808, 58 Pac. 471: petition in action for personal injuries; Hastings *v.* Anacortes Packing Co. (1902), 29 Wash. 224, 69 Pac. 776: complaint in an action for possession of a fishing site; Dishneau *v.* Newton (1895), 91 Wis. 199, 64 N. W. 879: complaint against sureties on sheriff's bond (held sufficiently specific).]

[1] Treadway *v.* Wilder, 8 Nev. 91.

[2] Garner *v.* McCullough, 48 Mo. 318; Scofield *v.* Whitelegge, 49 N. Y. 259, 261, 262; Saulsbury *v.* Alexander, 50 Mo. 142, 144.

cannot produce that effect.[1] If the averments are so defective, if the omission of material facts is so great, that, even under the rule of a liberal construction, no cause of action is stated, it is not a mere case of insufficiency, but one of complete failure; and the complaint or petition should be dismissed at the trial, or a judgment rendered upon it should be reversed. A few examples are placed in the foot-note.[2] While the general doctrine before

[1] Scofield *v.* Whitelegge, 49 N. Y. 259, 261, 262; Bate *v.* Graham, 11 N. Y. 237; Louisville & P. Canal Co. *v.* Murphy, 9 Bush, 522, 529.

[2] Antisdel *v.* Chicago & N. W. Ry. Co., 26 Wis. 145, 147; Tomlinson *v.* Monroe, 41 Cal. 94 (an ambiguous and unintelligible complaint); Holmes *v.* Williams, 16 Minn. 164, 168. The case described in the text is that of a cause of action, good if properly pleaded, which the plaintiff intended and attempted to set out, but which he failed to set out by reason of omissions and defects in the material allegations; and it is to be distinguished from a cause of action entirely bad in law, no matter how complete and perfect may be the averments by which it is stated. In the first case a pure question of pleading is involved, and the complaint or petition is demurrable because the rules of pleading have been *essentially* violated; in the second case a pure question of law is involved, and the complaint or petition is demurrable, although the rules of pleading have been in every respect complied with.

[*Wholly Deficient Pleadings.*

Waiver of Defects of Substance.

The objection that a pleading does not state facts constituting a cause of action or defence is never waived, but may be raised at any stage of the proceedings: O'Toole *v.* Faulkner (1902), 29 Wash. 544, 70 Pac. 58; Jones *v.* St. Paul, etc. Ry. Co. (1896), 16 Wash. 25, 47 Pac. 226; Hoffman *v.* McCracken (1902), 168 Mo. 337, 67 S. W. 878; Lilly *v.* Menke (1894), 126 Mo. 190, 28 S. W. 643; McPeak *v.* Mo. Pac. Ry. Co. (1895), 128 Mo. 617, 30 S. W. 170; State *ex rel. v.* Thompson (1899), 149 Mo. 441, 51 S. W. 98; Epperson *v.* Postal Tel. Co. (1900), 155 Mo. 346, 50 S. W. 795; Wells *v.* Mutual Benefit Ass'n (1894), 126 Mo. 630, 29 S. W. 607, holding that even a stipulation by the parties as to the issues in a case does not waive the question of the sufficiency of a petition; State *ex rel. v.* Moores (1899), 58 Neb. 285, 78 N. W. 529; Latenser *v.* Misner (1898), 56 Neb. 340, 76 N. W. 897; Tracy *v.* Grezaud (1903), — Neb. —, 93 N. W. 214; Hudelson *v.* First Nat. Bank (1897), 51 Neb. 557, 71 N. W. 304; Sage *v.* City of Plattsmouth (1896), 48 Neb. 553, 67 N. W. 455; Kemper *v.* Renshaw (1899), 58 Neb. 513, 78 N. W. 1071; Dufrene *v.* Anderson (1903), — Neb. —, 93 N. W. 139; City of South Bend *v.* Turner (1900), 156 Ind. 418, 60 N. E. 271; Galvin *v.* Britton (1898), 151 Ind. 1, 49 N. E. 1064; Insurance Co. *v.* Bonner (1897), 24 Colo. 220, 49 Pac. 366; School District *v.* Flanigan (1901), 28 Colo. 431, 65 Pac. 24; Mizzell *v.* Ruffin (1896), 118 N. C. 69, 23 S. E. 927; City of Guthrie *v.* Nix (1895), 3 Okla. 136, 41 Pac. 343; De Loach Mill Co. *v.* Bonner (1897), 64 Ark. 510, 43 S. W. 504; Warner *v.* Hess (1899), 66 Ark. 113, 49 S. W. 489; Buckman *v.* Hatch (1903), 139 Cal. 53, 72 Pac. 445; Moore *v.* Halliday (1903), 43 Ore. 243, 72 Pac. 801.

But see Queen City Printing Co. *v.* McAden (1902), 131 N. C. 178, 42 S. E. 575, and O'Donohoe *v.* Polk (1895), 45 Neb. 510, 63 N. W. 829, where it was held that the want of a material allegation is waived by failure to demur. See also Cook *v.* Am. Ex. Bank (1901), 129 N. C. 149, 39 S. E. 746; Duerst *v.* St. Louis Stamping Co. (1901), 163 Mo. 607, 63 S. W. 827.

Pleading over after demurrer for want of facts has been overruled is not a waiver of the objection: Epperson *v.* Postal Tel. Co. (1900), 155 Mo. 346, 50 S. W. 795; Hoffman *v.* McCracken (1902), 168 Mo. 337, 67 S. W. 878; Jones *v.* St. Paul, etc. Ry. Co. (1896), 16 Wash. 25, 47 Pac. 226 (but see Hardin *v.* Mullin (1897), 16 Wash. 647, 48 Pac. 349, where it is held that an

stated, as to the nature of insufficient and defective averments, has been universally approved in the abstract, it has sometimes

affirmative waiver of the demurrer waives the objection); Cox *v.* Yeazel (1896), 49 Neb. 343, 68 N. W. 483; Hopewell *v.* McGrew (1897), 50 Neb. 789, 70 N. W. 397 (but see Palmer *v.* Caywood (1902), 64 Neb. 372, 89 N. W. 1034, apparently *contra*); Henderson *v.* Turngren (1894), 9 Utah, 432, 35 Pac. 495; Seckinger *v.* Philibert Co. (1895), 129 Mo. 590, 31 S. W. 957; Thompson *v.* Brazile (1898), 65 Ark. 495, 47 S. W. 299.

An objection to the sufficiency of a pleading made for the first time in the Supreme Court is not favored, and the pleading will be liberally construed: Brothers *v.* Brothers (1901), 29 Colo. 69, 66 Pac. 901; Colorado Fuel & Iron Co. *v.* Four Mile Ry. Co. (1901), 29 Colo. 90, 66 Pac. 902; School District *v.* Flanigan (1901), 28 Colo. 431, 65 Pac. 24; Insurance Co. *v.* Bonner (1897), 24 Colo. 220, 49 Pac. 366; Latenser *v.* Misner (1898), 56 Neb. 340, 76 N. W. 897.

In South Carolina the court has held that the statute which provides that the objection that facts are not stated sufficient to constitute a cause of action is not waived by failure to demur, applies only to the Circuit Court and not to the Supreme Court. Hence the objection cannot be raised for the first time in the Supreme Court, but is waived if not raised below: Green *v.* Green (1897), 50 S. C. 514, 27 S. E. 952; Garrett *v.* Weinberg (1897), 50 S. C. 310, 27 S. E. 770; Hillhouse *v.* Jennings (1901), 60 S. C. 373, 38 S. E. 599.

In Iowa it is held, in a long line of decisions, that the question whether a pleading states a cause of action is waived unless it is raised by demurrer or motion in arrest of judgment: Alexander *v.* Grand Lodge (1903), — Ia. —, 93 N. W. 508; Enix *v.* Iowa Cent. R. R. Co. (1901), 114 Ia. 508, 87 N. W. 417; Osborne *v.* Metcalf (1900), 112 Ia. 540, 84 N. W. 685; Dubuque Lumber Co. *v.* Kimball (1900), 111 Ia. 48, 82 N. W. 458; Pierson *v.* School District (1898), 106 Ia. 695, 77 N. W. 494; Haden *v.* Sioux City, etc. R. R. Co. (1896), 99 Ia. 735, 68 N. W. 733; Zundelowitz *v.* Webster (1896), 96 Ia. 587, 65 N. W. 835; Fulmer *v.* Mahaska County (1894), 92 Ia. 20, 60 N. W. 207; McCorkell *v.* Karhoff (1894), 90 Ia. 545, 58 N. W. 913; Manwell *v.* Burlington, etc. R. R. Co. (1894), 89 Ia. 708, 57 N. W. 441.

In Washington it was held in State *ex rel.* *v.* Indemnity Ass'n (1898), 18 Wash. 514, 52 Pac. 234, that a motion for a nonsuit on the ground that the complaint failed to state a cause of action was properly denied, where there was no demurrer and the defect had been cured by the admission of proof without objection. And in Mosher *v.* Bruhn (1896), 15 Wash. 332, 46 Pac. 397, it was held that where the objection that a complaint did not state a cause of action was raised by demurrer, and then abandoned, it cannot be subsequently raised. To the same effect is Hardin *v.* Mullin (1897), 16 Wash. 647, 48 Pac. 349.

Wisconsin, also, seems to hold that a failure to seasonably object to a fatally defective complaint is a waiver of the defect. See Bigelow *v.* Town of Washburn (1898), 98 Wis. 553, 74 N. W. 362; Wells *v.* Western Paving & Supply Co. (1897), 96 Wis. 116, 70 N. W. 1071.

Form of Objection.

An objection to the introduction of any evidence, on the ground that the complaint does not state a cause of action, need not specify wherein the complaint is insufficient: Wylly *v.* Grigsby (1899), 11 S. D. 491, 78 N. W. 957. But a motion to direct a verdict for defendant because the evidence is not sufficient to show a cause of action, without stating the specific defects in the evidence, is not sufficient: Howie *v.* Bratrud (1901), 14 S. D. 648, 86 N. W. 747.

An objection to the introduction of evidence upon the ground that the complaint does not state facts sufficient to constitute a cause of action, is insufficient when it does not point out the particular defect relied upon: Chilson *v.* Bank (1899), 9 N. D. 96, 84 N. W. 354. So in James River Bank *v.* Purchase (1900), 9 N. D. 280, 83 N. W. 7. But in Vidger *v.* Nolin (1901), 10 N. D. 353, 87 N. W. 593, such an objection directed against an answer as a counterclaim or defence was held sufficient.

It was held in Galvin *v.* Britton (1898),

been departed from, and pleadings have been wholly condemned, which, according to the criterion established by numerous cases,

151 Ind. 1, 49 N. E. 1064, that where the sufficiency of a complaint is attacked for the first time on appeal, it must be on the ground that it does not state facts sufficient to constitute a cause of action, and an attack on the ground that it does not state facts sufficient to entitle plaintiff to the relief prayed will not be considered.

Methods of Raising Question.

The failure of a complaint to state a cause of action may be availed of by demurrer, by objection to evidence, by motion for judgment on the pleadings, by motion in arrest of judgment, or on motion for a new trial: Consolidated Canal Co. *v.* Peters (1896), Ariz., 46 Pac. 74. After failure to demur, the method of raising the question of the sufficiency of the pleading to state a cause of action or defence, which is not waived, is by motion, either for judgment on the pleadings or for new trial: James River Bank *v.* Purchase (1900), 9 N. D. 280, 83 N. W. 7.

Held in the following cases that a judgment on the pleadings was properly given where they are fatally defective: Finley *v.* City of Tucson (1900), Ariz., 60 Pac. 872; Goldwater *v.* Bowen, (1900), Ariz., 62 Pac. 691; Hutchison *v.* Myers (1893), 52 Kan. 290, 34 Pac. 742. Nothing outside the pleadings can be considered in passing on such a motion: McCoy *v.* Jones (1899), 61 O. St. 119, 55 N. E. 219. A judgment on the pleadings is the equivalent of the common-law judgment *non obstante veredicto:* Crew *v.* Hutcheson (1902), 115 Ga. 511, 42 S. E. 16.

In Boyer *v.* Commercial Building Co. (1900), 110 Ia. 491, 81 N. W. 720, the court said: "When the case came on for trial, defendant objected to the introduction of any evidence, because no cause of action was stated in the petition. This objection was entered of record and overruled. The first assignment of error is based upon this action of the court. This sort of oral demurrer has no place in our practice, and we think the trial court was fully justified in so disposing of it." To same effect, see Van Sickle *v.* Keith (1893), 88 Ia. 9, 55 N. W. 42. Held, in Sackman *v.* Sackman (1898), 143 Mo. 576, 45 S. W. 264, that such an objection would be sustained only where the pleading was so defective that a motion in arrest would lie.

The legal sufficiency of facts alleged in a complaint must be tested either by demurrer before trial or by motion in arrest of judgment after verdict, but cannot be tested by a motion for nonsuit during the trial: Cook *v.* Morris (1895), 66 Conn. 196, 33 Atl. 994.

In Georgia, it was held, in Fleming *v.* Roberts (1901), 114 Ga. 634, 40 S. E. 792, that the question of the sufficiency of a petition cannot be raised by objection to evidence. "If a petition is not good in substance, that is, taking every allegation to be true, it fails to set forth a cause of action, objection must be made either by a general demurrer, or motion to dismiss the case before verdict, or by a motion in arrest of judgment, or a motion to set aside the judgment after verdict. We know of no other way in which the legal sufficiency of a petition can be properly brought before the court." But this case was overruled in Kelly *v.* Strouse (1903), 116 Ga. 872, 43 S. E. 280. The rule in Crew *v.* Hutcheson (1902), 115 Ga. 511, 42 S. E. 16, in which it was held that it was not error to refuse to allow a defendant to sustain by evidence the allegations of a plea which set forth no defence, was extended to cover the petition as well as the plea.

It is not the office of a motion to cure fatal defects. Such objections should be made by demurrer: Chicago, R. I. & Pac. Ry. Co. *v.* Shepherd (1894), 39 Neb. 523, 58 N. W. 189; Holgate *v.* Downer (1899), 8 Wyo. 334, 57 Pac. 918.

In California it is held that pleading evidence is a fatal defect, and hence the objection may be raised by a general demurrer for want of facts: McCaughey *v.* Schuette (1897), 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088.

Question Raised by Court on its own Motion. In Thomas *v.* Franklin (1894), 42 Neb. 310, 60 N. W. 568, the court said: "This court in an action at law or equity will, on its own motion, look into the

set forth a cause of action, although in an incomplete and imperfect manner. Some illustrations of this strict method of decision are given in the note.[1]

record of a case brought on appeal or error, for the purpose of determining whether the petition upon which the action is founded states a cause of action, and whether the court has jurisdiction of the subject-matter of the action."

Predicating Error on Ruling on Demurrer.

A defendant who pleads over after a demurrer is sustained to his answer, waives the right to have such ruling considered on appeal: Frick *v.* Kabaker (1902), 116 Ia. 494, 90 N. W. 498; Nystuen *v.* Hanson (1902), — Ia. —, 91 N. W. 1071. A statute in Iowa (Acts 25th Gen. Assem., ch. 96) reads as follows: "When a demurrer shall be overruled, and the party demurring shall answer or reply, the ruling on the demurrer shall not be considered an adjudication of any question raised by the demurrer; and in such case the sufficiency of the pleading thus attacked shall be determined as if no demurrer had been filed." Construing this statute, the court, in Frum *v* Keeney (1899), 109 Ia. 393, 80 N. W. 507, said: "It was not designed to permit a review of the ruling on a demurrer which had been overruled, where the party demurring had afterwards filed an answer or reply, but to provide that the ruling should not have the effect of an adjudication, and to permit the party demurring unsuccessfully to question the sufficiency of the pleading in other ways during the progress of the trial, as by a motion to direct the verdict or in arrest of judgment. In other words, in such a case the party waived his right to complain of the overruling of the demurrer by pleading over, but did not waive his right to attack the pleading on the grounds upon which his demurrer was founded at any subsequent time in the progress of the case; for the statute expressly provided that where a demurrer was overruled the sufficiency of the pleading was to 'be determined as if no demurrer had been filed.'" See the following cases in which this statute has been discussed: Adams *v.* Holden (1900), 111 Ia. 54, 82 N. W. 468; Buchanan *v.* Blackhawk Coal Works (1903), — Ia. —, 93 N. W. 51; Krause *v.* Lloyd (1897), 100 Ia. 666, 69 N. W. 1062; Long *v.* Mellet (1895), 94 Ia. 548, 63 N. W. 190. See also Wyland *v.* Griffith (1895), 96 Ia. 24, 64 N. W. 673; Cook *v.* Doty (1894), 91 Ia. 721, 59 N. W. 35.

By answering after his demurrer to the complaint is overruled a defendant waives an exception to the decision on the demurrer: Cook *v.* Kittson (1897), 68 Minn. 474, 71 N. W. 670; Thompson *v.* Ellenz (1894), 58 Minn. 301, 59 N. W. 1023.

Filing an amended pleading after a demurrer thereto has been sustained, is a waiver of error in sustaining the demurrer: Heman *v.* Glann (1895), 129 Mo. 325, 31 S. W. 589; Ganceart *v.* Henry (1893), 98 Cal. 281, 33 Pac. 92; Berry *v.* Barton (1902), 12 Okla. 221, 71 Pac. 1074.

Pleadings Construed on General Demurrer: Jarrell *v.* Railroad Co. (1900), 58 S. C. 491, 36 S. E. 910 (negligence); Morrison *v.* City of Eau Claire (1902), 115 Wis. 538, 92 N. W. 280 (negligence); Andrews *v.* School District (1896), 49 Neb. 420, 68 N. W. 631 (action by a firm in partnership name); Aurora Water Co. *v.* Aurora (1895), 129 Mo. 540, 31 S. W. 946 (action against city to recover hydrant rentals); Duryee *v.* Friars (1897), 18 Wash. 55, 50 Pac. 583 (action to enjoin city from issuing bonds); De Baker *v.* Southern Cal. Ry. Co. (1895), 106 Cal. 257, 39 Pac. 610.]

[1] Scofield *v.* Whitelegge, 49 N. Y. 259, 261; Hathaway *v.* Quinby, 1 N. Y. S. C. 386; Doyle *v.* Phœnix Ins. Co., 44 Cal. 264, 268; Holmes *v.* Williams, 16 Minn. 164, 168. Scofield *v.* Whitelegge was an action to recover possession of a chattel. The complaint alleged that the defendant had become possessed of and wrongfully detained from the plaintiff a piano of the value of, etc., and demanded the usual judgment. The answer denied the possession of any property belonging to the plaintiff, denied the wrongful taking, and denied the plaintiff's ownership. The complaint was dismissed at the trial, on the ground that it stated no cause of ac-

§ 445. *551. **II. Redundant, Immaterial, and Irrelevant Allegations, and the Mode of Objecting to and Correcting them. Distinctions.** In a legal action all matter stated in addition to the

tion. The opinion of the New York Court of Appeals, by Folger J., after reciting the common-law rule in replevin, that the action could only be maintained by one who had the general or a special property in the chattel, that this property must have been averred in the declaration, that the action under the code takes exactly the place of the old replevin, and that the plaintiff in it must have a property in the chattel, proceeds as follows (p. 261): "Nor is it less necessary now than then for the plaintiff to aver the facts which constitute his cause of action. He must allege the facts, and not the evidence; he must allege facts, and not conclusions of law. The plaintiff here alleges that the defendant *wrongfully detains from him* the chattel. If, indeed, this be true, then it must be that the plaintiff has a general or special property in the chattel and the right of immediate possession. But unless he has that general or special property and right of immediate possession, it cannot be true that it is wrongfully detained from him. The last — the wrongful detention — grows from the first, — the property and right of possession. The last is the conclusion. The first is the fact upon which that conclusion is based; it is the fact which, in a pleading, must be alleged. Is not the statement of a conclusion of law, without a fact averred to support it, an immaterial statement?" This decision is certainly technical to the last degree when tested by the standard established in the codes and in other cases. The complaint was undoubtedly imperfect; but it set forth a cause of action, although in an incomplete manner. The learned judge concedes that the averment "the defendant *wrongfully detains from* the plaintiff" necessarily presupposes and implies a property and right of possession in the plaintiff. The only defect, therefore, consisted in an allegation of the evidence, or perhaps of the legal conclusion, instead of the issuable fact. The defendant was not misled; his answer shows that he understood the claim, and it raised all the issues upon which he relied. The complaint is, indeed, a striking illustration of a defective pleading, which should be corrected by motion, and not attacked by demurrer; and the opinion is a clear and convincing argument showing why such a motion ought to be granted; but it violates the liberal principle of construction, and returns to the common-law rule requiring a strict interpretation against the pleader. The facts and opinion in Hathaway *v.* Quinby, which is quite similar in its general character, and in Doyle *v.* Phœnix Ins. Co., may be found *supra*, §§ *531, *535. The following cases give further illustrations of the rule as stated in the text, — that defects of form merely are waived by going to trial without objection and are cured by verdict, while defects which go to the cause of action itself are not thus waived nor cured. There is not, however, an absolute unanimity on this point among the decisions; some of them cannot be reconciled with the general current of authority, nor, in my opinion, with the letter and spirit of the codes. Jefferson *v.* Hale, 31 Ark. 286; People *v.* Sloper, 1 Idaho, 158; Hawse *v.* Burgmere, 4 Colo. 313; Revelle's Heirs *v.* Claxon's Heirs, 12 Bush, 558; Thompson *v.* Killian, 25 Minn. 111; Reed *v.* Pixley, 25 id. 482; Chesterson *v.* Munson, 27 id. 498; International Bk. of St. Louis *v.* Franklin Cy., 65 Mo. 105; State *v.* Bartlett, 68 id. 581; Richardson *v.* Hoole, 13 Nev. 492; Youngstown *v.* Moore, 30 Ohio St. 133; State *v.* Cason, 11 S. C. 392; Edgerly *v.* Farmers' Ins. Co., 43 Iowa, 587; Meyer *v.* Dubuque Cy., 43 id. 592; Polster *v.* Rucker, 16 Kan. 115; Moody *v.* Arthur, 16 id. 419; Castle *v.* Houston, 19 id. 417; Sheridan *v.* Jackson, 72 N. Y. 170, 172, 173; Streeter *v.* Chicago, etc. R. Co., 40 Wis. 294, 301; Univ. of Notre Dame *v.* Shanks, 40 id. 352; Smith *v.* Barron Cy. Sup., 44 id. 686; Vassar *v.* Thompson, 46 id. 345; Stetler *v.* Chicago & N. W. Ry. Co., 49 id. 609; Gander *v.* State, 50 Ind. 539, 541; Green *v.* Louthain, 49 id. 139; Donellan *v.* Hardy, 57 id. 393; Galvin *v.* Woollen, 66 id. 464; Indian-

allegations of issuable facts, and in an equitable action all such matter in addition to the averments of material facts affecting the remedy, is unnecessary, and therefore immaterial and redundant. Whenever, therefore, the issuable facts constituting a legal cause of action, or the material facts upon which the right to equitable relief is wholly or partially based, are pleaded, all the details of probative matter by which these facts are to be established, and all the conclusions of law inferred therefrom, are plainly embraced within this description. It would not be strictly correct to say that statements of evidence or of legal conclusions are, under all circumstances, redundant. If a complaint or petition should, in violation of the principles established by the reformed procedure, allege the evidence of some issuable or material fact instead of the fact itself, or should state a conclusion of law in place of the proper fact or facts which support it, these averments would be irregular, imperfect, insufficient, and liable to correction by a motion; but they might not be necessarily redundant. If the pleading was not reformed, and if the defect was not so serious as to render it demurrable, it would be treated on the trial as sufficient; and the statement of probative matter or of legal conclusions would take the place of the issuable or material facts which ought to have been averred, and would thus become material. It is self-evident, however, that if the essential doctrines of pleading are complied with, and the proper facts constituting the cause of action, or affecting the equitable relief, are all set forth, then any detail of evidence or any conclusion of law is necessarily surplusage, and redundant. An allegation is irrelevant when the issue formed by its denial can have no connection with nor effect upon the cause of action.[1] Every irrelevant allegation is immaterial and redundant: but the converse of this proposition is not true; every immaterial or redundant allegation is not irrelevant. This general description can only be explained and illustrated by an examination of individual cases, of which a few have been collected in the note as examples.[2]

apolis & V. R. Co. *v.* McCaffery, 72 id. 294; Parker *v.* Clayton, 72 id. 307; Newman *v.* Perrell, 73 id. 153; Charlestown Sch. Dist. *v.* Hay, 74 id. 127; Smock *v.* Harrison, 74 id. 348; Lewis *v.* Bortsfield, 75 id. 390; King *v.* Montgomery, 50 Cal. 115; Hanlin *v.* Martin, 53 id. 321.

[1] [Smith *v.* Smith (1897), 50 S. C. 54, 27 S. E. 545, quoting the text. See also Ragsdale *v.* Railway Co. (1901), 60 S. C. 381, 38 S. E. 609.]

[2] Bowman *v.* Sheldon, 5 Sandf. 657, 660; Fasnacht *v.* Stehn, 53 Barb. 650; Hunter *v.* Powell, 15 How. Pr. 221; Fab-

§ 446. *552. **Motion, not Demurrer, Proper Method of Objecting to Superfluous Allegations.** The rule is established by the unanimous decisions of the courts, as well as by the provision found in the codes, that the proper and only method of objecting to and correcting redundant, immaterial, or irrelevant allegations in a pleading, is a motion to strike out the unnecessary matter, and not a demurrer, nor an exclusion of evidence at the trial.[1] The new procedure thus furnishes, by means of these motions in cases of insufficiency, redundancy, or irrelevancy, a speedy and certain mode of enforcing the fundamental doctrines of pleading which it has established, and of causing the complaints or petitions and answers to present single, clear, and well-defined issues. At the same time it prevents a sacrifice of substance to form, and a decision of controversies upon technical points not involving the merits, by requiring these objections to be taken before the trial, and by regarding them as waived if the prescribed mode of remedy is not resorted to. The courts have it in their power, by encouraging these classes of motions, and by treating them as highly remedial and important, to shape the pleading into an harmonious and consistent system, constructed upon the few natural and philosophical principles which were adopted as its foundation; or they may, on the other hand, by discouraging a resort to these corrective measures, and by treating them as idle, unnecessary, or vexatious, suffer those principles to become forgotten, and to be finally abandoned, and may, thereby, lose all

ricotti *v.* Launitz, 3 Sandf. 743; Lee Bank *v.* Kitching, 7 Bosw. 664; 11 Abb. Pr. 435; Cahill *v.* Palmer, 17 Abb. Pr. 196; Decker *v.* Mathews, 12 N. Y. 313; Gould *v.* Williams, 9 How. Pr. 51; St. John *v.* Griffith, 1 Abb. Pr. 39; O'Connor *v.* Koch, 56 Mo. 253; Clague *v.* Hodgson, 16 Minn. 329, 334, 335; King *v.* Enterprise Ins. Co., 45 Ind. 43, 55; Hynds *v.* Hays, 25 Ind. 31; Booher *v.* Goldsborough, 44 Ind. 490, 498, 499 (duplicity); Loomis *v.* Youle, 1 Minn. 175; Clark *v.* Harwood, 8 How. Pr. 470; Edgerton *v.* Smith, 3 Duer, 614; Sellar *v.* Sage, 12 How. Pr. 531; 13 How. Pr. 230; Lee *v.* Elias, 3 Sandf. 736; Lamoreux *v.* Atlantic Mut. Ins. Co., 3 Duer, 680. See also the additional cases cited in the next following notes.

[1] Loomis *v.* Youle, 1 Minn. 175; O'Connor *v.* Koch, 56 Mo. 253; King *v.* Enterprise Ins. Co., 45 Ind. 43, 55; Hynds *v.* Hays, 25 Ind. 31; Smith *v.* Countryman, 30 N. Y. 655; Simmons *v.* Eldridge, 29 How. Pr. 309; 19 Abb. Pr. 296; Cahill *v.* Palmer, 17 Abb. Pr. 196. See also Vliet *v.* Sherwood, 38 Wis. 159: allegations stating a good cause of action should not be struck out on the objection that they are irrelevant and redundant; if they are improperly in the complaint, this is not the mode and ground of relief. Magee *v.* Waupaca Cy. Sup., 38 Wis. 247; Biggs *v.* Biggs, 50 id. 443; Hoffmann *v.* Koppelkora, 8 Neb. 344; Johns *v.* Potter, 55 Iowa, 665; Cooper *v.* French, 52 id. 531; Schoonover *v.* Hinckley, 46 id. 207; Davis *v.* C. & W. W. R. R., 46 id. 389; Gabe *v.* McGinnis, 68 Ind. 538; Harris *v.* Todd, 16 Hun, 248; Smith *v.* Summerfield, 108 N. C. 284.

the benefits which were designed, and which could have been obtained from the reform.[1]

[1] [*Redundant, Immaterial, and Irrelevant Allegations.*

Motion Proper Remedy. "A demurrer is not a pruning hook, and cannot be used to trim out immaterial and irrelevant matter. This must be done by motion:" *In re* Estate of McMurray (1899), 107 Ia. 648, 78 N. W. 691. To the same effect see Bolt *v.* Gray (1898), 54 S. C. 95, 32 S. E. 148; Duke *v.* Brown (1901), 113 Ga. 310, 38 S. E. 764; City of Butte *v.* Peasley (1896), 18 Mont. 303, 45 Pac. 210; McGillivray *v.* McGillivray (1896), 9 S. D. 187, 68 N. W. 316; Campbell *v.* Equitable Loan & Trust Co. (1901), 14 S. D. 483, 85 N. W. 1015.

Form of Motion. A motion to strike out portions of a pleading should designate with particularity the averments which it attacks: Stuht *v.* Sweesy (1896), 48 Neb. 767, 67 N. W. 748; Kearnes *v.* Durst (1899), 110 Ia. 114, 81 N. W. 238; State *ex inf. v.* Fleming (1898), 147 Mo. 1, 44 S. W. 758. If the motion is too broad, so that it cannot be sustained as made, it must be overruled, though a narrower motion might have been well taken: Smith *v.* Meyers (1898), 54 Neb. 1, 74 N. W. 277; Chicago, B. & Q. R. R. Co. *v.* Spirk (1897), 51 Neb. 167, 70 N. W. 926; Gilbert *v.* Loberg (1894), 86 Wis. 661, 57 N. W. 982.

What may be stricken out as Surplusage. A paragraph of a complaint which does not allege any fact essential to the plaintiff's cause of action, should be stricken out upon motion: Pitkin *v.* New York & New England R. R. Co. (1894), 64 Conn. 482, 30 Atl. 772. The court may, on its own motion, strike out scandalous matter: Morrison *v.* Snow (1903), 26 Utah 247, 72 Pac. 924. Averments of oral conversations between plaintiff and defendant prior to the making of the written contract set out in the pleading, are properly stricken out on motion because merged in the written instrument: Jordan *v.* Coulter (1902), 30 Wash. 116, 70 Pac. 257. It is unnecessary to plead facts of which the court will take judicial notice: George *v.* State (1899), 59 Neb. 163, 80 N. W. 486.

Consequence of Retaining Surplusage. While unnecessary averments in a pleading need not be proved (Kerr *v.* Topping (1899), 109 Ia. 150, 80 N. W. 321), yet they may be supported by evidence if allowed to remain, and such evidence should not be ruled out on objection: Dent *v.* Railroad (1901), 61 S. C. 329, 39 S. E. 527; Hicks *v.* Southern Ry. (1902), 63 S. C. 559, 41 S. E. 753; Smith *v.* Meyers (1898), 54 Neb. 1, 74 N. W. 277.

In Kelly *v.* Clark (1898), 21 Mont. 291, 53 Pac. 959, the court said: "If a plaintiff aver more than is necessary, and fail to sustain immaterial and redundant averments, but does prove all the material facts upon which a right to relief is based, and no motion to correct the pleading has been made, it will be treated as sufficient, and the surplus allegations disregarded." And in Smith *v.* Meyers (1898), 54 Neb. 1, 74 N. W. 277, the court said: "A defendant who by answer pleaded new matter, which the court refused to strike out as immaterial, cannot be heard to complain that the court erred in efusing to strike from the reply allegations traversing those of the answer."

It was held in Campbell *v.* Mo. Pac. Ry. Co. (1893), 121 Mo. 340, 25 S. W. 936, that the fact that the petition unnecessarily charged negligence did not prevent a recovery under the statute without proof of negligence, the statute making railroad companies liable without proof of negligence for property injured or destroyed by fire set by their locomotives. And in Oglesby *v.* Mo. Pac. Ry. Co. (1899), 150 Mo. 137, 37 S. W. 829, it was held that if a petition founded on negligence states two acts, each constituting negligence and either sufficient in itself to sustain the cause of action, if there be proof to sustain one and no proof to sustain the other, the action will not fail after verdict.

Inconsistent Allegations. If a complaint states a good cause of action, additional allegations inconsistent with such statement do not render it demurrable: Ross *v.* Charleston, etc. Co. (1894), 42 S. C. 447, 20 S. E. 285. But where a complaint states a good cause of action and also states facts constituting a defence thereto, it is bad on demurrer: Roberts *v.* Indian-

§ 447. *553. **III. The Doctrine that the Cause of Action Proved must correspond with the One Alleged. Degrees of Variance between Allegations and Proof.** The codes describe three grades of disagreement between the proofs at the trial and the allegations in the pleadings to which such proofs are directed: namely, (1) An immaterial variance, where the difference is so slight and unimportant that the adverse party is not misled thereby, and in which case the court will order an immediate amendment without costs, or will treat the pleading as though amended, permitting the evidence to be received and considered; (2) A material variance, where although the proof has some relation to and connection with the allegation, yet the difference is so substantial that the adverse party is misled by the averment, and would be prejudiced on the merits, in which case the court may permit the pleading to be amended upon terms;[1] (3) A complete failure of proof, where the proofs do not simply fail to conform with the allegation in some particular or particulars, but in its entire scope and meaning, or, in other words, the proof establishes something wholly different from the allegations. In this case

apolis St. Ry. Co. (1902), 158 Ind. 634, 64 N. E. 217.

Where an answer contains allegations of fraud and other allegations absolutely contradictory of and inconsistent with them, the latter may be stricken out on motion: State *ex rel. v.* Dickerman (1895), 16 Mont. 278, 40 Pac. 698.

It was held in Raming *v.* Metropolitan St. Ry. Co. (1900), 157 Mo. 477, 57 S. W. 268, that a petition which states acts as being both negligent and wanton or wilful at the same time is self-contradictory. A claim by a bank of a general lien on a debtor's securities for a balance due by the debtor is not inconsistent with its claim of a lien thereon by special contract: Cockrill *v.* Joyce (1896), 62 Ark. 216, 35 S. W. 221. Nor is an allegation in a complaint on a promissory note that the indorser waived notice inconsistent with allegations showing that the holder was excused from giving notice by the subsequent action of the indorser: Loveday *v.* Anderson (1897), 18 Wash. 322, 51 Pac. 463.

Predicating Error on Ruling on Motion. The refusal of the court to strike out redundant and irrelevant matter is not reversible error unless it affirmatively appears that the rights of the moving party are thereby prejudiced: Lincoln Mortgage & Trust Co. *v.* Hutchins (1898), 55 Neb. 158, 75 N. W. 538; Hudelson *v.* First Nat. Bank (1898), 56 Neb. 247, 76 N. W. 570; State Bank *v.* Showers (1902), — Kan. —, 70 Pac. 332; Pfau *v.* State *ex rel.* (1897), 148 Ind. 539, 47 N. E. 927; Coddington *v.* Canaday (1901), 157 Ind. 243, 61 N. E. 567; Atchison, etc. Ry. Co. *v.* Marks (1901), 11 Okla. 82, 65 Pac. 996.

Waiver of Objection. It is too late after verdict to raise the objection that a petition contains redundant and immaterial matter: Bradley *v.* Chicago, etc. Ry. Co. (1896), 138 Mo. 293, 39 S. W. 763. And it was held in Bright *v.* Ecker (1896), 9 S. D. 192, 69 N. W. 824, that a complaint containing redundant matter and allegations relating to more than one cause of action, will be held sufficient in the Supreme Court in the absence of an attack by motion, if the facts alleged show any cause of action.]

[1] [See Olson *v.* Snake River Valley R. R. Co. (1900), 22 Wash. 139, 60 Pac. 156.]

no amendment is permitted, but the cause of action or defence is dismissed or overruled.[1] In these statutory provisions the doctrine that the proofs must correspond with the allegations is, in a somewhat modified form, united with the subject of amendment, by which the minor grades of the variance may be obviated. In the present subdivision I shall consider only the former of these two topics, and shall discuss the scope and effect of the general rule, that the cause of action, or the defence as proved, must correspond with that averred in the pleading.[2]

§ 448. *554. **Consequences of Different Degrees of Variance.** The very object and design of all pleading by the plaintiff, and of all pleading of new matter by the defendant, is that the adverse party may be informed of the real cause of action or defence relied upon by the pleader, and may thus have an opportunity of meeting and defeating it if possible at the trial. Unless the petition or complaint on the one hand, and the answer on the other, fully and fairly accomplishes this purpose, the pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state their demands orally before the court at the time of the trial. The requirement, therefore, that the cause of action or the affirmative defence must be stated as it actually is, and that the proofs must estab-

[1] See these provisions quoted *supra*, § *435.

[2] The following cases will illustrate this rule: Bishop *v.* Griffith, 4 Colo. 68; Burdsall *v.* Waggoner, 4 id. 256; Boardman *v.* Griffin, 52 Ind. 101; Long *v.* Doxey, 50 id. 385; Baker *v.* Dessauer, 49 id. 28; Stroup *v.* State, 70 id. 495; Jeffersonville, M. & I. R. Co. *v.* Worland, 50 id. 339; Arnold *v.* Angell, 62 N. Y. 508; Vrooman *v.* Jackson, 6 Hun, 326; Mondran *v.* Goux, 51 Cal. 151; Hopkins *v.* Orcutt, 51 id. 537; Bolen *v.* San Gorgonio Fl. Co., 55 id. 164; McCord *v.* Seale, 56 id. 262.

[A plaintiff must recover according to the allegations of his complaint, or not at all: Thompson *v.* Citizens' St. Ry. Co. (1898), 152 Ind. 461, 53 N. E. 462; Southern Kansas Ry. Co. *v.* Griffith (1894), 54 Kan. 428, 38 Pac. 478; Imhoff *v.* House (1893), 36 Neb. 28, 53 N. W. 1032; Thompson *v.* Wertz (1894), 41 Neb. 31, 59 N. W. 518; Luce *v.* Foster (1894), 42 Neb. 818, 60 N. W. 1027; Lewis *v.* Scotia Bldg. & Loan Ass'n (1894), 42 Neb. 439, 60 N. W. 881; Omaha Consolidated Co. *v.* Burns (1895), 44 Neb. 21, 62 N. W. 301; Matthews *v.* O'Shea (1895), 45 Neb. 299, 63 N. W. 820; Cannon *v.* Smith (1896), 47 Neb. 917, 66 N. W. 999; Carter *v.* Gibson (1896), 47 Neb. 655, 66 N. W. 631; Esterly Harv. Mach. Co. *v.* Berg (1897), 52 Neb. 147, 71 N. W. 952; Solt *v.* Anderson (1902), 63 Neb. 734, 89 N. W. 306; Elliott *v.* Carter White-Lead Co. (1898), 53 Neb. 458, 73 N. W. 948; Smith *v.* Building, etc. Ass'n (1895), 116 N. C. 102, 21 S. E. 33; McMahan *v.* Canadian Ry. Co. (1901), 40 Ore. 148, 66 Pac. 708; Crawford *v.* Aultman & Co. (1897), 139 Mo. 262, 40 S. W. 952; Hite *v.* Metropolitan St. Ry. Co. (1895), 130 Mo. 132, 31 S. W. 262; Chitty *v.* St. Louis, etc. Ry. Co. (1899), 148 Mo. 64, 49 S. W. 868; Rumsey *v.* People's Ry. Co. (1898), 144 Mo. 175, 46 S. W. 144; Solt *v.* Anderson (1903), — Neb. —, 93 N. W. 205.

And this is so notwithstanding that evidence to support a judgment may have been

lish it as stated, is involved in the very theory of pleading.[1] It frequently happens, however, and from the very nature of the case it must happen, that the facts as proved do not *exactly* agree with those alleged. To determine the effect of such a disagreement we must recur to the reason and object of the rule, and they furnish a certain and equitable test. If the difference is so slight that the adverse party has not been misled, but, in preparing to meet and contest the case as alleged, he is fully prepared to meet and oppose the one to be actually proved, then no effect whatever is produced by the variance; to impose any loss or penalty on the pleader would be arbitrary and technical.[2] In

admitted without objection: New Idea Pattern Co. *v.* Whelan (1903), 75 Conn. 445, 53 Atl. 953; Central R. R. Co. *v.* Cooper (1894), 95 Ga. 406, 22 S. E. 549; McMahan *v.* Canadian Ry. Co. (1901), 40 Ore. 148, 66 Pac. 708; Christian *v.* Conn. Mut. Ins. Co. (1898), 143 Mo. 460, 45 S. W. 268; Greenthal *v.* Lincoln, Seyms, & Co. (1896), 67 Conn. 372, 35 Atl. 266; Box Butte County *v.* Noleman (1898), 54 Neb. 239, 74 N. W. 582; Schmidt *v.* Oregon Gold Min. Co. (1895), 28 Ore. 9, 40 Pac. 406, 1014; Coughanour *v.* Hutchinson (1902), 41 Ore. 419, 69 Pac. 68; McGavock *v.* City of Omaha (1894), 40 Neb. 64, 58 N. W. 543; Furbush *v.* Barker (1894), 38 Neb. 1, 56 N. W. 996; Brown *v.* Railway Co. (1898), 59 Kan. 70, 52 Pac. 65; Whiting *v.* Koepke (1898), 71 Conn. 77, 40 Atl. 1053; Moran *v.* Bentley (1897), 69 Conn. 392, 37 Atl. 1092; Daly *v.* New Haven (1897), 69 Conn. 644, 38 Atl. 397. See also McLaughlin *v.* Webster (1894), 141 N. Y. 76, 35 N. E. 1081.

Contra, Morrow *v.* Board of Education (1895), 7 S. D. 553, 64 N. W. 1126; Brady *v.* Nally (1896), 151 N. Y. 258, 45 N. E. 547; Gillies *v.* Improvement Co. (1895), 147 N. Y. 420, 42 N. E. 196; Schoepflin *v.* Coffey (1900), 162 N. Y. 12, 56 N. E. 502; Bassett *v.* Haren (1895), 61 Minn. 346, 63 N. W. 713; Rosenberger *v.* Marsh (1899), 108 Ia. 47, 78 N. W. 837; Smith *v.* Phelan (1894), 40 Neb. 765, 59 N. W. 562.]

[1] [But the issues may, by written stipulation, or agreement in open court, be narrowed so as to be confined to one point: Granby Mining Co. *v.* Davis (1900), 156 Mo. 422, 57 S. W. 126. And the issues may be broadened by stipulation. In McElwaine *v.* Hosey (1893), 135 Ind. 481, 35 N. E. 272, it was held that where the parties to an action agree before entering upon a trial "that all facts relating in any way to the case in hand, or affecting the merits of the controversy on either side, may be introduced in evidence under the pleadings now on file," such agreement precludes all insistence that the relief granted is broader than the pleadings authorize.]

[2] [A party cannot complain of a mere variance between pleading and proof unless he has been actually misled to his prejudice: Kuhn *v.* McKay (1897), 7 Wyo. 42, 49 Pac. 473; and such prejudice must be shown to the court: Meldrum *v.* Kenefick (1902), 15 S. D. 370, 89 N. W. 863; Chicago House Wrecking Co. *v.* Lumber Co. (1902), — Neb. —, 92 N. W. 1009; People's Nat. Bank *v.* Myers (1902), 65 Kan. 122, 69 Pac. 164.

Variances between allegations and proof which are immaterial or not prejudicial, do not call for a reversal of the judgment: Knight *v.* Finney (1899), 59 Neb. 274, 80 N. W. 912; Salazar *v.* Taylor (1893), 18 Colo. 538, 33 Pac. 369; Lubker *v.* Grand Detour Plow Co. (1897), 53 Neb. 111, 73 N. W. 457; Kuhn *v.* McKay (1897), 7 Wyo. 42, 49 Pac. 473. A variance will not be deemed material unless it has misled the adverse party to his prejudice: Toy *v.* McHugh (1901), 62 Neb. 820, 87 N. W. 1059; Post-Intelligencer Co. *v.* Harris (1895), 11 Wash. 500, 39 Pac. 965; Dudley *v.* Duval (1902), 29 Wash. 528, 70 Pac. 68; Meldrum *v.* Kenefick (1902), 15 S. D. 370, 89

the second place, the difference, while it does not extend to the entire cause of action or defence, may be so great in respect to some of its particular material facts as to have misled the adverse party, so that his preparation in connection with that particular is not adapted to the proofs which are produced. In such circumstances an amendment is proper because the variance is partial, but it is obviously equitable that terms should be imposed. Finally, if the divergence is total, that is, if it extends to such an important fact, or group of facts, that the cause of action or defence as proved would be another than that set up in the pleadings, there is plainly no room for amendment, and a dismissal of the complaint or rejection of the defence is the only equitable result. It should be noticed that, in order to constitute this total failure of proof, it is not necessary for the discrepancy to include and affect each one of the averments. A cause of action as stated on the pleadings might consist, say, of five distinct issuable or material facts; on the trial four of these might be proved as laid, while one so entirely different might be substituted in place of the fifth that the cause of action would be wholly changed in its essential nature.

§ 449. *555. **Instances where Variance has been held Immaterial.** The conclusions reached in the foregoing analysis, and the reasons which support them, are fully sustained by the decided cases which constantly discriminate between the immaterial variance which is disregarded, and the total failure of proof which is fatal to the cause of action or defence.[1] It is of course impossible to give any comprehensive formula which shall determine these two conditions; the scope and operation of the doctrine can only be learned from the decisions which have applied it, of which a few are selected as illustrations. In the following instances the variance was held to be immaterial: In an action upon a written contract which was properly set out in the complaint except that one material stipulation was omitted, but a correct copy of it had been served upon the defendant's attorney;[2] in an action against a city for injuries done to the plaintiff's house and grounds by the unlawful construction of sewers, side-

N. W. 863; Wilcox Lumber Co. *v.* Ritteman (1902), 88 Minn. 18, 92 N. W. 472. Where a variance is immaterial the court will either disregard it altogether or order an immediate amendment without costs: Wilcox Lumber Co. *v.* Ritteman (1902), 88 Minn. 18, 82 N. W. 472.]

[1] [See Dudley *v.* Duval (1902), 29 Wash. 528, 70 Pac. 68.]

[2] Fisk *v.* Tank, 12 Wis. 276, 301.

walks, etc., it was held that, if the manner of constructing the works was unlawful, the failure to allege negligence in the complaint was not material, and might be either disregarded or amended at any stage of the proceeding;[1] in an action upon a warranty given in a sale of horses, where the complaint stated in general terms that the defendant warranted them to be sound, while the proof was that he warranted them to be sound as far as he knew; that they were unsound, and that he knew them to be so, the court saying that an amendment if necessary should be made at any time even by the appellate court;[2] in an action upon a warranty of quality, where the complaint set forth an express warranty, and on the trial facts were proved from which a warranty would be implied;[3] in an action against two defendants to recover damages for injuries done to the plaintiff's sheep by the defendants' dogs, the petition alleging that "a certain pack or lot of dogs owned by the defendants worried, etc., certain sheep of the plaintiff," while the proof showed that one of the defendants owned a portion of the dogs, and the other defendant the remainder, but there was no joint ownership;[4] in an action by a husband and wife against a husband and wife for an assault and battery by the female defendant upon the female plaintiff, the petition alleging that the plaintiff Mary D. *is* the wife of the plaintiff, James D., and the defendant, Martha H., *is* wife of the defendant, Aaron H., and proof was admitted that the parties were respectively man and wife at the time of the affray;[5] in an equitable action brought to set aside a conveyance of land made to the defendant, on the ground of his alleged fraud, and the plaintiff failed to make out a case of fraud, but did prove one of mutual mistake;[6] in an action for work and labor stated in the complaint to have been done for an agreed compensation, but at the trial the plaintiff proved the value as upon a *quantum meruit*.[7] The Supreme Court of North Carolina

[1] Harper *v.* Milwaukee, 30 Wis. 365, 377, 378. "The alleged variance did not change the *gravamen* of the action."

[2] Chatfield *v.* Frost, 3 N. Y. S. C. 357.

[3] Giffert *v.* West, 33 Wis. 617, 621; Leopold *v.* Vankirk, 27 Wis. 152, 155; s. c. 29 Wis. 548, 551. At the common law, this was the only mode of alleging an implied warranty.

[4] McAdams *v.* Sutton, 24 Ohio St. 333.

[5] Dailey *v.* Houston, 58 Mo. 361, 366.

[6] Montgomery *v.* Shockey, 37 Iowa, 107, 109; Sweezey *v.* Collins, 36 Iowa, 589, 592.

[7] Sussdorff *v.* Schmidt, 55 N. Y. 319, 324.

has gone so far as to hold in one case where the complaint set up a cause of action for the conversion of chattels, and the proof at the trial showed only a liability upon an implied promise for money had and received, that the plaintiff could recover, since all distinction between forms of action had been abolished, and amendments were freely allowed.[1] This decision, as will be seen, stands opposed to the whole current of authority in other States. The objection that the proof varies from the allegation must be taken at the trial; if omitted, then it cannot be afterwards raised on appeal.[2] The reason is obvious; when made

[1] Oates *v.* Kendall, 67 N. C. 241. But see Parsley *v.* Nicholson, 65 N. C 207, 210, which maintains the general doctrine.

[2] Speer *v.* Bishop, 24 Ohio St. 598. See, also, as further examples of immaterial variance, Chamballe *v.* McKenzie, 31 Ark. 155; Bruguier *v.* U. S., 1 Dak. 5; McMahan *v.* Miller, 82 N. C. 317; Gaines *v.* Union Ins. Co., 28 Ohio St. 418; Sibila *v.* Bahney, 34 Ohio St. 399; Dodd *v.* Denney, 6 Ore. 156; Miller *v.* Hendig, 55 Iowa, 174; Peck *v.* N. Y. & N. J. Ry. Co., 85 N. Y. 246; Durnford *v.* Weaver, 84 id. 445; Thomas *v.* Nelson, 69 id. 118; Lifler *v.* Sherwood, 21 Hun, 573; Clayes *v.* Hooker, 4 id. 231; Cody *v.* Bemis, 40 Wis. 666; Flanders *v.* Cottrell, 36 id. 564; Giffert *v.* West, 37 id. 115; Chunot *v.* Larson, 43 id. 536; Russell *v.* Loomis, 43 id. 545; Aschermann *v.* Brewing Co., 45 Wis. 262; Union Nat. Bk. *v.* Roberts, 45 id. 373; Delaplaine *v.* Turnley, 44 id. 31; Ryan *v.* Springfield F. & M. Ins. Co., 46 id. 671; Willer *v.* Bergenthal, 50 id. 474; Galloway *v.* Stewart, 49 Ind. 156; Glasgow *v.* Hobbs, 52 id. 239, 242; Wright *v.* Johnson, 50 id. 454; Stroup *v.* State, 70 id. 495; Huntington *v.* Mendenhall, 73 id. 460; Thigpen *v.* Staton, 104 N. C. 40; Merkle *v.* Bennington, 68 Mich. 133; Thalheimer *v.* Crow, 13 Colo. 397.

[Gillies *v.* Improvement Co. (1895), 147 N. Y. 420, 42 N. E. 196; Brady *v.* Nally (1896), 151 N. Y. 258, 45 N. E. 547; Ashe *v.* Beasley (1896), 6 N. D. 191, 69 N. W. 188; Ætna Iron Works *v.* Firmenich Mfg. Co. (1894), 90 Ia. 390, 57 N. W. 904; Dean *v.* Goddard (1893), 55 Minn. 290, 56 N. W. 1060; Adams *v.* Castle (1896), 64 Minn. 505, 67 N. W. 637; Lindsay *v.* Pettigrew (1894), 5 S. D. 500, 59 N. W. 726; Chouquette *v.* Southern Elec. R. R. Co. (1899), 152 Mo. 257, 53 S. W. 897. The party whose proof varies from his allegations cannot complain: Williams *v.* Williams (1899), 102 Wis. 246, 78 N. W. 419.

In Schirmer *v.* Drexler (1901), 134 Cal. 134, 66 Pac. 180, the court said: "The findings and decree seem to be entirely outside of the case made by the pleadings. The said findings and decree contradict the material allegations of plaintiff's complaint, and there seem to be no allegations at all in the complaint to which the findings and decree can be held to be material or pertinent. The whole theory of the complaint is, that the plaintiff's rights are those of an owner, acquired by adverse use of the ditch and the water. The findings and decree proceed upon an entirely different theory, and expressly state that the use of the water and of the ditch by the plaintiff and his predecessor in interest therein was had with the consent of the owners thereof and under an oral license or agreement therefor. The decree attempts to enforce the specific performance of a contract which is not only not set up in the complaint, but to which no reference is made anywhere in the pleadings. We know that there are cases which hold, as contended by respondent, that where a question is treated by both parties as an issue in the case, and evidence is taken thereon without objection, the appellant will not thereafter be heard to say that the question was not in issue. That is a salutary general rule, and we do not wish to overturn it. But

at the trial, there is an opportunity for removing it at once by amendment.[1]

in none of those cases, that we have been able to find, were the findings and decree clear outside of the case as made by the pleadings, but in each and all of them the findings, taken altogether, have some relation to the issues as framed; but here the issues as made by the pleadings sustain no degree of kinship whatever to the findings and decree, and are, besides, in direct conflict with the allegations of the complaint. It would be going too far to hold that such a variance as this should be deemed to be waived by failure to object to evidence at the trial. If the burden was on the plaintiff to establish the case made by his complaint, why should the defendants object to evidence, as long as it went to show that the case as thus made did not exist? If this kind of a judgment can be upheld on this kind of a record, then written pleadings are no longer necessary, and may well be dispensed with altogether." Cases cited.]

[1] [In the following cases the variance was held immaterial: In an action against a national bank on its double liability as a stockholder in another corporation, an allegation that it acquired the stock in a particular manner and proof that it acquired it in another manner not *ultra vires:* Bank *v.* Bank (1902), 64 Kan. 134, 67 Pac. 458; error in the description of the name of the obligee in a bond: Post-Intelligencer Co. *v.* Harris (1895), 11 Wash. 500, 39 Pac. 965; a mistake in the description of a house upon which a lien is sought to be foreclosed, when the mistake is so slight that the house is still capable of identification: Griffith *v.* Maxwell (1898), 20 Wash. 403, 55 Pac. 571; error in the details of personal injuries suffered by an insured by reason of a fall: Mercier *v.* Travelers' Ins. Co. (1901), 24 Wash. 147, 64 Pac. 158; an allegation that defendant signed a note as principal, and evidence that he signed as surety: Hermiston *v.* Green (1898), 11 S. D. 81, 75 N. W. 819; an allegation that defendant and another were partners until the other's death in 1893, and proof that the partnership was dissolved by consent in 1885, without the knowledge of the plaintiff; an allegation that defendant executed a separate promissory note, and proof that it was a joint and several note of defendant and another: Nichols & Shepard Co. *v.* Dedrick (1895), 61 Minn. 513, 63 N. W. 1110.

In the following cases it was held that there was no variance between the pleadings and proof: an allegation of a money indebtedness for services rendered, and proof of an agreement to pay in specific articles of property: New York News Publishing Co. *v.* Steamship Co. (1895), 148 N. Y. 39, 42 N. E. 514; an allegation that promissory notes were signed by defendant as maker, and proof that they were signed by defendant and others under a several liability: Hinchman *v.* Point Defiance Ry. Co. (1896), 14 Wash. 349, 44 Pac. 152; an allegation that the place of injury was a sidewalk, and proof that it was a crosswalk: Piper *v.* City of Spokane (1900), 22 Wash. 147, 60 Pac. 138; an allegation, in an action for trespass, of ownership of property in fee, and proof of an equitable interest only: Olson *v.* City of Seattle (1903), 30 Wash. 687, 71 Pac. 201; an allegation that plaintiff stumbled over the nails projecting from a walk, and proof that she caught her foot between two planks: Bell *v.* City of Spokane (1902), 30 Wash. 508, 71 Pac. 31; proof of interest upon a balance of an account, where there is no allegation of interest due in the complaint: North Star Boot Co. *v.* Stebbins (1893), 3 S. D. 540, 54 N. W. 593; an allegation of slanderous words, and proof of the use of words only substantially the same: Emerson *v.* Miller (1902), 115 Ia. 315, 88 N. W. 803; an allegation of defendant's liability as a common carrier, and proof of liability as a warehouseman: Cavallaro *v.* Texas, etc. Ry. Co. (1895), 110 Cal. 348, 42 Pac. 918 (see *contra*, Normile *v.* Oregon, etc. Co. (1902), 41 Ore. 177, 69 Pac. 928); an allegation that plaintiff, in an action for fraud, was mentally weak and incompetent, and proof that she was weak-minded and far below the average in intellect: Hayes *v.* Candee (1902), 75 Conn. 131, 52 Atl. 826.]

§ 450. *556. **Instances of Complete Failure of Proof.** The following are examples of a complete failure of proof. In all these cases one cause of action was alleged by the plaintiff, and another one was proved or attempted to be proved at the trial, but was rejected by the court. The New York Court of Appeals, while passing upon the admissibility of evidence which made out a liability under implied contract, in order to sustain a complaint that charged a fraudulent transaction and sought to recover the money obtained by means of such fraud, used the following language in a recent case: "It is insisted that, under the code, forms of action are abolished, and that the facts showing the right of action need only be stated. This is correct, but it does not aid the plaintiff. The plaintiff had a cause of action against the defendant upon an account for moneys advanced for him. Instead of stating this cause of action, the allegation is in substance that he paid him money as the price of stocks fraudulently sold by defendant to plaintiff, which contract has been rescinded by the plaintiff, and a return of the money demanded, which has been refused by the defendant. These causes of action differ in substance. The former is upon contract, the latter in tort; and the law will not permit a recovery upon the latter by showing a right to recover upon the former."[1] It is the settled rule under the codes, contrary to that prevailing in the common-law system, that when a cause of action depends upon the performance of some act, but under certain circumstances the performance may

[1] Degraw *v.* Elmore, 50 N. Y. 1. The following cases give further examples of a material or fatal variance, or a failure of proof: Bishop *v.* Griffeth, 4 Colo. 68; Proctor *v.* Rief, 52 Iowa, 592; Burns *v.* Iowa Homestead Co., 48 id. 279; York *v.* Wallace, 48 id. 305; Fauble *v.* Davis, 48 id. 462; McKoon *v.* Ferguson, 47 id. 636; Arnold *v.* Angell, 62 N. Y. 508 (partnership); Harris *v.* Kasson, 79 id. 381; Stowell *v.* Eldred, 39 Wis. 614; Cowles *v.* Warner, 22 Minn. 449; Cummings *v.* Long, 25 id. 337; Vrooman *v.* Jackson, 6 Hun, 326 (ejectment); Southwick *v.* First Nat. Bk. of Memphis, 84 N. Y. 420; Gaston *v.* Owen, 43 Wis. 103; Streeter *v.* Chicago, etc. Ry. Co., 44 id. 383; Jeffersonville, M. & I. R. Co. *v.* Worland, 50 Ind. 339 (complaint sets forth special contract for transportation of goods; cannot recover on breach of implied contract or of common carrier's legal duty to transport in a reasonable time); Hinkle *v.* San Francisco & N. P. R. Co., 55 Cal. 627; and cases cited *ante*, under § *553. See also Ehrlich *v.* Ætna L. Ins. Co., 103 Mo. 231 (allegation of performance does not lay foundation for evidence excusing nonperformance); Daley *v.* Russ, 86 Cal. 114 (same); Reed *v.* McConnell, 133 N. Y. 425; Clark *v.* Sherman (Wash. 1893), 32 Pac. 771 (complaint being for money had and received, plaintiff cannot recover on an express contract); Distler *v.* Dabney, 3 Wash. 200 (same); Wernli *v.* Collins (Iowa, 1893), 54 N. W. 365 (complaint being on an express contract, plaintiff cannot recover on a *quantum meruit*); Woolsey *v.* Ellenville V. Trs. (Supreme, 1893), 23 N. Y. Suppl. 411.

be excused and the cause of action still remain in force, the facts showing the excuse must be alleged if the plaintiff intends to rely upon it, and not upon the performance. The plaintiff is no longer permitted to aver the performance of the required act, and on the trial prove the circumstances which excuse such performance, or prove any other alternative than the one specially alleged.[1] Thus where, in an action against indorsers, the complaint stated a demand at maturity, and notice thereof to the defendants, and on the trial the plaintiff offered to prove facts which would excuse any demand, the evidence was held inadmissible, and the action was dismissed;[2] and in a similar case under a statute which required that, in order to make an indorser liable, due diligence must be used by the institution of a suit against the maker, or else that such a suit would be unavailing, the petition alleged that due diligence had been used by commencing a suit against the maker, in which judgment had been recovered, and an execution had been issued and returned unsatisfied; and it was held that the other alternative, the maker's insolvency, and the consequent unavailing character of a suit against him, could not be shown on the trial;[3] and in a similar action against the drawer of a bill or the indorser of a bill or note, when the petition avers the demand and notice in order to charge the defendant, a waiver of these steps cannot be proved, — for example, a subsequent promise by the defendant to pay the note when the steps necessary to charge him had been omitted.[4]

§ 451. *557. **Examples of Fatal Disagreement between Cause of Action Pleaded and Proved.** The following are miscellaneous instances of a fatal disagreement between the cause of action pleaded and that proved on the trial. In an action to recover damages for trespass to lands, the complaint alleging that the plaintiffs were possessed of the premises; on the trial, however, it appeared that they were remainder-men not yet entitled to the possession, while the defendants were rightfully in possession, but had committed acts of waste for which they would be liable

[1] [See subject "Waiver" in note on Necessity and Form of Particular Allegations, p. 689, where cases are cited in support of, and in opposition to, the rule stated in the text. See also Omaha Consolidated Co. *v.* Burns (1895), 44 Neb. 21, 62 N. W. 301; Olson *v.* Snake River Valley R. R. Co. (1900), 22 Wash. 139, 60 Pac. 156; New England Loan & Trust Co. *v.* Browne (1900), 157 Mo. 116, 57 S. W. 760.]

[2] Pier *v.* Heinrichoffen, 52 Mo. 333, 335.

[3] Woolsey *v.* Williams, 34 Iowa, 413, 415.

[4] Lumbert *v.* Palmer, 29 Iowa, 104, 108. See also Hudson *v.* McCartney, 33 Wis. 331, 346, and cases cited.

in an action properly brought. This cause of action being wholly different from that alleged, the complaint was dismissed.[1] The petition in an action of forcible entry and detainer stating that the defendant was holding over after the expiration of his lease, the plaintiff was not permitted to show that he obtained possession through fraud; since this would be the averment of one material fact, and the proof of another.[2] When the complaint set forth a contract, and on the trial the plaintiff proved without objection a materially different one, and was thereupon nonsuited, the nonsuit was sustained, the court adding that the admission of the evidence without objection made no difference with the operation of the rule.[3] And if a complaint sets forth a cause of action for a nuisance of a certain specified kind, an essentially different one cannot be proved; as, for example, in an action by a lower riparian owner for increasing the flow of a natural watercourse by draining other streams into it, the plaintiff was not permitted to prove a nuisance which consisted solely in the fouling of such watercourse by the defendant.[4] A written contract having been set out in the petition, the plaintiff cannot in place of it prove facts going to show that the defendant is estopped from denying such contract.[5] When a petition stated a cause of action for work and labor done by the plaintiff for the defendant, but the proofs showed that defendant had only guaranteed the payment by other persons for services rendered to them, a recovery was held impossible.[6] An allegation that the defendant erected a fence across a highway, and thereby obstructed it, cannot be sustained by proof that the defendant built a stone fence fifteen rods from the road, and thereby caused water to flow upon and obstruct the same, for the causes of action are different;[7] and upon an allegation that the plaintiff did work and labor for defendant on his milldam, proof that the services were performed in harvesting grain is a fatal variance.[8]

[1] Tracy *v.* Ames, 4 Lans. 500, 506.

[2] Goldsmith *v.* Boersch, 28 Iowa, 351, 354.

[3] Johnson *v.* Moss, 45 Cal. 515.

[4] O'Brien *v.* St. Paul, 18 Minn. 176, 181.

[5] Phillips *v.* Van Schaick, 37 Iowa, 229, 237. It was added that if the plaintiff wishes to avail himself of an estoppel it must be specially pleaded, citing Ransom *v.* Stanberry, 22 Iowa, 334.

[6] Packard *v.* Snell, 35 Iowa, 80, 82.

[7] Hill *v.* Supervisor, 10 Ohio St. 621.

[8] Thatcher *v.* Heisey, 21 Ohio St. 668.

[*Variance.*

In the following cases it was held that there was a variance between pleadings and proof: —

Negligence. An allegation that the engineer of the train which struck plaintiff

§ 452. *558. Variance Fatal where Cause of Action in Tort Alleged and one in Contract Proved. By far the most important distinction directly connected with this doctrine is that which

discovered plaintiff in time to prevent the injury, and proof that it was the fireman and not the engineer who saw plaintiff (not curable by amendment): Chun *v.* Receivers (1901), Ky., 64 S. W. 649; an allegation of negligence in running defendant's cars, and proof that defendant did not provide plaintiff with a safe place in which to work: Thompson *v.* Citizens' St. Ry. Co. (1898), 152 Ind. 461, 53 N. E. 462; an allegation that plaintiff injured herself by stepping into a hole caused by a missing board in a sidewalk, and proof that she stepped upon a loose board, which "rocked," turning her foot and causing it to go into the hole: Gagan *v.* City of Janesville (1900), 106 Wis. 662, 82 N. W. 558; an allegation of an injury to a passenger by reason of defendant's negligence, and proof of injury to a trespasser by reason of gross negligence: Fitzgibbon *v.* Chicago, etc. Ry. Co. (1899), 108 Ia. 614, 79 N. W. 477; an allegation that defendant was negligent in failing to stop its train at a station while plaintiff was getting off, and proof that defendant was negligent in not showing plaintiff the safe way to go from one train to another: Moss *v.* North Carolina R. R. Co. (1898), 122 N. C. 889, 29 S. E. 410; an allegation that the gripman pushed plaintiff from the car, and proof that plaintiff fell in trying to dodge a blow aimed at him by the gripman: Raming *v.* Metropolitan St. Ry. Co. (1900), 157 Mo. 477, 57 S. W. 268; an allegation that fire was negligently taken from defendant's threshing engine and placed in the stubble where it communicated to plaintiff's property, and evidence that defendant was negligent in not properly extinguishing the fire after having properly taken it from the engine: Lieuallen *v.* Mosgrove (1898), 33 Ore. 282; 54 Pac. 200; an allegation of joint negligence and proof of negligence of defendants severally: Chetwood *v.* California Nat. Bank (1896), 113 Cal. 414, 45 Pac. 704; an allegation of negligence in operation of railroad and proof of negligence in use of defective spark arrester: Missouri, etc. Ry. Co. *v.* Garrison (1903), — Kan. —, 72 Pac. 225; location of accident: Dolan *v.* City of Milwaukee (1895), 89 Wis. 497, 61 N. W. 564; Kolb *v.* City of Fond du Lac (1903), 118 Wis. 311, 95 N. W. 149.

Common Carriers, Actions against. Plaintiff having sued defendant on its common-law liability as a common carrier, cannot recover on proof of a special contract limiting the common-law liability: Normile *v.* Oregon, etc. Co. (1902), 41 Ore. 177, 69 Pac. 928; where a complaint is drawn on the theory of defendant's liability as a common carrier, a recovery cannot be had against defendant as a warehouseman: Same case. But see, *contra*, Cavallaro *v.* Texas, etc. Ry. Co. (1895), 110 Cal. 348, 42 Pac. 918.

Fraud. In an action to set aside a sale as fraudulent, allegations of actual fraud are not supported by proof of constructive fraud. The court said: "If the vice which renders the sale null as to them [defendants] was the existence of actual fraud, the complaint must, as this complaint does, charge its presence. If the vice was constructive fraud, then it is incumbent upon the plaintiffs to state the matters which constitute that cause of action. Of course, both actual and constructive fraud may be pleaded in the same complaint, but if actual fraud only be set up, then, although proof of constructive fraud may be evidence, having a tendency to support the allegation of actual fraud, yet the finding of constructive fraud is not of itself sufficient to support a judgment, for the allegations and proof must correspond:" Finch *v.* Kent (1900), 24 Mont. 268, 61 Pac. 653. See also Kley *v.* Healey (1896), 149 N. Y. 346, 44 N. E. 150, where allegations of fraud were held not to be supported by the proof.

Title. A party cannot plead absolute ownership of property and prove a lien upon it merely, nor *vice versa:* Randall *v.* Persons (1894), 42 Neb. 607, 60 N. W. 898. See Title, p. 687. But see Olson *v.* City of Seattle (1903), 30 Wash. 687, 71 Pac. 201, p. 619, note 1. Held, in Smith *v.* Runnels (1896), 97 Ia. 55, 65 N. W. 1002, that

subsists between causes of action *ex contractu* and those *ex delicto*. It is settled by an almost unanimous series of decisions in various

plaintiff in a suit to partition land, who claims in the petition to have a life estate therein, is not entitled to relief on the ground that she has an estate in fee simple. See, however, the following cases: Where the complaint alleges title and right of possession in the plaintiff, a recovery may be had on proof that plaintiff owns the equity of redemption: Arrington *v.* Arrington (1894), 114 N. C. 116, 19 S. E. 278. In an action to recover land, plaintiff may allege title by inheritance and prove title by possession: Davis *v.* Leeper (1900), Ky., 56 S. W. 712. In an action to quiet title there is no variance between an allegation of title in fee and proof of an equitable title: Oliver *v.* Dougherty (1902), Ariz., 68 Pac. 553.

Express and Implied Contract. Where the complaint alleges an express contract and proof shows an implied contract, and *vice versa*, no recovery can be had: Buell *v.* Brown (1900), 131 Cal. 158, 63 Pac. 167; Morrow *v.* Board of Education (1895), 7 S. D. 553, 64 N. W. 1126. *Contra*, Hecht *v.* Stanton (1895), 6 Wyo. 84, 42 Pac. 749. See also on this general question, Gillies *v.* Improvement Co. (1895), 147 N. Y. 420, 42 N. E. 196; Columbus, etc. Ry. Co. *v.* Gaffney (1901), 65 O. St. 104, 64 N. E. 152.

Rescission. Where a breach of contract is alleged, the pleader cannot on the trial elect to rescind the contract and recover the portion of the price paid: Detroit Heating Co. *v.* Stevens (1897), 16 Utah, 177, 52 Pac. 379.

Mortgage. Where a complaint is predicated on the theory of lack of mental capacity to execute a deed, no recovery can be had on theory that the deed is in reality a mortgage: Swank *v.* Swank (1900), 37 Ore. 439, 61 Pac. 846.

Trust. In an action to enforce a trust, an allegation that a husband is trustee of property alleged to belong to his deceased wife's estate, is not supported by evidence that he had received money from his wife's separate property: Elmore *v.* Elmore (1896), 114 Cal. 516, 46 Pac. 458.

Insurance. A complaint upon a contract of insurance for $500 upon a certain building is not supported by evidence of a contract for $600 insurance upon two buildings on the same lot: Waldron *v.* Home Mutual Ins. Co. (1894), 9 Wash. 534, 38 Pac. 136.

Nuisance. Where, in an action against the city for damages caused by a nuisance, the petition charges that the city originated the nuisance, proof that it continued it only will not sustain a recovery, since in the latter case a request to abate is necessary: Rychlicki *v.* City of St. Louis (1893), 115 Mo. 662, 22 S. W. 908.

Account and Account Stated. Where the petition sets up a cause of action on an open account, plaintiff cannot recover upon proof of an account stated, as the two are distinct and inconsistent: McCormick *v.* Interstate, etc. Ry. Co. (1900), 154 Mo 191, 55 S. W. 252.

Trespass. Where one act of trespass is alleged to have been committed at a designated time and place, no recovery can be had for a different act shown to have been committed at a different time: La Rue *v.* Smith (1897), 153 N. Y. 428, 47 N. E. 796.

Contract. Plaintiff cannot allege one special contract and recover on proof of a different contract: Cremer *v.* Miller (1893), 56 Minn. 52, 57 N. W. 318; Winchester *v.* Joslyn (1903), — Colo. —, 72 Pac. 1079. But under an allegation that plaintiff performed services for defendant "at his instance and request," evidence may be introduced showing facts giving rise to an implied contract only: Columbus, etc. Ry. Co. *v.* Gaffney (1901), 65 O. St. 104, 61 N. E. 152. Under an allegation that a grantee orally agreed to assume a mortgage "and thereby and otherwise became legally and equitably bound to the grantor and to the mortgagee to pay the same," evidence that the grantee executed a bond to pay the deficiency if any, is admissible: Wager *v.* Link (1896), 150 N. Y. 549, 44 N. E. 1103. There is a variance between an allegation that a bond sued on was in the penal sum of $2,500 and evidence that it was in the sum of $1,500: Chicago, K. & W. Ry. Co. *v.* Evans (1896), 57 Kan. 286, 46 Pac. 303.

Miscellaneous. An allegation that plaintiff is indebted to defendant is not sup-

States, that if a complaint or petition in terms alleges a cause of action *ex delicto*, for fraud, conversion, or any other kind of tort,

ported by evidence that plaintiff's assignor is indebted to defendant: Anderson *v.* Alseth (1895), 6 S. D. 566, 62 N. W. 435. There is a fatal variance between an allegation that a contract was made by all the heirs of a named intestate and evidence that it was made by a portion only: Thompson *v.* Fenn (1896), 100 Ga. 234, 28 S. E. 39. Where suit is brought on a sheriff's bond for damages alleged to have been sustained by the failure of the sheriff to properly perform his duties, the plaintiff cannot recover on account of breaches of duty not alleged in the declaration: Hall & Brown Co. *v.* Barnes (1902), 115 Ga. 945, 42 S. E. 276. If the pleading is of allowed claims and the proof is of claims presented but not adjusted, there is a variance: Hofmann *v.* Tucker (1899), 58 Neb. 457, 78 N. W. 941. A petition alleging that a certain sum had come to the husband by reason of the marriage, is not supported by evidence that the money was voluntarily allowed to the husband by the wife after marriage: Dillon *v.* Starin (1895), 44 Neb. 881, 63 N. W. 12.

The fact that acts of negligence are alleged conjunctively does not require that all of them must be proved: Duell *v.* Chicago & N. W. Ry. Co. (1902), 115 Wis. 516, 92 N. W. 269; Stern *v.* City of St. Louis (1901), 161 Mo. 146, 61 S. W. 594; Terre Haute, etc. R. R. Co. *v.* Sheeks (1900), 155 Ind. 74, 56 N. E. 434; Cameron *v.* Bryan (1893), 89 Ia. 214, 56 N. W. 434.

And in general, if one alleges more than is necessary, such additional allegations need not be proved: Young *v.* Gormley (1903), 119 Ia. 541, 93 N. W. 565; Kaline *v.* Stover (1893), 88 Ia. 245, 55 N. W. 346; Reizenstein *v.* Clark (1897), 410 Ia. 287, 73 N. W. 588; Harwood *v.* Davenport (1898), 105 Ia. 592, 75 N. W. 487; Anderson *v.* Union Terminal Ry. Co. (1901), 161 Mo. 411, 61 S. W. 874; Meyer *v.* Koehring (1895), 129 Mo. 15, 31 S. W. 449; Gannon *v.* Laclede Gas Co. (1898), 145 Mo. 502, 46 S. W. 968. But see, however, Botkin *v.* Cassody (1898), 106 Ia. 334, 76 N. W. 722, which appears inconsistent with this rule.

Evidence Held Admissible under Particular Allegations.

In general, the proof must be confined to the issues as made by the pleadings: Thompson *v.* Wertz (1894), 41 Neb. 31, 59 N. W. 518; Callen *v.* Rose (1896), 47 Neb. 638, 66 N. W. 639; Ayers *v.* Wolcott (1902), — Neb. —, 92 N. W. 1036. See the following cases for specific illustrations of this rule: —

Acceptance: Thompson *v.* Perkins (1896), 97 Ia. 607, 66 N. W. 874. *Agreement to deliver:* Central R. R. Co. *v.* Hasselkus (1893), 91 Ga. 382, 17 S. E. 838. *Agreement to pay for services:* Owen *v.* Meade (1894), 104 Cal. 179, 37 Pac. 923. *Breach of warranty:* Snowden *v.* Waterman (1897), 100 Ga. 588, 28 S. E. 121. *Contract:* Duval *v.* Am. T. & T. Co. (1902), 113 Wis. 504, 89 N. W. 482. *Description of property:* Boyd's Adm'r *v.* Farmers' Bank (1902), Ky., 69 S. W. 964; Barnhart *v.* Ehrhart (1898), 33 Ore. 274, 54 Pac. 195. *Employment:* Holton *v.* Waller (1895), 95 Ia. 545, 64 N. W. 633. *Extreme cruelty:* Winterburg *v.* Winterburg (1893), 52 Kan. 406, 34 Pac. 971. *Finding purchaser:* Clark *v.* Allen (1899), 125 Cal. 276, 57 Pac. 985. *Fraud:* First Nat. Bank *v.* McKinney (1896), 47 Neb. 149, 66 N. W. 280. *Goods sold and delivered:* Gaar, Scott, & Co. *v.* Brundage (1903), 89 Minn. 412, 94 N. W. 1091. *Illegal voting:* McLain *v.* Maracle (1900), 60 Neb. 359, 83 N. W. 829. *Indebtedness:* Kleinschmidt *v.* Kleinschmidt (1893), 13 Mont. 64, 32 Pac. 1. *Money loaned:* Clarkson *v.* Kennett (1895), 17 Mont. 563, 44 Pac. 88. *Negligence:* Dickey *v.* Northern Pac. Ry. Co. (1898), 19 Wash. 350, 53 Pac. 347; McClellan *v.* Chippewa Valley Elec. Ry. Co. (1901), 110 Wis. 326, 85 N. W. 1018; Brown *v.* Benson (1897), 101 Ga. 753, 29 S. E. 215; Kelly *v.* Cable Co. (1893), 13 Mont. 411, 34 Pac. 611; Spaulding *v.* C. St. P. & K. C. Ry. Co. (1896), 98 Ia. 205, 67 N. W. 227; Lewis *v.* Schultz (1896), 98 Ia. 341, 67 N. W. 266; Jenkins *v.* McCarthy (1895), 45 S. C. 278, 22 S. E. 883; Neville *v.* St. Louis, etc. Ry. Co. (1900), 158 Mo. 293, 59 S. W. 123; Schwartzschild,

and the proof establishes a breach of contract express or implied, no recovery can be had, and the action must be dismissed, even though by disregarding the averments of tort, and treating them as surplusage, there might be left remaining the necessary and sufficient allegations, if they stood alone, to show a liability upon the contract.[1] While this doctrine is firmly established, and while there is no difficulty in its application, when it is once ascertained that the cause of action *is* for a tort, it is not so easy, in the absence of any specific facts, and in the careless mode of pleading which is too prevalent, to determine whether the cause of action stated by the plaintiff is *ex delicto* or *ex contractu*. Under the former system, the presence or absence of certain

etc. Co. *v.* Weeks (1903), 66 Kan. 800, 72 Pac. 274; Noland *v.* Great Northern Ry. Co. (1903), 31 Wash. 430, 71 Pac. 1098; Wolf *v.* Hemrich Bros. Co. (1902), 28 Wash. 187, 68 Pac. 440. *Notice and knowledge:* De Lay *v.* Carney (1897), 100 Ia. 687, 69 N. W. 1053; Hunt *v.* City of Dubuque (1895), 96 Ia. 314, 65 N. W. 319; King *v.* Howell (1895), 94 Ia. 208, 62 N. W. 738. *Ownership:* Darnall *v.* Bennett (1896), 98 Ia. 410, 67 N. W. 273. *Services rendered:* Bean *v.* Percival Copper Mining Co. (1901), 111 Wis. 598, 87 N. W. 465. *Validity of levy:* Chapman *v.* James (1895), 96 Ia. 233, 64 N. W. 795. *Votes cast at election:* Furguson *v.* Henry (1895), 95 Ia. 439, 64 N. W. 292.]

[1] From the great number of cases which maintain this doctrine I have selected those which are the most recent and important, and which discuss it with the greatest fulness. Walter *v.* Bennett, 16 N. Y. 250; Ross *v.* Mather, 51 N. Y. 108; De Graw *v.* Elmore, 50 N. Y. 1; Sager *v.* Blain, 44 N. Y. 445, 448; Moore *v.* Noble, 53 Barb. 425; Rothe *v.* Rothe, 31 Wis. 570, 572; Anderson *v.* Case, 28 Wis. 505, 508; Kewaunee Cy. Sup. *v.* Decker, 30 Wis. 624; Johannesson *v.* Borschenius, 35 Wis. 131, 135; Dean *v.* Yates, 22 Ohio St. 388, 397; Watts *v.* McAllister, 33 Ind. 264. See, *per contra*, Oates *v.* Kendall, 67 N. C. 241; Culp *v.* Steere, 47 Kan. 746. See also Barnes *v.* Quigley, 59 N. Y. 265; Matthews *v.* Cady, 61 id. 561; Lane *v.* Cameron, 38 Wis. 613; Pierce *v.* Carey, 37 id. 232; Goss *v.* Boulder Cy. Com'rs, 4 Colo. 468; Neudecker *v.* Kohlberg, 81 N. Y. 296, 299, 301; People *v.* Denison, 84 id. 272; 80 id. 656; Neftel *v.* Lightstone, 77 id. 96; Lockwood *v.* Quackenbush, 83 id. 600; Lindsay *v.* Mulqueen, 26 Hun, 485; Front *v.* Hardin, 56 Ind. 165; Hachett *v.* Bank of Cal., 57 Cal. 335; Freeman *v.* Grant, 132 N. Y. 22; Mea *v.* Pierce, 63 Hun, 400. These cases, as well as others, show that an action cannot be changed from tort to contract by amendment at the trial.

[See also, to same effect, Noble *v.* Atchison, etc. R. R. Co. (1896), 4 Okla. 534, 46 Pac. 483; A. F. Shapleigh Hardware Co. *v.* Hamilton (1902), 70 Ark. 319, 68 S. W. 490; Miller *v.* Hirschberg (1895), 27 Ore. 522, 40 Pac. 506; Brooke *v.* Cole (1899), 108 Ga. 251, 33 S. E. 849; Hollmann *v.* Lange (1898), 143 Mo. 100, 44 S. W. 752; Westinghouse Co. *v.* Tilden (1898), 56 Neb. 129, 76 N. W. 416; Peay *v.* Salt Lake City (1894), 11 Utah, 331, 40 Pac. 206; Ellis *v.* Flaherty (1902), 65 Kan. 621, 70 Pac. 586 (an important case).

Compare the case of Wilson *v.* Fuller (1894), 58 Minn. 149, 59 N. W. 988, in which it is held that where a party alleges that certain representations, amounting to a warranty, were fraudulently made, and proves the warranty and its breach, but fails to prove the fraud, he may recover for the breach of the warranty. The court observes that the contrary is held in Ross *v.* Mather, 51 N. Y. 108. Followed in Brown *v.* Doyle (1897), 69 Minn. 543, 72 N. W. 814. And see, in this connection, Higgins *v.* Hayden (1897), 53 Neb. 61, 73 N. W. 280.]

technical formulas removed all doubt; but as these arbitrary means of distinction have been abandoned, and as pleadings frequently, in violation of true principles, combine charges of fraud, of guilty knowledge, of taking, carrying away, and conversion, and the like, with averments of undertakings and promises and their breach, it is sometimes impossible to decide which class of allegations constitute the *gravamen* of the action, and which is to be regarded as surplusage. The decided cases will not give us much aid, for pleadings with substantially the same averments have received diametrically opposite constructions. There is thus a conflict among the decisions in reference to this subject irreconcilable upon principle, and only to be evaded by pronouncing one set of them to be erroneous. Although it is simply impossible to develop any general rule of interpretation from these cases, a few are selected as examples.

§ 453. *559. **How Nature of Cause of Action is determined. Illustrations of Causes ex contractu.** It may be considered a settled point, on principle and on authority, that the nature of the cause of action is determined by the allegations of the complaint or petition,[1] so that the inquiry need never extend beyond this first pleading in the suit. I shall first cite illustrations of causes *ex contractu*. In an action by a vendee to recover damages arising on the sale of a horse to him, the complaint, after setting forth the sale, and that the horse was in fact "wind-broken," stated that the defendant knew of this defect, and "fraudulently concealed the same with intent to deceive" the plaintiff, giving the circumstances in unnecessary detail; and that, "further to mislead and deceive the plaintiff, the defendant falsely represented and *warranted* to the plaintiff that the horse was sound, etc.; that by reason of the premises the plaintiff was deceived, and was induced to purchase and pay for the horse;" concluding with an allegation of damages and a prayer for judgment. The

[1] Welsh *v.* Darragh, 52 N. Y. 590. Although the immediate question was whether the cause was a referable one, yet the reasoning and conclusion are general. Some of the cases lay some stress upon the kind of summons used as indicative of the pleader's intention. The following are further examples of actions held to be on contract: Freer *v.* Denton, 61 N. Y. 492; Vilmar *v.* Schall, 61 id. 564; Graves *v.* Waite, 59 id. 156; Greentree *v.* Rosenstock, 61 id. 583; Sheahan *v.* Shanahan, 5 Hun, 461; Harden *v.* Corbett, 6 id. 522; Loomis *v.* Mowry, 8 id. 311; Harrington *v.* Bruce, 84 N. Y. 103; Sparman *v.* Keim, 83 id. 245, 249; Harris *v.* Todd, 16 Hun, 248; Westcott *v.* Ainsworth, 9 id. 53; Stitt *v.* Little, 63 N. Y. 427, 432; Bishop *v.* Davis, 9 Hun, 342; Slutts *v.* Chafee, 48 Wis. 617.

Superior Court of New York City held that this complaint stated a cause of action on contract for the breach of a warranty, and that all the averments of fraud must be treated as surplusage.[1] A complaint contained the following averments: that the defendants, having in their possession certain securities, the property of the plaintiff, entered into an agreement with him, whereby they promised to deliver up said securities to him; that he had demanded the same, but the defendants wrongfully refused to deliver them, and *wrongfully disposed of and converted them to their own use.* The New York Court of Appeals pronounced this cause of action to be on contract, and not for a tort.[2] In another quite similar case the complaint stated that the plaintiffs, at, etc., consigned to the defendants, who were commission-merchants at, etc., certain specified articles, to be sold by them, and the net proceeds thereof remitted; that the defendants received the goods, and sold them for a sum named; and after deducting all expenses, there was due to the plaintiffs the sum of, etc., which they demanded of the defendants, who omitted and refused to pay the same, and have converted the same to their own use, to the damage of the plaintiffs of, etc. This cause of action was also held by the same court to be on contract, and not for a tort.[3] In a more recent action, brought for the price of certain bonds that had been sold to the plaintiff, and which had turned out to be null and void, the claim to recover was put at

[1] Quintard *v.* Newton, 5 Robt. 72. The plaintiff, at the trial, proved the warranty, but gave no evidence of the *scienter*, and the complaint was dismissed. The General Term held that he should have recovered, putting their decision upon the allegation of a warranty. As this averment stood alone, it would seem that it ought to have been rejected as surplusage. This decision, in the light of more recent ones, must be regarded as erroneous: it is not, however, opposed to the leading doctrine stated in the text.

[2] Austin *v.* Rawdon, 44 N. Y. 63, 68, 69. The statement of a wrongful disposition and conversion was said to be merely the averment of a breach. There can be no doubt as to the correctness of this decision. The central fact of the complaint was made to be the promise, and the breach was inartificially charged. See also Sheahan *v.* Shanahan, 5 Hun, 461; Harden *v.* Corbett, 6 Hun, 522; Greentree *v.* Rosenstock, 61 N. Y. 583, per Dwight, C.; Harlow *v.* Mills, 58 Hun, 391.

[3] Conaughty *v.* Nichols, 42 N. Y. 83. The complaint was dismissed at the trial, on the ground that the cause of action proved was on contract, while the one pleaded was for tort. This ruling was reversed, the appellate court saying that the single concluding averment of a conversion should be treated as surplusage. The opinion contains an elaborate discussion of authorities. This and the preceding case are substantially alike. See also Byxbie *v.* Wood, 24 N. Y. 607, 610, 611, in which certain averments of fraudulent practices were held to be surplusage, and the cause of action to be on contract.

the trial on the ground of implied contract, — a warranty of title. The defendant moved to dismiss the complaint, because it was based upon the theory of fraud, that its allegations were of deceit and false representations. The reporter does not think best to disclose the nature of the complaint, although the entire decision turned upon it. The court held that the cause of action was on contract.[1]

§ 454. *560. **Illustrations of Causes ex delicto.** The following are instances of actions *ex delicto*. In a suit growing out of the sale of a horse bought by the vendee, the complaint was, "That on, etc., at, etc., the plaintiff purchased a certain horse of the defendant for the agreed price of $120, and paid defendant said sum; that the defendant, to induce the plaintiff to buy the said horse, falsely and fraudulently represented the said horse worth and of the value of $120, and *guaranteed* the said horse to be sound in all respects, and wholly free from disease; that said horse was not sound or free from disease, but was unsound and diseased in this (describing), which said disease was well known to defendant at the time of the sale," etc., to the plaintiff's damage, etc. This cause of action was held by the New York Supreme Court to be for deceit, and not on a warranty.[2] The

[1] Ledwich *v.* McKim, 53 N. Y. 307, 316. As to the allegations which must be made and proved in order to establish a cause of action for deceit, see Meyer *v.* Amidon, 45 N. Y. 169; Oberlander *v.* Spiess, 45 N. Y. 175; Marsh *v.* Falker, 40 N. Y. 562; Marshall *v.* Gray, 57 Barb. 414; Weed *v.* Case, 55 Barb. 534; Gutchess *v.* Whiting, 46 Barb. 139; Stitt *v.* Little, 63 N. Y. 427, 432; Westcott *v.* Ainsworth, 9 Hun, 53.

[A complaint averring the delivery of merchandise by plaintiff to defendants, under an agreement that defendants should sell the same, and account for the proceeds, less expenses and a certain commission, but that defendants "wrongfully and unlawfully retained and converted to their own use" an excess over the agreed commission, declares upon a contract rather than upon a tort. Hutchcroft *v.* Herren (1898), 33 Ore. 1, 52 Pac. 692.

See also McIntosh *v.* Rankin (1896), 134 Mo. 340, 35 S. W. 995, for an interesting case involving allegations indicative both of contract and tort, where the court held that the petition stated a single cause of action on contract by which the tort damages were liquidated.]

[2] Moore *v.* Noble, 53 Barb. 425. The following are additional examples of actions held to be *ex delicto:* Barnes *v.* Quigley, 59 N. Y. 265; Matthews *v.* Cady, 61 id. 561; Peck *v.* Root, 5 Hun, 547; Lane *v.* Cameron, 38 Wis. 603; Pierce *v.* Carey, 37 id. 232; Neudecker *v.* Kohlberg, 31 N. Y. 296, 299, 301; People *v.* Denison, 84 id. 272; 80 id. 656; Lockwood *v.* Quackenbush, 83 id. 600; Stitt *v.* Little, 63 id. 427, 432; Bishop *v.* Davis, 9 Hun, 342; Westcott *v.* Ainsworth, 9 id. 53.

[Where negligence is clearly the gravamen of the complaint, the allegations of a promise to repair defective machinery, merely to negative any presumption that plaintiff had assumed the risk of the defective machinery by continuing in the employment after the defect became known to him, does not warrant defendant in assuming at the trial that the action is for breach of contract to repair defects: Mangum *v.* Bullion, etc. Mining Co. (1897), 15 Utah, 534, 50 Pac. 834.]

following case is even still stronger; for although it was conceded that a contract was fully set forth in the pleading, yet the averments of fraud were held to fix the true character of the action. The claim was for damages arising from the sale of a horse, and sustained by the purchaser. The complaint alleged the sale; that at the time thereof the horse was lame in one leg; that defendant *warranted* and falsely and fraudulently represented that this lameness resulted from an injury to his foot, and nowhere else; that when his foot grew out he would be well, and that he had only been lame two weeks; that plaintiff, relying upon this warranty and representation, and believing them to be true, bought the horse, and paid the price (the representations were then negatived); that the horse was lame in his gambrel joint, and had been so for a long time, all which the defendant, at the time of the sale and the making such warranty and representations, well knew; that by reason of the premises the defendant falsely and fraudulently deceived him, — to his damage of $500. The cause of action thus stated was held to be for deceit, and not for a breach of warranty.[1]

§ 455. * 561. **Further Examples of Variance where Tort is Alleged and Contract Proved.** The doctrine that a cause of action *ex contractu* cannot be proved at the trial when the complaint or petition states one *ex delicto* has been applied to the following classes of cases: where the complaint alleged improper, careless, and negligent conduct, and concealment of material facts by the defendant;[2] where the complaint was for the conversion of goods or moneys, and the plaintiff, at the trial, relied upon the breach of an implied contract for money had and received;[3] where the

[1] Ross *v.* Mather, 51 N. Y. 108; Marshall *v.* Gray, 57 Barb. 414; McGovern *v.* Payn, 32 Barb. 83, all of which hold the causes of action therein stated to be fraud, and that the plaintiff must prove a *scienter;* Walter *v.* Bennett, 16 N. Y. 250; Belknap *v.* Sealey, 14 N. Y. 143. Conaughty *v.* Nichols, 42 N. Y. 83. Ross *v.* Mather was distinguished in the case of Graves *v.* Waite, 59 N. Y. 156, and it was held in the latter case that, the gist of the action being upon contract, allegations of fraudulent representations inducing the plaintiff to enter into the contract and a demand of judgment for damages for the same did not change the action to tort; that the allegations of fraud were irrelevant and non-issuable; also that the summons cannot be used to interpret the pleadings. Graves *v.* Waite, again, was distinguished in Barnes *v.* Quigley, 59 N. Y. 265, and Matthews *v.* Cady, 61 N. Y. 651. See also Peck *v.* Root, 5 Hun, 547 (fraud); Pierce *v.* Carey, 37 Wis. 232 (fraud).

[2] Rothe *v.* Rothe, 31 Wis. 570, 572. The court further held that the rule must be applied, even though the allegations of tort failed to state a sufficient ground for a recovery, if they were enough to determine the nature of the cause of action.

[3] Anderson *v.* Case, 28 Wis. 505, 508; Kewaunee Cy. Sup. *v.* Decker, 30 Wis.

suit was brought to recover the possession of personal property, and the cause of action as proved was for money had and received, or money due upon a general indebtedness;[1] and finally where a case of deceit and fraudulent representations was stated, and the proof established the breach of a contract.[2] In addition to the general doctrine, that a party should be fully and truly apprised of the nature of the claim set up against him, there is a special reason why the plaintiff cannot recover for a breach of contract when the cause of action stated in the record is for deceit or any other tort. In many actions of tort the defendant may be taken on a body execution, issued upon the judgment; while a simple breach of contract never exposes him to that liability. If, therefore, a cause of action on contract could be proved and judgment thereon recovered when one for tort was alleged, the record might show a case for arrest on final process, although the issues actually tried involved no such consequence.[3]

[§§ * 562, * 563, * 564. These sections, consisting of quotations from the Wisconsin case of Supervisors *v.* Decker, are given below in the note.[4]]

624; Johannesson *v.* Borschenius, 35 Wis. 131, 135; Walter *v.* Bennett, 16 N. Y. 250.

[1] Sager *v.* Blain, 44 N. Y. 445, 448, 450.

[2] De Graw *v.* Elmore, 50 N. Y. 1; Ross *v.* Mather, 51 N. Y. 108; Moore *v.* Noble, 53 Barb. 425; Watts *v.* McAllister, 33 Ind. 264; Dean *v.* Yates, 22 Ohio St. 388, 397. When a complaint sets out a cause of action upon contract, and not for tort, as, for example, to recover money had and received by the defendant to the plaintiff's use, any averments as to the nature of the defendant's employment showing that it was of a fiduciary character, and the like, are wholly immaterial; they form no part of the cause of action, and are not issuable. Prouty *v.* Swift, 51 N. Y. 594, 601.

[3] This special reason for the rule is alluded to in several of the foregoing cases.

[4] § 562. I shall conclude this subdivision by quoting some passages from the most able and practically instructive opinion of Mr. Chief Justice Dixon in the case of [Kewaunee Sup. *v.* Decker, 30 Wis. 624, 626. The action was brought to recover money of the county alleged to have been converted by the defendant to his own use, he being Clerk of the Board of Supervisors. The complaint contained averments of fraud, of negligence, of conversion, and of contract. A demurrer to it having been overruled, the defendant appealed.] The whole theory of pleading is discussed in this elaborate judgment; but it is peculiarly appropriate in connection with the subjects of insufficiency, redundancy, and immateriality of allegations. "It would certainly," he said, "be a most anomalous and hitherto unknown condition of the law of pleading, were it established that the plaintiff could file a complaint, the particular nature and object of which no one could tell, but which might and should be held good as a statement of two or three or more different and inconsistent causes of action, as one in tort, one upon a money demand upon contract, and one in equity, all combined or fused and moulded into one count, so that the defendant must await the events of the trial, and until the plaintiff's proofs are all in, before being informed with any certainty or definiteness what he was called upon to meet. The

§ 456. *565. **Amendments Allowed by the Code.** The new procedure, from its dread lest the proper requirements as to form

proposition that a complaint or any single count of it may be so framed with a double, treble, or any number of aspects, looking to so many distinct and incongruous causes of action, in order to hit the exigencies of the plaintiff's case or any possible demands of his proofs at the trial, we must say strikes us as something exceedingly novel in the rules of pleading. We do not think it is the law, and, unless the legislature compels us by some new statutory regulation, shall hereafter be very slow to change this conclusion. The defendant supposes the complaint herein to be intended to be one in trover, charging or seeking to charge the defendant with the wrongful conversion of certain moneys which came into his hands as a public officer, and which belonged to the plaintiff; and acting upon such supposition, he has demurred to the complaint as not stating facts sufficient to constitute that cause of action. In answer to this view, the plaintiffs rather concede than otherwise that the complaint is and was intended to be one in tort for the conversion; but at the same time they insist, that, if it is not good as a complaint of that kind, it is sufficient as a complaint or count in an action for money had and received; and, being sufficient for that purpose, they argue that the demurrer was properly overruled. In other words, their position is, that it is a question now open to speculation and inquiry on this demurrer, whether upon all or any of the facts stated in the complaint taken collectively or separately, or even by severing the allegations themselves so as to eliminate or discard certain portions of them as surplusage, a cause of action of any kind is or can be made out; and if it be found that it can, then the demurrer should be overruled. To show that the complaint may be upheld as one for money had and received for the use of the plaintiff, and the action considered as one of that kind, counsel gravely contend that the averments that the defendant made fraudulent representations, and acted falsely, fraudulently, and wrongfully in claiming and withholding the moneys, and that he converted the same, etc., may be disregarded, and rejected as surplusage.

§ 563. "In support of this position, counsel cited several New York decisions, and some in this court where *after trial and judgment, or after issue has been taken on the merits, or after the trial has commenced and the plaintiff's case is closed*, it has been held that such allegations may be disregarded. The decisions were in actions like the present, and others involving a somewhat similar question under the circumstances above stated, and were made in favor of a good cause of action proved or proposed to be, and which by a fair and reasonable interpretation of the pleadings could be said to be within the scope of them, or to be fairly mapped out and delineated by the averments, so that the defendant was apprised of the demand made against him, and of the facts relied upon to establish it. The great liberality of the code and the broad powers of amendment conferred and enforced upon the courts under such circumstances are well known [citing provisions in reference to amendments, variances, and the interpretation of pleadings]. These provisions for the most part, if not entirely, relate to the proceedings in an action after issue joined on the merits upon or after trial, or after judgment on the merits, when the facts are made to appear, and the substantial rights of the parties are shown. They are enacted in amplification and enlargement of the rules of the common law on the same subject, by which it is well understood that there were many defects, imperfections, and omissions constituting fatal objections on demurrer, which were waived after issue joined, and a trial of verdict and judgment on the merits. The cases cited by counsel are all of them manifestly such as fall within these provisions and rules, and none of them touch or have any bearing upon the question or case here presented. No case arising upon demurrer to the complaint is cited, and it is believed none can be, holding any such doctrine as that contended for." The learned judge cites the following cases as illustrations: Barlow *v.* Scott, 24

should degenerate into mere technicalities, and from its opposition to the decision of controversies upon points not involving

N. Y. 40; Byxbie *v.* Wood, 24 N. Y. 607, Austin *v.* Rawdon, 44 N. Y. 63; Greason *v.* Keteltas, 17 N. Y. 491; Emory *v.* Pease, 20 N. Y. 62; Conaughty *v.* Nichols, 42 N. Y. 83; Wright *v.* Hooker, 10 N. Y. 51; Walter *v.* Bennett, 16 N. Y. 250; Stroebe *v.* Fehl, 22 Wis. 347; Hopkins *v.* Gilman, 22 Wis. 481; Tenney *v.* State Bk. of Wis., 20 Wis. 152; Leonard *v.* Rogan, 20 Wis. 540; Samuels *v.* Blanchard, 25 Wis. 329; Vilas *v.* Mason, 25 Wis. 310, 328. It is certain that the decision in some of these cases is not based upon the doctrine stated by the judge, — that is, upon any ground of amendment or of waiving the objection by answering, etc.; but it is put upon the broad and fundamental principle, that, under the codes, equitable and legal reliefs may be granted in the same action, or one may be granted when the other is demanded: the other cases, however, fully sustain the position taken by the opinion.

§ 564. "It thus appears that the authorities relied upon do not sanction the position that a complaint in the first instance, and when challenged by demurrer, may be uncertain and ambulatory, purposely so made, now presenting one face to the court and now another, at the mere will of the pleader, so that it may be regarded as one in tort or one on contract or in equity, as he is pleased to name it, and as the necessities of the argument may require, and, if discovered to be good in any of the phases which it may thus be made to assume, that it must be upheld in that aspect as a proper and sufficient pleading by the court. As already observed, the opinion of the court is quite to the contrary. We have often held that the inherent and essential differences and peculiar properties of actions have not been destroyed, and from their very nature cannot be. Howland *v.* Needham, 10 Wis. 495, 498. These distinctions continuing, they must be regarded by the courts now as formerly; and now no more than then, except under the peculiar circumstances above noted, can any one complaint or count be made to subserve the purposes of two or more distinct and dissimilar causes of action, at the option of the party presenting it. If counsel disagree as to the nature of the action or purposes of the pleading, it is the province of the courts to settle the dispute. It is a question, when properly raised, which cannot be left in doubt; and the court must determine with precision and certainty upon inspection of the pleading to what class of actions it belongs, or was intended to belong, whether of tort, upon contract, or in equity; and if necessary and material, even the exact kind of it within the class must also be determined. See Clark *v.* Langworthy, 12 Wis. 441; Gillett *v.* Treganza, 13 Wis. 472. This is not only in harmony with the decisions above referred to, but with all the decisions of this court bearing upon the question, and we know of none elsewhere in conflict. It is in harmony with these decisions which have been made, that an application to amend should be denied which professes to entirely change the cause of action sued upon, or to introduce a new one of a different kind."

Citing Newton *v.* Allis, 12 Wis. 378; Sweet *v.* Mitchell, 15 Wis. 641, 664, 19 Wis. 524; Larkin *v.* Noonan, 19 Wis. 82; Stevens *v.* Brooks, 23 Wis. 196. The opinion proceeds to show that the conclusion thus reached is in harmony with the decisions made in Scheunert *v.* Kaehler, 23 Wis. 523; Anderson *v.* Case, 28 Wis. 505; Lee *v.* Simpson, 29 Wis. 333; Ragan *v.* Simpson, 27 Wis. 355; Samuels *v.* Blanchard, 25 Wis. 329. It also declares that in determining upon demurrer the true nature of the complaint, its object, and what particular kind or cause of action is stated in it, the character of the summons may be taken into consideration in connection with the form of the allegations in the complaint; and this particular conclusion is also sustained by the recent decision made by the New York Court of Appeals, before cited. Having thus laid down the general principles, the learned judge applies them to the case before him. The summons is for relief, which indicates the pleader's inten-

the merits, has made most ample and liberal provision for amendments. The sections of the codes are quoted at large in a former paragraph.[1] So far as they relate to the pleadings, amendments are separated into two general classes, — those made before the trial, and those made during or after the trial. The first of these classes is again subdivided into (1) the amendments of course, without any application to the court, which each party is allowed to make once in his own pleading within a specified time after it is filed or served; (2) the amendments which are made by permission of the court as the result of a special motion or application for that purpose, including those which the party is generally suffered to make in his pleading after a demurrer to it has been sustained. The amendments of the second class are for the purpose of conforming the pleadings to the facts which have been proved, or which are proposed to be proved, at the trial. They are all made by permission of the court, frequently upon an oral application during the trial or during the argument on appeal; often by the court itself on its own suggestion. Sometimes, however, the trial is suspended, and the party desiring an amendment is driven to a formal motion in order to obtain it.[2] It is not within the scope of this work to describe the practice in reference to amendments; nor to discuss the particular cases in which they have been or will be allowed. I shall simply state the general principles which have governed the courts in the exercise of the discretion conferred upon them by the statute.

§ 457. *566. **Conflict of Authority on Right to amend by Substituting Different Cause of Action.** In giving a practical interpretation to the clauses of the codes, a conflict of decision has

tion to bring an action of tort, and not one on implied contract for money had and received. The complaint itself is pronounced insufficient in its averments; the charges of fraud and conversion are in the form of general legal inferences, without the necessary statements of facts. "A general charge that a party acted fraudulently, falsely, or wrongfully, or that he made fraudulent representations or statements, amounts to nothing; there must be a specification of facts to justify it" (p. 634). The foregoing quotations form a small part of this exceedingly instructive opinion.

The nature of the reformed pleading and its essential principles are here stated in a most clear and accurate manner, while the description of the improper modes which prevail to such an extent in actual practice is equally graphic and correct. The one explains the intent and design of the reform; the other shows how that design has been ignored, and that intent frustrated.

[1] See *supra*, § *435.

[2] This particular instance strictly belongs to the first general class, since it is virtually an amendment before the trial.

arisen among the tribunals of the different States, and sometimes among those of the same State, which it is utterly impossible to reconcile. The rule is established by one class of cases, and prevails in certain States, that in all the voluntary amendments which a party may make as a matter of course in his own pleadings, and in all amendments before trial for which the party applies to the court by motion, including those rendered necessary by the sustaining of a demurrer to his pleading, he cannot under the form of an amendment change the nature and scope of his action; he cannot substitute a wholly different cause of action in place of the one which he attempted to set up in his original pleading.[1] A very different rule is laid down by another class of cases. It is settled in New York by a carefully considered decision of the Court of Appeals, which overrules a number of contrary decisions made by inferior tribunals of that State, that a complaint may be amended voluntarily and of course, by substituting an entirely different cause of action for the one originally alleged, provided the summons continues to be appropriate. It is not necessary that the new cause of action should be of the same general nature or class as the first one; but the plaintiff may, by omitting a cause of action, substitute another in its stead of an entirely different class and character, if the change does not require an alteration in the summons. A like rule, it was held, also applies to answers and to defences contained therein.[2] In some States this liberal interpretation

[1] Kewaunee Sup. *v.* Decker, 34 Wis. 378; Rutledge *v.* Vanmeter, 8 Bush, 354, 356; McGrath *v.* Balser, 6 B. Mon. 141. See also Vliet *v.* Sherwood, 38 Wis. 159; Spinners *v.* Brett, 38 Wis. 648; Northwestern Union Packet Co. *v.* Shaw, 37 Wis. 655 (an amendment may change the action from one on express contract to one for money had and received on implied contract).

[2] Brown *v.* Leigh, 12 Abb. Pr. N. S. 193 (1872). See also, to the same effect, Mason *v.* Whitely, 1 Abb. Pr. 85; 4 Duer, 611; Prindle *v.* Aldrich, 13 How. Pr. 466; Troy & B. R. Co. *v.* Tibbits, 11 How. Pr. 168; Watson *v.* Rushmore, 15 Abb. Pr. 51; Hall *v.* Woodward, 30 S. C. 564, 575. Some of these cases apply the same doctrine to amendments made upon motion. By this rule, an entirely new defence may be added to an answer by an amendment of course. McQueen *v.* Babcock, 13 Abb. Pr. 268; 3 Keyes, 428; Wyman *v.* Remond, 18 How. Pr. 272; although the Court of Appeals, in Brown *v.* Leigh, pointed out a difference between the terms of the section which permits amendments of course and of that which allows amendments upon application to the court before trial, yet it did not hold that the latter were to be any more restricted in their scope and extent than the former.

[Deyo *v.* Morss (1894), 144 N. Y. 216, 39 N. E. 81.

In South Carolina, it was held in Jennings *v.* Parr (1898), 54 S. C. 109, 32 S. E. 73, that the limitation on the power to allow amendments found in sec. 194 of the code, viz., that they shall not substantially change the claim or defence, has no appli-

of the code has been expressly extended to those amendments which require the consent of the court granted upon a motion, and the rule is settled that even in that class the cause of action or defence may be entirely changed.[1] In respect to the amendments made at the trial, or on appeal, or by the court upon its own motion, great freedom is used, provided the parties are not misled and surprised, and the issues to be decided are not wholly changed. When evidence has been received without objection making out a cause of action, and especially after a favorable verdict upon such evidence, the utmost liberality is shown by the courts in conforming the averments of the pleading to the case as proved, if the ends of justice will be subserved thereby.[2]

cation to amendments made before the trial. The only limitation in such cases is that the amendment shall be in furtherance of justice. The same rule seems to be followed in Oregon. In Talbot *v.* Garretson (1897), 31 Ore. 256, 49 Pac. 978, the court said: "It is within the power of the trial court to allow, before trial, an amended complaint to be filed containing a new cause of action or suit material to the subject-matter of the controversy then before the court. A plaintiff cannot, of course, abandon his original cause of action or suit, and substitute an entirely new and different one, because in such case the new pleading would not be an amendment, but a substitution for the original. But so long as the amendment is germane to the subject-matter of the controversy, we can see no objection to the court, in the exercise of a sound discretion, allowing the pleadings to be amended in the furtherance of justice by inserting new and additional allegations material to such controversy, although they may, in effect, constitute a new cause of action or defence." This decision is opposed to Board of Supervisors *v.* Decker, 34 Wis. 378, which it cites, and in harmony with Brown *v.* Leigh, 49 N. Y. 78; Hatch *v.* Central Bank, 78 N. Y. 487; Freeman *v.* Grant, 132 N. Y. 22, all of which it cites. See also Lieuallen *v.* Mosgrove (1900), 37 Ore. 446, 61 Pac. 1022; McMahan *v.* Canadian Ry. Co. (1901), 40 Ore. 148, 66 Pac. 708. See, in this connection, Mulhall *v.* Mulhall (1895), 3 Okla. 304, 41 Pac. 109.

In California it was held, in Frost *v.* Witter (1901), 132 Cal. 421, 64 Pac. 705, that a plaintiff may, by amendment, change the nature and scope of his action, but that he may not introduce in that way "a wholly different cause of action." Citing the text, § *566.]

[1] This is particularly the case in North Carolina, where the greatest liberality of amendment prevails. Robinson *v.* Willoughby, 67 N. C. 84; Bullard *v.* Johnson, 65 N. C. 436. In the first case the action was brought to recover possession of land under a deed absolute on its face (ejectment). The court, on appeal, held that this deed was in fact a mortgage, and reversed a judgment obtained by the plaintiff, ordering a new trial. Before the second trial, an amendment was permitted changing the cause of action from its original form to one for the foreclosure of this mortgage. See also Culp *v.* Steere, 47 Kan. 746 (change from action for false representations in a sale to action for breach of express warranty); Hopf *v.* U. S. Baking Co. (Buf. Super. Ct. 1892), 21 N. Y. S. 589 (plaintiff allowed to amend by changing a course of action sounding in tort to one sounding in contract).

[2] Kewaunee Sup. *v.* Decker, 34 Wis. 378; Hodge *v.* Sawyer, 34 Wis. 397; Bowman *v.* Van Kuren, 29 Wis. 209, 215; Smith *v.* Whitney, 22 Wis. 438; Robinson *v.* Willoughby, 67 N. C. 84; Bullard *v.* Johnson, 65 N. C. 436; Oates *v.* Kendall, 67 N. C. 241; Flanders *v.* Cottrell, 36 Wis. 564; Little *v.* Va. & G. H. Water Co., 9 Nev. 317. The reporter's head-note is much broader than the decision actually

The plaintiff cannot, however, have his summons and complaint amended during the trial by substituting a different defendant for the single one who was sued, and who had appeared and defended.[1]

made, and is manifestly erroneous. The following cases illustrate the general rules concerning amendments, and the extent to which amendments are permitted. It seems to be settled by a very decided preponderance of authority that amendments at the trial cannot change the nature of the cause of action or of the defence; but that the court may at its discretion permit amendments on motion before trial which change the cause of action or defence, add a new cause of action or defence, and the like (see additional cases cited under § *558). Johnson *v.* Filkington, 39 Wis. 62 (cannot amend at trial so as to substitute a new cause of action); Vliet *v.* Sherwood, 38 id. 159; Spinners *v.* Brett, 38 id. 648; North West. Union P. Co. *v.* Shaw, 37 id. 655; Flanders *v.* Cottrell, 36 id. 564; Tormey *v.* Pierce, 49 Cal. 306; Blood *v.* Fairbanks, 48 id. 171; Lottman *v.* Barnett, 62 Mo. 159; Jeffree *v.* Walsh, 14 Nev. 143; Almance Cy. Comm'rs *v.* Blair, 76 N. C. 136; Scott *v.* Chickasaw Cy., 54 Iowa, 47; Spink *v.* McCall, 52 id. 432; Newell *v.* Mahaska Cy. Sav. Bk., 51 id. 178; Peck *v.* Shick, 50 id. 281; Hammond *v.* S. C. & P. R. Co., 49 id. 450; O'Connell *v.* Cotter, 44 id. 48; Hobson *v.* Ogden's Ex., 16 Kan. 388; Beyer *v.* Reed, 18 id. 86; Leavenworth, L. & G. R. Co. *v.* Van Riper, 19 id. 317; Harris *v.* Turnbridge, 83 N. Y. 92, 97; Reeder *v.* Sayre, 70 id. 180; Weston *v.* McMullin, 42 Wis. 567; Tanguay *v.* Felthouser, 44 id. 30; Tewsbury *v.* Bronson, 48 id. 581; Graham *v.* Chicago, etc. Ry. Co., 49 id. 532; Oro Fino, etc. Min. Co. *v.* Cullen, 1 Idaho, 113; Read *v.* Beardsley, 6 Neb. 493; Page *v.* Williams, 54 Cal. 562; Nichols *v.* Scranton Steel Co., 137 N. Y. 471; Dexter *v.* Ivins, 133 N. Y. 551; Miner *v.* Bacon, 131 N. Y. 677; Freeman *v.* Grant, 132 N. Y. 22; Davis *v.* N. Y., L. E. & W. R. Co., 110 N. Y. 646 (test proposed, whether recovery on the original complaint would be a bar to recovery on the amended complaint); Bockes *v.* Lansing, 74 N. Y. 437; Lustig *v.* N. Y., L. E. & W. R. Co., 65 Hun, 547; Mea *v.* Pierce, 63 Hun, 400; Bowen *v.* Sweeney, 63 Hun, 224; 22 Civ. Pro. R. 79; Agersinger *v.* Scorr, 54 Hun, 613; Hopf *v.* U. S. Baking Co. (Buf. Super. Ct. 1892), 21 N. Y. Suppl. 589 (plaintiff allowed to amend by changing a cause of action sounding in tort to one sounding in contract); Zoller *v.* Kellogg, 66 Hun, 194 (change from legal to equitable cause of action not allowed); Sleeman *v.* Hotchkiss (Supreme, Jan. 1891), 13 N. Y. S. 98 (change from equitable to legal cause of action not allowed); Cumber *v.* Schoenfeld, 16 Daly, 454 (change from malicious prosecution to false imprisonment not allowed); Chamberlain *v.* Mensing (S. C.), 51 Fed. Rep. 511; Esch *v.* Home Ins. Co. of N. Y., 78 Iowa, 334; Plumer *v.* Clarke, 59 Wis. 646; Continental Ins. Co. *v.* Phillips (Wis., Nov. 1892), 53 N. W. Rep. 774; Carmichael *v.* Dolan, 25 Neb. 335; McNider *v.* Sirrine (Iowa, Oct. 1891), 50 N. W. Rep. 200; Barnes *v.* Hekla F. Ins. Co., 75 Iowa, 11; Hughes *v.* McDivitt, 102 Mo. 77; Bradley *v.* Phœnix Ins. Co., 28 Mo. App. 7 (amendment before answer or reply); Missouri Lumber, etc. Co. *v.* Zeitinger, 45 Mo. App. 114 (cannot change from statutory action for treble damages for cutting timber, into action of trover for the timber); Gourley *v.* St. L. & S. F. Ry. Co., 35 Mo. App. 87; Caldwell *v.* Meshew, 53 Ark. 263; Jackson *v.* Jackson, 94 Cal. 446; McKeighan *v.* Hopkins, 19 Neb. 33. As to amendment enlarging the amount of recovery, see Work *v.* Tibbits, 133 N. Y. 574; Schuttler *v.* King (Mont., May, 1892), 30 Pac. Rep. 25; Cain *v.* Cody (Cal., April, 1892), 29 Pac. Rep. 778; Guidery *v.* Green, 95 Cal. 630 (amendment by defendant during trial must be allowed, when no new issue presented). That answering the amended complaint is a waiver of the objection that it states a new cause of action, see Witkowski *v.* Hern, 82 Cal. 604.

[1] [*Amendments.*

The question of the right to file amended pleadings during the trial is one within the sound discretion of the trial court, and its rulings will not be disturbed

§ 458. * 567. **Election between Actions ex delicto and Actions ex contractu.** Intimately connected with the questions last

unless the record shows an abuse of discretion.

Arizona: Brady *v.* Pinal County (1903), Ariz., 71 Pac. 910.

California: Bean *v.* Stoneman (1894), 104 Cal. 49, 37 Pac. 777.

Connecticut: Kennenberg *v.* Neff (1901), 74 Conn. 62, 49 Atl. 853; Gulliver *v.* Fowler (1894), 64 Conn. 556, 30 Atl. 852.

Indiana: Burnett *v.* Milnes (1897), 148 Ind. 230, 46 N. E. 464.

Iowa: Aultman *v.* Shelton (1894), 90 Ia. 288, 57 N. W. 857; Guyer *v.* Minn. Thresher Co. (1896), 97 Ia. 132, 66 N. W. 83; Greenlee *v.* Home Ins. Co. (1897), 103 Ia. 484, 72 N. W. 676; Rosenberger *v.* Marsh (1899), 108 Ia. 47, 78 N. W. 837; Smith *v.* City of Sioux City (1903), 119 Ia. 50, 93 N. W. 81.

Kansas: Laird *v.* Farwell (1899), 60 Kan. 512, 57 Pac. 98.

Minnesota: Reeves & Co. *v.* Cress (1900), 80 Minn. 466, 83 N. W. 443; Burke *v.* Baldwin (1893), 54 Minn. 514, 56 N. W. 173; Minneapolis, etc. Ry. Co. *v.* Firemen's Ins. Co. (1895), 62 Minn. 315, 64 N. W. 902.

Missouri: Evans *v.* Fulton (1896), 134 Mo. 653, 36 S. W. 230.

Nebraska: Chicago, B. & Q. R. R. Co. *v.* Martelle (1902), — Neb. —, 91 N. W. 364; Scherar *v.* Prudential Ins. Co. (1902), 63 Neb. 530, 88 N. W. 687; Chicago, R. I. & P. R. R. Co. *v.* Shaw (1901), 63 Neb. 380, 88 N. W. 508; Gage *v.* West (1901), 62 Neb. 612, 87 N. W. 344; Dunn *v.* Bozarth (1899), 59 Neb. 244, 80 N. W. 811; Harrington *v.* Connor (1897), 51 Neb. 214, 70 N. W. 911; Murray *v.* Loushman (1896), 47 Neb. 256, 66 N. W. 413; Kleckner *v.* Turk (1895), 45 Neb. 176, 63 N. W. 469; Central City Bank *v.* Rice (1895), 44 Neb. 594, 63 N. W. 60; Barr *v.* City of Omaha (1894), 42 Neb. 341, 60 N. W. 591; Home Fire Ins. Co. *v.* Murray (1894), 40 Neb. 601, 59 N. W. 102; Manning *v.* Viers (1894), 38 Neb. 32, 56 N. W. 719; Omaha & R. V. R. R. Co. *v.* Moschel (1893), 38 Neb. 281, 56 N. W. 825; Commercial Nat. Bank *v.* Gibson (1893), 37 Neb. 750, 56 N. W. 616; Ledwith *v.* Campbell (1903), — Neb. —, 95 N. W. 838.

North Carolina: Barnes *v.* Crawford (1894), 115 N. C. 76, 20 S. E. 386.

North Dakota: Martin *v.* Luger Furniture Co. (1898), 8 N. D. 220, 77 N. W. 1003; Q. W. Loverin-Browne Co. *v.* Bank (1898), 7 N. D. 569, 75 N. W. 923.

Oklahoma: Tecumseh State Bank *v.* Maddox (1896), 4 Okla. 583, 46 Pac. 563; Consolidated Steel & Wire Co. *v.* Burnham (1899), 8 Okla. 514, 58 Pac. 654.

Oregon: Clemens *v.* Hanley (1895), 27 Ore. 326, 41 Pac. 658; Hume *v.* Kelly (1896), 28 Ore. 398, 43 Pac. 380; Osmun *v.* Winters (1896), 30 Ore. 177, 46 Pac. 780.

South Dakota: Heegaard *v.* Dakota Loan & Trust Co. (1893), 3 S. D. 569, 54 N. W. 656.

Washington: Long *v.* Eisenbeis (1901), 23 Wash. 556, 63 Pac. 249; Hart Lumber Co. *v.* Rucker (1898), 20 Wash. 383, 55 Pac. 320; Bishop *v.* Averill (1898), 19 Wash. 490, 53 Pac. 726; Seward *v.* Derrickson (1895), 12 Wash. 225, 40 Pac. 939; Hulbert *v.* Brackett (1894), 8 Wash. 438, 36 Pac. 264; State *ex rel. v.* Superior Court (1894), 9 Wash. 366, 37 Pac. 454.

Wisconsin: Illinois Steel Co. *v.* Budzisz (1900), 106 Wis. 499, 82 N. W. 534; Matthieson *v.* Schomberg (1896), 94 Wis. 1, 68 N. W. 416; Studebaker Bros. Mfg. Co. *v.* Langson (1895), 89 Wis. 200, 61 N. W. 773.

The question whether, under the particular facts, the ruling of the court showed an abuse of discretion, was considered in the following cases: —

California: Schaake *v.* Eagle Automatic Can Co. (1902), 135 Cal. 472, 63 Pac. 1025.

Idaho: Jones *v.* Stoddart (1902), Idaho, 67 Pac. 650.

Iowa: Clough *v.* Bennett (1896), 99 Ia. 69, 68 N. W. 578; Ankrum *v.* City of Marshalltown (1898), 105 Ia. 493, 75 N. W. 360; Burkhardt *v.* Burkhardt (1899), 107 Ia. 369, 77 N. W. 1069.

Kentucky: Brady *v.* Peck (1896), 99 Ky. 42, 34 S. W. 906; Felton *v.* Dunn (1901), Ky., 60 S. W. 298; Metropolitan

discussed, as to the proper forms of actions and the correspondence between the allegations and the proofs, is the subject indi-

Life Ins. Co. *v.* Smith (1900), Ky., 59 S. W. 24.

Minnesota: Smith *v.* Prior (1894), 58 Minn. 247, 59 N. W. 1016; Minneapolis Stockyards Co. *v.* Cunningham (1894), 59 Minn. 325, 61 N. W. 329.

Montana: York *v.* Steward (1898), 21 Mont. 515, 55 Pac. 29; Haupt *v.* Independent Tel. Co. (1900), 25 Mont. 122, 63 Pac. 1033.

Nebraska: Donovan *v.* Hibbler (1902), Neb., 92 N. W. 637; Hubenka *v.* Vach (1902), 64 Neb. 170, 89 N. W. 789; Dufrene *v.* Anderson (1902), Neb., 90 N. W. 221; Chicago, R. I. & Pac. R. R. Co. *v.* Young (1903), — Neb. —, 93 N. W. 922; Missouri, etc. Trust Co. *v.* Clark (1900), 60 Neb. 406, 83 N. W. 202; Schlageck *v.* Widhalm (1900), 59 Neb. 541, 81 N. W. 448; Weich *v.* Milliken (1898), 57 Neb. 86, 77 N. W. 363; Horbach *v.* Marsh (1893), 37 Neb. 22, 55 N. W. 286; Western Assurance Co. *v.* Dry Goods Co. (1898), 54 Neb. 241, 74 N. W. 592; Perkins County *v.* Miller (1898), 55 Neb. 141, 75 N. W. 577.

North Dakota: Anderson *v.* Bank, (1895), 5 N. D. 80, 64 N. W. 114.

Oregon: Wade *v.* City Railway Co. (1900), 36 Ore. 311, 59 Pac. 875; Nosler *v.* Coos Bay R. R. Co. (1901), 39 Ore. 331, 64 Pac. 644; Tillamook Dairy Ass'n *v.* Schermerhorn (1897), 31 Ore. 308, 51 Pac. 438.

South Dakota: Brown *v.* Edmunds (1896), 9 S. D. 273, 68 N. W. 734.

Utah: Ruffatti *v.* Lexington Mining Co. (1894), 10 Utah, 386, 37 Pac. 591.

Washington: Norris Safe & Lock Co. *v.* Clark (1902), 28 Wash. 268, 68 Pac. 718; Newman *v.* Buzard (1901), 24 Wash. 225, 64 Pac. 139; State *v.* Lorenz (1900), 22 Wash. 289, 60 Pac. 644; Price Baking Powder Co. *v.* Rinear (1897), 17 Wash. 95, 49 Pac. 223; West Seattle Land Co. *v.* Herren (1897), 16 Wash. 665, 48 Pac. 341; Van Lehn *v.* Morse (1897), 16 Wash. 672, 48 Pac. 404; McDonough *v.* Great Northern Ry. Co. (1896), 15 Wash. 244, 46 Pac. 334; Price *v.* Scott (1896), 13 Wash. 574, 43 Pac. 634; Maney *v.* Hart (1895), 11 Wash 67, 39 Pac. 268; Barnes *v.* Packwood (1894), 10 Wash. 50, 38 Pac. 857; Morgan *v.* Morgan (1894), 10 Wash. 99, 38 Pac. 1054; Gould *v.* Gleason (1895), 10 Wash. 476, 39 Pac. 123.

Wisconsin: Jacobson *v.* Tallard (1903), 116 Wis. 662, 93 N. W. 841; Whereatt *v.* Worth (1900), 108 Wis. 291, 84 N. W. 441; Sullivan *v.* Collins (1900), 107 Wis. 291, 83 N. W. 310; Carroll *v.* Fethers (1899), 102 Wis. 436, 78 N. W. 604; St. Clara Female Academy *v.* Northwestern Nat. Ins. Co. (1899), 101 Wis. 464, 77 N. W. 893; Rock *v.* Collins (1898), 99 Wis. 630, 75 N. W. 426; Schaller *v.* Chicago & Northwestern Ry. Co. (1897), 97 Wis. 31, 71 N. W. 1042; Segelke & Kohlhaus Mfg. Co. *v.* Hulberg (1896), 94 Wis. 106, 68 N. W. 653; O'Connor *v.* Chicago & Northwestern Ry. Co. (1896), 92 Wis. 612, 66 N. W. 795; Geer *v.* Holcomb (1896), 92 Wis. 661, 66 N. W. 793; Thompson *v.* Caledonian Fire Ins. Co. (1896), 92 Wis. 664, 66 N. W. 801; Kennan *v.* Smith (1902), 115 Wis. 463, 91 N. W. 986.

In the following cases it is held that a new and distinct cause of action or defence cannot be introduced by amendment: —

Arkansas: Freeman *v.* Lazarus (1895), 61 Ark. 247, 32 S. W. 680; Sarber *v.* McConnell (1897), 64 Ark. 450, 43 S. W. 395.

California: Frost *v.* Witter (1901), 132 Cal. 421, 64 Pac. 705 (an important case).

Colorado: Anderson *v.* Groesbeck (1899), 26 Colo. 3, 55 Pac. 1086.

Connecticut: Pitkin *v.* New York, etc. R. R. Co. (1894), 64 Conn. 482, 30 Atl. 772.

Idaho: Hallett *v.* Larcom (1897), Idaho, 51 Pac. 108.

Iowa: Boos *v.* Dulin (1897), 103 Ia. 331, 72 N. W. 533; Denzler *v.* Rieckhoff (1896), 97 Ia. 75, 66 N. W. 147; Williams *v.* Williams (1902), 115 Ia. 520, 88 N. W. 1057.

Kansas: Ellis *v.* Flaherty (1902), 65 Kan. 621, 70 Pac. 586; State *v.* Krause (1897), 58 Kan. 651, 50 Pac. 882.

Kentucky: Greer *v.* Louisville, etc. R. R. Co. (1893), 94 Ky. 169, 21 S. W. 649; Louisville, etc. R. R. Co. *v.* Beauchamp (1900), 108 Ky. 47, 55 S. W. 716;

cated by this heading: that is, the power held by the plaintiff, under certain circumstances, of choosing whether he will treat

Duckwall *v.* Brooke (1901), Ky., 65 S. W. 357 (allowing the *addition* of another cause of action, when the two might have been originally joined).

Minnesota: O'Gorman *v.* Sabin (1895), 62 Minn. 46, 64 N. W. 84.

Missouri: Heman *v.* Glann (1895), 129 Mo. 325, 31 S. W. 589; Chance *v.* Jennings (1901), 159 Mo. 544, 61 S. W. 177.

Nebraska: Western Cornice, etc. Works *v.* Meyer (1898), 55 Neb. 440, 76 N. W. 23; Undeland *v.* Stanfield (1897), 53 Neb. 120, 73 N. W. 459; Stratton *v.* Wood (1895), 45 Neb. 629, 63 N. W. 917; Scroggin *v.* Johnston (1895), 45 Neb. 714, 64 N. W. 236; Scott *v.* Spencer (1895), 44 Neb. 93, 62 N. W. 312; Dietz *v.* City Nat. Bank (1894), 42 Neb. 584, 60 N. W. 896.

North Carolina: King *v.* Dudley (1893), 113 N. C. 167, 18 S. E. 110; Mizzell *v.* Ruffin (1896), 118 N. C. 69, 23 S. E. 927; Parker *v.* Harden (1898), 122 N. C. 111, 28 S. E. 962; Goodwin *v.* Fertilizer Works (1898), 123 N. C. 162, 31 S. E. 373; Board of County Commissioners *v.* Candler (1898), 123 N. C. 682, 31 S. E. 858; Nims Mfg. Co. *v.* Blythe (1900), 127 N. C. 325, 37 S. E. 455; Martin *v.* Bank (1902), 131 N. C. 121, 42 S. E. 558.

North Dakota: Mares *v.* Wormington (1899), 8 N. D. 329, 79 N. W. 441.

South Carolina: Pickett *v.* Fidelity Co. (1901), 60 S. C. 477, 38 S. E. 160.

Wisconsin: Gates *v.* Paul (1903), 117 Wis. 170, 94 N. W. 55 (a valuable case); Klipstein *v.* Raschein (1903), 117 Wis. 248, 94 N. W. 63.

Wyoming: Sowin *v.* Pease (1895), 6 Wyo. 91, 42 Pac. 750.

That an amended pleading changes the cause of action is ground for motion to strike but not for demurrer: Beattie Mfg. Co. *v.* Gerardi (1901), 166 Mo. 142, 65 S. W. 1035; Williams *v.* Williams (1902), 115 Ia. 520, 88 N. W. 1057.

In the following cases the question is considered whether, under the particular facts, the amendment offered amounted to a change in the cause of action or ground of defence.

For cases holding that it did not change the cause of action or defence, see: —

Colorado: Messenger *v.* Northcutt (1899), 26 Colo. 527, 58 Pac. 1090.

Connecticut: Mechanics' Bank *v.* Woodward (1902), 74 Conn. 689, 51 Atl. 1084.

Georgia: Dinkler *v.* Baer (1893), 92 Ga. 432, 17 S. E. 953; Colley *v.* Gate City Co. (1893), 92 Ga. 664, 18 S. E. 817; McCandless *v.* Inland Acid Co. (1902), 115 Ga. 968, 42 S. E. 449; Craven *v.* Walker (1897), 101 Ga. 845, 29 S. E. 152; Causey *v.* Causey (1898), 106 Ga. 188, 32 S. E 138.

Iowa: Sachra *v.* Town of Manilla (1903), 120 Ia. 562, 95 N. W. 198; Thompson *v.* Brown (1898), 106 Ia. 367, 76 N. W. 819.

Kansas: St. Louis & San Francisco Railway Co. *v.* Ludlum (1901), 63 Kan. 719, 66 Pac. 1045.

Kentucky: Adams Oil Co. *v.* Christmas (1897), 101 Ky. 564, 41 S. W. 545; Ford Lumber Co. *v.* Clark (1902), Ky., 68 S. W. 443; Scottish Union Ins. Co. *v.* Strain (1902), Ky., 70 S. W. 274

Missouri: Courtney *v.* Blackwell (1899), 150 Mo. 245, 51 S. W. 668.

Montana: Murray *v.* Tingley (1897), 20 Mont. 260, 50 Pac. 723.

Nebraska: Massillon Engine & Thresher Co. *v.* Prouty (1902), — Neb. —, 91 N. W. 384; Ball *v.* Beaumont (1902), 63 Neb. 215, 92 N. W. 170.

North Carolina: Craven *v.* Russell (1896), 118 N. C. 564, 24 S. E. 361.

Oklahoma: Myers *v.* First Presbyterian Church (1901), 11 Okla. 544, 69 Pac. 874.

South Carolina: Booth *v.* Langley Co. (1897), 51 S. C. 412, 29 S. E. 204; Whitmire *v.* Boyd (1898), 53 S. C. 315, 31 S. E. 306.

Utah: Connor *v.* Raddon (1898), 16 Utah, 418, 52 Pac. 764.

For cases holding that the amendment did introduce a new cause of action or ground of defence, see: —

Arizona: Motes *v.* Gila Valley Ry. Co. (1902), Ariz., 68 Pac. 532.

Arkansas: Robinson *v.* United Trust (1903), — Ark. —, 72 S. W. 992.

California: Lambert *v.* McKenzie (1901), 135 Cal. 100, 67 Pac. 6; Storer *v.* Austin (1902), 136 Cal. 588, 69 Pac. 277.

Colorado: Anthony *v.* Slayden (1900),

his cause of action as arising from tort or from contract. This right of election sometimes occurs when the contract is express;

27 Colo. 144, 60 Pac. 826 (an important case).

Georgia: Georgia R. R. Co. *v.* Roughton (1899), 109 Ga. 604, 34 S. E. 1026; Charleston, etc. Ry. Co. *v.* Miller (1901), 113 Ga. 15, 38 S. E. 338; Cox *v.* Henry (1901), 113 Ga. 259, 38 S. E. 856; Horton *v.* Smith (1902), 115 Ga. 66, 41 S. E. 253; Glaze *v.* Bogle (1898), 105 Ga. 295, 31 S. E. 169; Franklin Bank-Note Co. *v.* Augusta, etc. Ry. Co. (1897), 102 Ga. 547, 30 S. E. 419.

Indiana: Cohoon *v.* Fisher (1896), 146 Ind. 583, 44 N. E. 664.

Kansas: Mo. Pac. Ry. Co. *v.* Henrie (1901), 63 Kan. 330, 65 Pac. 665; Kansas City *v.* Hart (1899), 60 Kan. 684, 57 Pac. 938; Jewett *v.* Malott (1899), 60 Kan. 509, 57 Pac. 100.

Missouri: Bricken *v.* Cross (1901), 163 Mo. 449, 64 S. W. 99.

Nevada: Schwartz *v.* Stock (1901), Nev., 65 Pac. 351.

North Carolina: Sams *v.* Price (1897), 121 N. C. 392, 28 S. E. 486.

Oregon: Foste *v.* Standard Ins. Co. (1894), 26 Ore. 449, 38 Pac. 617; Bailey *v.* Wilson (1899), 34 Ore. 186, 55 Pac. 973.

Cases in which particular amendments have been allowed or disallowed are classified and cited as follows: —

Arkansas: Bank of Malvern *v.* Burton (1900), 67 Ark. 426, 55 S. W. 483.

California: Porter *v.* Fillebrown (1897), 119 Cal. 235, 51 Pac. 322; County of Mono *v.* Flanigan (1900), 130 Cal. 105, 62 Pac. 293.

Georgia: Baldwin Fertilizer Co. *v.* Carmichael (1902), 116 Ga. 762, 42 S. E. 1002; Allen *v.* Stephens (1899), 107 Ga. 733, 33 S. E. 651; Norton *v.* Scruggs (1899), 108 Ga. 802, 34 S. E. 166; Maddox *v.* Central of Georgia Ry. Co. (1899), 110 Ga. 301, 34 S. E. 1036; Mutual Life Ins. Co. *v.* Presbyterian Church (1900), 111 Ga. 677, 36 S. E. 880; Equitable Building, etc. Ass'n *v.* Holloway (1901), 114 Ga. 780, 40 S. E. 742; Smith *v.* Columbia Jewelry Co. (1901), 114 Ga. 698, 40 S. E. 735; Wood *v.* Bewick Lumber Co. (1897), 103 Ga. 235, 29 S. E. 820; Williams *v.* Hall (1898), 103 Ga. 796, 30 S. E. 660; Roush *v.* First Nat. Bank (1897), 102 Ga. 109, 29 S. E. 144; Malone *v.* Kelly (1897), 101 Ga. 194, 28 S. E. 689; Atlantic Brewing Co. *v.* Bluthenthal (1897), 101 Ga. 541, 28 S. E. 1003; King *v.* McGhee (1896), 99 Ga. 621, 25 S. E. 849; Carey *v.* Cranston (1896), 99 Ga. 77, 24 S. E. 869; Ford *v.* Williams (1896), 98 Ga. 238, 25 S. E. 416; Carson *v.* Fears (1893), 91 Ga. 482, 17 S. E. 342; Purity Ice Works *v.* Rountree (1898), 104 Ga. 676, 30 S. E. 885; Thompson *v.* Mallory Bros. (1898); 104 Ga. 684, 30 S. E. 887.

Indiana: Chapman *v.* Jones (1897), 149 Ind. 434, 47 N. E. 1065.

Iowa: Clapp *v.* Greenlee (1897), 100 Ia. 586, 69 N. W. 1049; Kreuger *v.* Sylvester (1897), 100 Ia. 647, 69 N. W. 1059; Renner Bros. *v.* Thornburg (1900), 111 Ia. 515, 82 N. W. 950.

Kansas: Chandler *v.* Parker (1902), 65 Kan. 860, 70 Pac. 368; McManus *v.* Walters (1901), 62 Kan. 128, 61 Pac. 686; Emporia Nat. Bank *v.* Layfeth (1901), 63 Kan. 17, 64 Pac. 973.

Kentucky: Traders' Deposit Bank *v.* Day (1899), 105 Ky. 219, 48 S. W. 983; Bright *v.* First Nat. Bank (1899), 106 Ky. 702, 51 S. W. 442; H. Feltman Co. *v.* Thompson (1900), Ky., 58 S. W. 693; Town of Latonia *v.* Hopkins (1898), 104 Ky. 419, 47 S. W. 248; City of Newport *v.* Commonwealth (1899), 106 Ky. 434, 50 S. W. 845; Leonard *v.* Boyd (1903), Ky., 71 S. W. 508; Jones' Admr. *v.* Ill. Cent. R. R. Co. (1902), Ky., 66 S. W. 609; Cincinnati Tobacco Warehouse Co. *v.* Matthews (1903), Ky., 74 S. W. 242.

Minnesota: Swank *v.* Barnum (1896), 63 Minn. 447, 65 N. W. 722.

Missouri: Habel *v.* Union Depot Co. (1897), 140 Mo. 159, 41 S. W. 459; Barth *v.* Kansas City Ry. Co. (1897), 142 Mo. 535, 44 S. W. 778; Leavenworth, etc. Co. *v.* Atchison (1896), 137 Mo. 218, 37 S. W. 913; Harlan *v.* Moore (1895), 132 Mo. 483, 34 S. W. 70; Clark *v.* St. Louis Transfer Co. (1894), 127 Mo. 255, 30 S. W. 121.

Montana: Merrill *v.* Miller (1903), — Mont. —, 72 Pac. 423.

Nebraska: Pekin Plow Co. *v.* Wilson

but, on account of the tortious acts of the defendant, the plaintiff may disregard it, and sue directly for the wrong. In the great

(1902), — Neb. —, 92 N. W. 176; Norfolk Beet Sugar Co. *v.* Hight (1899), 59 Neb. 100, 80 N. W. 276; Security Nat. Bank *v.* Latimer (1897), 51 Neb. 498, 71 N. W. 38; Hanover Fire Ins. Co. *v.* Stoddard (1897), 52 Neb. 745, 73 N. W. 291; Burlington Voluntary Relief Dept. *v.* Moore (1897), 52 Neb. 719, 73 N. W. 15; Real *v.* Honey (1894), 39 Neb. 516, 58 N. W. 136; Omaha Bottling Co. *v.* Theiler (1899), 59 Neb. 257, 80 N. W. 82; Grotte *v.* Nagle (1897), 50 Neb. 363, 69 N. W. 973; Rosewater *v.* Horton (1903), — Neb. —, 93 N. W. 681.

New York: Lyman *v.* Kurtz (1901), 166 N. Y. 274, 59 N. E. 903; McLaughlin *v.* Webster (1894), 141 N. Y. 76, 35 N. E. 1081; Martin *v.* Home Bank (1899), 160 N. Y. 190, 54 N. E. 717.

North Carolina: Tillery *v.* Candler (1896), 118 N. C. 888, 24 S. E. 709; Shell *v.* West (1902), 130 N. C. 171, 41 S. E. 65.

North Dakota: Power *v.* Bowdle (1893), 3 N. D. 107, 54 N. W. 404.

Ohio: Raymond *v.* Railway Co. (1897), 57 O. St. 271, 48 N. E. 1093.

Oklahoma: Armour Packing Co. *v.* Orrick (1896), 4 Okla. 661, 46 Pac. 573; Lookabaugh *v.* La Vance (1897), 6 Okla. 358, 49 Pac. 65; Swope *v.* Burnham, etc. Co. (1898), 6 Okla. 736, 52 Pac. 924; Smock *v.* Carter (1897), 6 Okla. 300, 50 Pac. 262.

Oregon: Tillamook Dairy Ass'n *v.* Schermerhorn (1897), 31 Ore. 308, 51 Pac. 438, Foster *v.* Henderson (1896), 29 Ore. 210, 45 Pac. 898; Koshland *v.* Fire Ass'n (1897), 31 Ore. 362, 49 Pac. 865; Farmers' Bank *v.* Saling (1898), 33 Ore. 394, 54 Pac. 190; Christenson *v.* Nelson (1901), 38 Ore. 473, 63 Pac. 648.

South Carolina: Baker *v.* Hornick (1897), 51 S. C. 313, 28 S. E. 941; Stewart *v.* Walterboro Ry. Co. (1902), 64 S. C. 92, 41 S. E. 827; Glenn *v.* Gerald (1902), 64 S. C. 236, 42 S. E. 155.

Utah: Murphy *v.* Ganey (1901), 23 Utah, 633, 66 Pac. 190; Pugmire *v.* Diamond Coal & Coke Co. (1903), 26 Utah, 115, 72 Pac. 385.

Washington: Morrissey *v.* Faucett (1902), 28 Wash. 52, 68 Pac 352; Daly *v.* Everett Pulp & Paper Co. (1903), 31 Wash. 252, 71 Pac. 1014; Owen *v.* St. Paul, etc. Ry. Co. (1895), 12 Wash. 313, 41 Pac. 44; Norris Safe & Lock Co. *v.* Clark (1902), 28 Wash. 268, 70 Pac. 129.

Wisconsin: Emerson *v.* Schwindt (1902), 114 Wis. 124, 89 N. W. 822; Jarvis *v.* Northwestern Mutual Relief Ass'n (1899), 102 Wis. 546, 78 N. W. 1089; Charles Baumback Co. *v.* Laube (1898), 99 Wis. 171, 74 N. W. 96; Hubbard *v.* Haley (1897), 96 Wis. 578, 71 N. W. 1036; Post *v.* Campbell (1901), 110 Wis. 378, 85 N. W. 1032; Robinson *v.* Eau Claire Stationery Co. (1901), 110 Wis. 369, 85 N. W. 983; John R. Davis Lumber Co. *v.* First Nat. Bank (1894), 87 Wis. 435, 58 N. W. 743.

The question of the right to amend as related to the operation of the statute of limitations was considered in the following cases: —

Arizona: Motes *v.* Gila Valley, etc. R. R. Co. (1902), 68 Pac. 532.

Georgia: Knox *v.* Laird (1893), 92 Ga. 123, 17 S. E. 988; Beaty *v.* Atlantic, etc. R. R. Co. (1896), 100 Ga. 123, 28 S. E. 32.

Indiana: Peerless Stone Co. *v.* Wray (1898), 152 Ind. 27, 51 N. E. 326.

Iowa: Curl *v.* Foehler (1901), 113 Ia. 597, 85 N. W. 811; Taylor *v.* Taylor (1900), 110 Ia. 207, 81 N. W. 472.

Kansas: Missouri Pac. Ry. Co. *v.* Moffat (1899), 60 Kan. 113, 55 Pac. 837; Huckelbridge *v.* Atchison, etc. Ry. Co. (1903), 66 Kan. 443, 71 Pac. 814; Missouri, K. & T. Ry. *v.* Bageley (1902), 65 Kan. 188, 69 Pac. 189.

Kentucky: Louisville, etc. R. R. Co. *v.* Pointer's Admr. (1902), — Ky. —, 69 S. W. 1108.

Missouri: Bricken *v.* Cross (1901), 163 Mo. 449, 64 S. W. 99.

Nebraska: Norfolk Beet Sugar Co. *v.* Hight (1899), 59 Neb. 100, 80 N. W. 276; Chicago, R. I. & Pac. R. R. Co. *v.* Young (1903), — Neb. —, 93 N. W. 922.

North Carolina: Gillam *v.* Life Ins. Co. (1897), 121 N. C. 369, 28 S. E. 470.

Oklahoma: Butt *v.* Carson (1896), 5 Okla. 160, 48 Pac. 182.

South Carolina: Mayo *v.* Spartanburg,

majority of instances, however, the contract invoked, and made the basis of the suit, is implied. The theory of the implied

etc. R. R. Co. (1894), 43 S. C. 225, 21 S. E. 10.

South Dakota: Houts *v.* Bartle (1901), 14 S. D. 322, 85 N. W. 591.

Washington: McClaine *v.* Fairchild (1901), 23 Wash. 758, 63 Pac. 517; Morgan *v.* Morgan (1894), 10 Wash. 99, 38 Pac. 1054.

Wisconsin: Whereatt *v.* Worth (1900), 108 Wis. 291, 84 N. W. 441; Sullivan *v.* Collins (1900), 107 Wis. 291, 83 N. W. 310; Kennan *v.* Smith (1902), 115 Wis. 463, 91 N. W. 986; Boyd *v.* Mutual Fire Ass'n (1903), 116 Wis. 155, 94 N. W. 171.

When an amended pleading is filed, the original ceases to be a part of the record or to perform any function as a pleading: La Société Française *v.* Weidmann (1893), 97 Cal. 507, 32 Pac. 583; Mowry *v.* Wareham (1897), 101 Ia. 23, 69 N. W. 1128; Town of Whiting *v.* Doob (1898), 152 Ind. 157, 52 N. E. 759; Western Union Tel. Co. *v.* State (1896), 146 Ind. 54, 44 N. E. 793; Aydelott *v.* Collings (1895), 144 Ind. 602, 43 N. E. 867; City of Huntington *v.* Folk (1899), 154 Ind. 91, 44 N. E. 759; Indianapolis, etc. Ry. Co. *v.* Center Township (1895), 143 Ind. 63, 40 N. E. 134; Boland *v.* O'Neil (1899), 72 Conn. 217, 44 Atl. 15; Raymond *v.* Railway Co. (1897), 57 O. St. 271, 48 N. E. 1093; Ralphs *v.* Hensler (1896), 114 Cal. 196, 45 Pac. 1062 (holding that the original cannot even be used as evidence against the pleader.)

But see, on the other hand, Threadgill *v.* Commissioners (1895), 116 N. C. 616, 21 S. E. 425, where it is held that the rule that where there is an amended pleading filed the case must be tried in the amended pleading, and not in the original, does not obtain in this State. The defendant is not limited to his amended answer, and may have the benefit of the allegations in the original answer.

And it has been held that abandoned pleadings are admissible in evidence against the pleader: Spurlock *v.* Mo. Pac. Ry. Co. (1894), 125 Mo. 404, 28 S. W. 634; Ludwig *v.* Blackshere (1897), 102 Ia. 366, 71 N. W. 356; Leach *v.* Hill (1896), 97 Ia. 81, 66 N. W. 69; Longley *v.* McVey (1899), 109 Ia. 666, 81 N. W. 150.

Where a defendant consents to the filing of an amended complaint, he waives his right to a default for plaintiff's failure to reply to the answer to the original complaint: Radford *v.* Gaskill (1897), 20 Mont. 293, 50 Pac. 854.

An abandoned pleading cannot form the basis for a judgment on the pleadings: Cummings *v.* Hoffman (1893), 113 N. C. 267, 18 S. E. 170.

As to the time when an amendment may be made, see the following cases: —

After the evidence is in: Metropolitan Life Ins. Co. *v.* Smith (1900), Ky., 59 S. W. 24; Carter *v.* Dilley (1902), 167 Mo. 564, 67 S. W. 232; Hocks *v.* Sprangers (1902), 113 Wis. 123, 87 Pac. 1101; Allend *v.* Spokane Falls, etc. Ry. Co. (1899), 21 Wash. 324, 58 Pac. 244. *After verdict:* Walker *v.* O'Connell (1898), 59 Kan. 306, 52 Pac. 894; Raymond *v.* Wathen (1895), 142 Ind. 367, 41 N. E. 815. *After pleading to original:* Goodwin *v.* Caraleigh, etc. Co. (1897), 121 N. C. 91, 28 S. E. 192. *After motion for change of venue:* Kay *v.* Pruden (1897), 101 Ia. 60, 69 N. W. 1137. *In the Appellate Court:* Ure *v.* Bunn (1902), Neb., 90 N. W. 904; Privett *v.* Railroad Co. (1899), 54 S. C. 98, 32 S. E. 75; Martin *v.* Shannon (1897), 101 Ia. 620, 70 N. W. 720; Evans *v.* Hughes County (1893), 4 S. D. 33, 54 N. W. 1049; Greely *v.* McCoy (1893), 3 S. D. 624, 54 N. W. 659; Smith *v.* Wetmore (1901), 167 N. Y. 234, 60 N. E. 419. *During trial:* Moore *v.* Harrod (1897), 101 Ky. 248, 40 S. W. 675. *Pending motion for non-suit:* Earl Orchard Co. *v.* Fava (1902), 138 Cal. 76, 70 Pac. 1073. *Pending motion for judgment on pleadings:* Bryant *v.* Davis (1899), 22 Mont. 534, 57 Pac. 143. *While jury is being empanelled:* Jorgenson *v.* Butte Co. (1893), 13 Mont. 288, 34 Pac. 37.

As to when the Supreme Court will consider as made amendments which might have been made in the court below, see Evansville, etc. R. R. Co. *v.* Maddox (1893), 134 Ind. 571, 33 N. E. 345; Helphrey *v.* Strobach (1895), 13 Wash. 128, 42 Pac. 537; Richardson *v*

promise, and its invention in order that certain classes of liabilities might be enforced by means of the action of assumpsit, have

Moore (1902), 30 Wash. 406, 71 Pac. 18; Scholey *v.* Demattos (1898), 18 Wash. 504, 52 Pac. 242.

A complaint which states no cause of action cannot be amended: Whaley *v.* Lawton (1900), 57 S. C. 256, 35 S. E. 558; Ruberg *v.* Brown (1897), 50 S. C. 397, 27 S. E. 873; Jacobs *v.* Gilreath (1893), 41 S. C. 143, 19 S. E. 308; Mizzell *v.* Ruffin (1896), 118 N. C. 69, 23 S. E. 927.

Tests to determine whether an amendment introduces a new cause of action, have been given by some courts. The Supreme Court of Oregon, in Hume *v.* Kelly (1896), 28 Ore. 398, 43 Pac. 380, has given the following: "A general test as to whether a new cause of action would be introduced by a proposed amendment is to inquire if a recovery had upon the original complaint would bar a recovery under the complaint if the amendment was allowed, or if the same evidence would support both, or the same measure of damages is applicable, or both are subject to the same plea." The rule given by the Supreme Court of Missouri is as follows: "There are two tests by which to determine whether a second petition is an amendment or a substitution of a new cause of action: *First*, whether the same evidence will support both petitions, and, *second*, whether the same measure of damages will apply to both. If these questions are answered in the affirmative, it is an amendment; if in the negative, it is a substitution:" Liese *v.* Meyer (1898), 143 Mo. 547, 45 S. W. 282. See also Grigsby *v.* Barton County (1902), 169 Mo. 221, 69 S. W. 296, where the test suggested is whether the same evidence will support both and the same judgment can be rendered under both.

Miscellaneous Rules respecting Amendments.

"A party cannot answer an amended petition, and, when evidence is offered to maintain its allegations, object for the first time on the ground that the amendment is a departure from the original:" Bender *v.* Zimmerman (1896), 135 Mo. 53, 36 S. W. 210. Enlarging the issues by amendment, if properly made, does not release the surety for costs even for the costs accruing after the amendments. Schawacker *v.* McLaughlin (1897), 139 Mo. 333, 40 S. W. 935. A motion to strike out a third amended petition should not be sustained if the cause of action stated in the original and last petition is the same: Sanguinett *v.* Webster (1900), 153 Mo. 343, 54 S. W. 563. "The rule is well established and is not in conflict with our statute regulating amendments to pleadings, that, where a complaint to which an answer has been filed is amended in substantial manner, the defendant has an absolute right to plead *de novo:*" Schwartz *v.* Stock (1901), Nev., 65 Pac. 351.

Where an answer denies the allegations of the original complaint, and an amended complaint is filed containing a mere repetition of the allegations in the original, it need not be answered: Brossard *v.* Morgan (1900), Idaho, 61 Pac. 1031; Schmidt *v.* Mitchell (1897), 101 Ky. 570, 41 S. W. 929. Where an "amended complaint" is identical with the original to which a demurrer has been sustained, no demurrer can be heard to such so-called amended complaint, since it is out of the record. The ruling on the original complaint applies equally to the unchanged amended complaint: Ellis *v.* City of Indianapolis (1897), 148 Ind. 70, 47 N. E. 218. "Prejudicial error cannot be predicated on an order allowing a pleading to be amended when the amendment does not change the issues, nor affect the quantum of proof as to any material fact:" Cate *v.* Hutchinson (1899), 58 Neb. 232, 78 N. W. 500. "It is not reversible error to refuse to permit a petition to be amended on the trial, when such amendment, taken in connection with the other averments of the petition, did not state a cause of action:" Bartlett *v.* Scott (1898), 55 Neb. 477, 75 N. W. 1102. "Courts very properly refuse affirmatively to direct what language must be employed in drafting pleadings:" Omaha Fire Ins. Co. *v.* Berg (1895), 44 Neb. 523, 62 N. W. 862. "Where, upon the trial of an action, testimony is admitted without objection, it is not error

been already explained. As the fictitious promise was implied or inferred by the law from acts or omissions of the defendant

for the court to permit the pleadings to be amended to conform to the proof:" Whipple *v.* Fowler (1894), 41 Neb. 675, 60 N. W. 15.

After the filing of an amended complaint, the defendant has the choice of filing a new answer or letting the old one stand as his answer to the amended complaint, but after his election to file a new answer the old one cannot be resorted to to save a default, and judgment may be taken against him if he neglects to file his new answer: Gettings *v.* Buchanan (1896), 17 Mont. 581, 44 Pac. 77; Ermentrout *v.* Am. Fire Ins. Co. (1895), 63 Minn. 194, 65 N. W. 270. Where an amendment is allowed, either a copy of the amendment or of the pleading as amended, may be filed and served, though the latter is the better practice: Holter Hardware Co. *v.* Ontario Mining Co. (1900), 24 Mont. 184, 61 Pac. 3. The filing of an amended pleading waives any error committed in rulings upon such pleading: State *ex rel.* *v.* Jackson (1895), 142 Ind. 259, 41 N. E. 534; Gowen *v.* Gilson (1895), 142 Ind. 328, 41 N. E. 594; Weaver *v.* Apple (1896), 147 Ind. 304, 46 N. E. 642. An amendment made not to show but to confer jurisdiction is not allowable: Gillam *v.* Life Ins. Co. (1897), 121 N. C. 369, 28 S. E. 470. But see Boyd *v.* Roanoke Lumber Co. (1903), 132 N. C. 184, 43 S. E. 631, where such an amendment was allowed.

"To strike out a pleading which is susceptible of being amended by a statement of facts known to exist, and which constitute a cause of action or defence to an action, is a harsh proceeding, and should only be resorted to in extreme cases:" Burns *v.* Scooffy (1893), 98 Cal. 271, 33 Pac. 86. A so-called amendment to a petition may be stricken out on motion when the matters alleged are not in support of the cause of action but in reply to matters alleged in appellee's cross-petition: Wood *v.* Brown (1897), 104 Ia. 124, 73 N. W. 608. A material amendment, unverified, to a verified complaint, renders it necessary to treat the complaint as unverified: Brown *v.* Rhinehart Bros. (1893), 112 N. C. 772, 16 S. E. 840. The validity of an attachment is not affected by the filing of an amended complaint which does not change the cause of action: Meyer *v.* Brooks (1896), 29 Ore. 203, 44 Pac. 281. "Great liberality, it is true, should be exercised in allowing amendments to pleadings; but that liberality should only be displayed in furtherance of justice. This is always the controlling consideration before the trial court:" Bank of Woodland *v.* Heron (1898), 122 Cal. 107, 54 Pac. 537.

"When a judgment is reversed and cause remanded, it stands the same as if no trial had been had, and pleadings may be amended, supplemental pleadings filed, and new issues formed, under proper restrictions, except that an issue determined upon an agreed statement of facts cannot generally be reopened:" Consolidated Steel & Wire Co. *v.* Burnham (1899), 8 Okla. 514, 58 Pac. 654. "The trial court may well refuse to permit the amendment of a defective plea in abatement, the only purpose of which is to prevent the court from determining on its merits a cause properly before it:" Mitchell *v.* Smith (1901), 74 Conn. 125, 49 Atl. 909. "Where the objection that a complaint fails to state a cause of action because of the omission of a material allegation is not taken by demurrer, but by a motion to dismiss at the trial, the court may in its discretion reserve its decision until possessed of the case upon the merits and then permit an amendment when the substantial rights of the defendant will not be injuriously affected thereby:" National Bank of Deposit *v.* Rogers (1901), 166 N. Y. 380, 59 N. E. 922. An oral decision allowing an amendment of the complaint is sufficient: Findlay *v.* Knickerbocker Ice Co. (1899), 104 Wis. 375, 80 N. W. 436. A pleading will not be allowed to be amended to conform to the proof when the facts proved are admissible under the original pleading: Buxton *v.* Sargent (1898), 7 N. D. 503, 75 N. W. 811. The sufficiency of an amendment to cure the defect in the pleading is not a question to be passed on in determining whether or not it should be allowed: Freeman *v.*

which created a liability *ex æquo et bono*, it sometimes happened that these acts or omissions were tortious in their nature. In such a case, therefore, the liability could be regarded in a double aspect; namely, as directly springing from the tort committed by the wrong-doer, or as arising from the promise to make compensation which the law implied and imputed to him. As the single liability thus resulting from the given acts or omissions was considered under these two different aspects, the common law provided two distinct means or instruments for enforcing it, — one by the form of action appropriate for the recovery of damages from the tort, the other by the form of action appropriate for the recovery of damages from the breach of an implied promise. In what instances — that is, in what classes of tortious acts or omissions — the right of action existed had been determined by the courts, although there was not a complete uniformity of decision among the tribunals of the several States.

§ 459. * 568. **New Procedure makes no Change in Doctrine of Election.** The doctrine of electing between an action *ex delicto* and one *ex contractu*, or, to speak more accurately, between treating the cause of action as arising from tort or from contract, has been retained under the new procedure; and it is applied in the same classes of cases, and is governed by the same general rules, as in the former system.[1] The courts, without

Brown (1902), 115 Ga. 23, 41 S. E. 385.

Where evidence is admitted which is not in conformity to the pleadings, the latter will be treated as amended to agree with the proof: Nicklace *v.* Dickerson (1898), 65 Ark. 422, 46 S. W. 945; Davis *v.* Goodman (1896), 62 Ark. 262, 35 S. W. 231.

The prayer for relief may be amended: Hogueland *v.* Arts (1901), 113 Ia. 634, 85 N. W. 818; Slater *v.* Estate of Cook (1893), 93 Wis. 104, 67 N. W. 15; Liese *v.* Meyer (1898), 143 Mo. 547, 45 S. W. 282. In the last case it was held that such an amendment did not change the cause of action.

An amendment substituting the real party in interest is not allowable: Wilson *v.* Kiesel (1894), 9 Utah, 397, 35 Pac. 488.

Contra, Service *v.* Bank (1900), 62 Kan. 857, 62 Pac. 670; Hudson *v.* Baratt (1901), 62 Kan. 137, 61 Pac. 737.

Where a new defence is introduced on the trial by amendment, the plaintiff is entitled to a continuance: Dunn *v.* Bozarth (1899), 59 Neb. 244, 80 N. W. 811.

"The mode of amending pleadings in this State is by rewriting the pleading, leaving out such allegations and inserting such other allegations, as may be desired, so that all parts of the pleading shall be in one instrument complete in itself:" Satterlund *v.* Beal (1903), — N. D. —, 95 N. W. 518.]

[1] [In Downs *v.* Finnegan (1894), 58 Minn. 112, 59 N. W. 981, the court said: "It being established that an injured party may elect between the two forms of remedial proceedings, — may sue in tort for the wrong done him, or in assumpsit as upon an implied contract, — it follows that by waiving the tort the demand may be counterclaimed against a plaintiff's cause of action arising on another contract, or, where itself set up by a plaintiff as arising

perhaps appreciating the full extent of the changes, and the effect of abolishing all distinctions between forms of actions, decided that the power of choice between the two modes of enforcing demands, of waiving the tort and suing upon an implied promise, still exists; and these early decisions have been followed by so many others without an expression of dissent, that the rule is as firmly established in the reformed as it was in the common-law pleading. The single principle upon which the entire doctrine rests is very simple, and should — and would, if the courts were always consistent in acting upon it — afford a ready and plain solution of every question, new or old, which can be suggested. This single principle may be thus formulated: From certain acts or omissions of a party creating a liability to make compensation in damages, the law implies a promise to pay such compensation. Whenever this is so, and the acts or omissions are at the same time tortious, the twofold aspect of the single liability at once follows, and the injured party may treat it as arising from the tort, and enforce it by an action setting forth the tortious acts or defaults; or may treat it as arising from an implied contract, and enforce it by an action setting forth the facts from which the promise is inferred by the law. It should be remembered that different promises may be inferred from different acts or omissions: thus, in one case, the promise might be to pay over money had and received to the use of the injured party; and in another, where no money had been actually received, the implied undertaking might be that the wrong-doer would pay the value or price of goods taken by him. This dis-

on contract, it may be opposed by a counterclaim arising out of another contract. . . . The right to waive the tort and to recover on an implied assumpsit is an exception to the principles of code pleading, and there must be no extension beyond what is allowed at common law. . . . Certain it is that the rule has been extended to cases where there has been a wrongful conversion of property of one person to the use of another, whether sold or not by the latter, and also to cases where a trespasser has severed trees from land in possession of the owner, or has quarried stone thereon, and has afterwards taken the trees or stone away, converting the same to his own use, so that trover or replevin might be maintained. That the doctrine has been greatly developed and extended in application is apparent, and that in cases where property has been severed from real estate by a wrongdoer, carried from the freehold, and converted to his own use, the rightful owner may sue and recover its value as on implied contract, is thoroughly established, although it may not be in harmony with the reformed system of pleading. No reason exists why, if permissible at all, it should not include cases arising out of trespass, to the extent that the property carried away is beneficial to the trespasser, except where it would involve a trial of title to real estate."]

tinction, so palpable and commonplace, seems to have been overlooked in some classes of decisions.

§ 460. * 569. **Classes of Cases where Election is allowed. Conversion. Conflict of Authority.** Having thus formulated the general principle which prevailed in the former procedure, and which has been adopted to its full extent in the present, I shall, in its further illustration, state the various classes of cases to which it has been applied by the courts, and shall thus ascertain the particular instances — the kinds of wrongful acts and omissions — in which the right of election exists. To this will be added a few observations upon the mode of indicating the fact that an election has been made by the pleader, that a tort has been waived, and a cause of action upon contract has been chosen. The most common classes of tortious acts, in respect of which the right of election has been invoked, are the wrongful taking or conversion of chattels, or things in action, or money; the wrongful use of land, and appropriation of its rents and profits; sales of goods on a credit procured by the fraud of the purchaser; frauds and deceits generally by which money or things in action, or chattels, are obtained; and certain cases of express contract, in which, from the policy of the law, the liability is regarded as resulting from a violation of general duty as well as from a breach of the stipulations of the agreement. These classes will be considered separately. It is a firmly established rule, from which no dissent has been suggested, that when goods or things in action have under any circumstances been wrongfully taken or detained or converted, and have been *sold* or disposed of by the wrong-doer, the owner may sue in tort to recover damages for the taking and carrying away or the conversion, or he may waive the tort and sue on the implied promise to refund the price or value as money had and received to the plaintiff's use.[1] When, however, the chattels or things in action have been simply taken or converted, but not sold or disposed of by the wrong-doer, a conflict of opinion exists in respect to the power of the plaintiff to elect between the two forms of action.

[1] McKnight *v.* Dunlop, 4 Barb. 36, 42; Hinds *v.* Tweddle, 7 How. Pr. 278, 281; Harpending *v.* Shoemaker, 37 Barb. 270, 291; Chambers *v.* Lewis, 2 Hilt. 591; Leach *v.* Leach, 2 N. Y. S. C. 657; Tryon *v.* Baker, 7 Lans. 511, 514; Roberts *v.* Evans, 43 Cal. 380; Gordon *v.* Bruner, 49 Mo. 570, 571; Putnam *v.* Wise, 1 Hill (N. Y.), 234, 240, and the reporter's note; Berly *v.* Taylor, 5 Hill, 577, 584, and the reporter's note.

Certain cases deny this power. This ruling is rested upon the ground that the goods remaining in the hands of the wrong-doer, and no money having in fact been received by him, an implied promise to pay over money had and received by the defendant to the plaintiff's use does not and cannot arise.[1] In this country, however, the weight of authority is strongly the other way. The cases generally admit an election, under the circumstances described, between an action based upon the tort, and an action based upon the implied promise to pay the price or value of the goods. The tort is waived, and the transaction is treated as a sale, and not as an instance of money had and received. This distinction is certainly supported by the plainest principles, if the doctrine of implied promises and election is to be admitted at all.[2] If money has been converted, the right of election exists

[1] McKnight *v.* Dunlop, 4 Barb. 36, 42; Henry *v.* Marvin, 3 E. D. Smith, 71; Tryon *v.* Baker, 7 Lans. 511, 514. [Held, in Brittain *v.* Payne (1896), 118 N. C. 989, 24 S. E. 711, that when property is tortiously taken and sold, the owner may waive the tort and sue in assumpsit.]

[2] Hinds *v.* Tweddle, 7 How. Pr. 278, 281; Chambers *v.* Lewis, 2 Hilt. 591; Putnam *v.* Wise, 1 Hill (N. Y.), 234, 240 (and see note of the reporter); Berly *v.* Taylor, 5 Hill, 577, 584 (and note of the reporter); Roberts *v.* Evans, 43 Cal. 380. Gordon *v.* Bruner, 49 Mo. 570, 571: "In Massachusetts, in Jones *v.* Hoar, 5 Pick. 285, to which there is a note to a former opinion reviewing the English cases, it was held that no contract could be implied unless the goods were sold and converted into money, and the same doctrine was held in Pennsylvania, in Willett *v.* Willett, 3 Watts, 277, and in Morrison *v.* Rogers, 2 Ill. 317. But such has not been the uniform ruling. In Putnam *v.* Wise, 1 Hill, 240, the court holds that, 'according to the well-known right of election in such cases, the plaintiff might have brought "assumpsit" as for goods sold and delivered against those who had tortiously taken their property.' To this the reporter, Mr. Hill, adds a note, reviewing the cases, and disapproving the doctrine of Jones *v.* Hoar. (See Hill *v.* Davis, 3 N. H. 384; Stockett *v.* Watkins's Adm., 2 Gill & J. 326, and cases cited.)" Quoting early Missouri decisions to the same effect, — Floyd *v.* Wiley, 1 Mo. 430, 643; Johnson *v.* Strader, 3 Mo. 359, — the learned judge adds: "It may be treated, then, as the doctrine in this State, that one who has converted to his own use the personal property of another, when sued for the value of that property as sold to him, will not be permitted to say in defence that he obtained it wrongfully." See also Small *v.* Robinson, 9 Hun, 418; Cushman *v.* Jewell, 7 id. 525, 530 (an unsupported *dictum*); Loomis *v.* Mowry, 8 id. 311; Freer *v.* Denton, 61 N. Y. 492; Fields *v.* Bland, 81 id. 239; Comstock *v.* Hier, 73 id. 269; Kalckhoff *v.* Zoehrlaut, 40 Wis. 427; Chamballe *v.* McKenzie, 31 Ark. 155; Huston *v.* Plato, 3 Colo. 402; Brady *v.* Brennan, 25 Minn. 210; Logan *v.* Wallis, 76 N. C. 416; Loomis *v.* O'Neal, 73 Mich. 582; Lehmann *v.* Schmidt, 87 Cal. 15; Terry *v.* Munger, 121 N. Y. 161; Abbott *v.* Blossom, 66 Barb. 353, 356; Starr Cash Car Co. *v.* Reinhardt (Com. Pl. 1892), 20 N. Y. Suppl. 872.

[To the same effect are Galvin *v.* Mac Mining Co. (1894), 14 Mont. 508, 37 Pac. 366; Cragg *v.* Arendale (1901), 113 Ga. 181, 38 S. E. 399; Crown Cycle Co. *v.* Brown (1901), 39 Ore. 285, 46 Pac. 451; Braithwaite *v.* Akin (1893), 3 N. D. 365, 56 N. W. 133; Anderson *v.* Bank (1896), 5 N. D. 451, 67 N. W. 821.

In Anderson *v.* Bank (*supra*), it was held that where an agent, authorized to

under the operation of either rule, since the actual receipt of money by the defendant brings the case exactly within the reason and operation of the doctrine as first stated.[1] The same choice between the actions may sometimes be possible when the liability is connected with a claim to land, or grows out of its use, although the instances are much fewer than those of the preceding class. Thus, when the owner agreed to lease certain premises to the plaintiff for a term of years commencing at a future day named, but before that day actually leased them to another person who took possession, and when the time arrived the plaintiff demanded possession, tendered the rent, and on refusal brought an action for damages, it was objected on the trial that his only remedy was ejectment against the tenant in possession. The court held, that, while the plaintiff might have maintained ejectment, he could also bring an action against the lessor, which could be either upon the agreement express or implied, or in tort for the violation of the duty arising from the relation of lessor and lessee between the parties.[2] It is settled in Wisconsin, after a careful consideration and an exhaustive analysis and comparison of the conflicting decisions, that when the defendant had committed a wilful trespass upon the plaintiff's land by deliberately turning his cattle thereon, in order that they might feed upon the grass, the plaintiff might waive the tort, and sue upon an implied contract for the price and value of the pasturage.[3]

§ 461. *570. **Actions against Common Carriers for Loss or Injury to Goods. Other Cases.** It is a familiar rule, that the action against a common carrier for a loss or injury of goods may either be in tort for the violation of his general duty, or on the contract which he expressly or impliedly enters into. The owner has his election which of these remedies he will pursue; but his choice cannot alter the extent of the carrier's liability.[4] Fraud in its

sell at a given price, sells to himself, and the principal waives the tort and sues in assumpsit, this does not constitute a ratification of the agent's act so as to limit the recovery to the price at which the agent had been authorized to sell. The suit is purely one in general assumpsit.]

[1] Tryon *v.* Baker, 7 Lans. 511, 514.

[2] Trull *v.* Granger, 8 N. Y. 115. See, however, Carpenter *v.* Stilwell, 3 Abb. Pr. 459.

[3] Norden *v.* Jones, 33 Wis. 600, 604, 605. The opinion of Dixon C. J. is a full and most instructive examination of the doctrine.

[4] Campbell *v.* Perkins, 8 N. Y. 430, 438; Brown *v.* Treat, 1 Hill (N. Y.), 225; People *v.* Kendall, 25 Wend. 399; Wallace *v.* Morss, 5 Hill, 391; Campbell *v.* Stakes, 2 Wend. 137.

[See Poly *v.* Williams (1894), 101 Cal. 648, 36 Pac. 102, where a counterclaim

various phases also furnishes many occasions and opportunities for the exercise of an election between actions. One of the most common is the case of a sale upon a credit procured by the false and fraudulent representations of the vendee as to his pecuniary responsibility. Upon discovering the fraud, even before the expiration of the credit, the vendor may rescind the sale and immediately bring an action in form of tort either to recover the goods themselves, or damages for their taking and conversion; or he may waive the tort, and sue at once on contract for the price.[1] And when money has been obtained by false and fraudulent representations, or by fraudulent practices of any kind, the plaintiff has the option to sue either in tort for the deceit, or in contract for money had and received by the defendant to his use.[2]

§ 462. *571. **Principle which determines when a Promise is Implied.** The conflict which has existed to a certain extent among the decisions in reference to the right of election, and the classes of tortious acts and omissions embraced within it, can only be put to rest by determining with certainty the occasions and circumstances in which a promise will be implied by the

was filed to recover upon an account for nursery stock, consisting of fruit-trees and grape-vines eaten up and destroyed by hogs, cattle, and horses of the plaintiff. A demurrer to this counterclaim was overruled. So in Monroe *v.* Cannon (1900), 24 Mont. 316, 61 Pac. 863, an action in assumpsit for the value of the pasturage was allowed in the case of a wrongful herding of sheep on plaintiff's land. See in this connection Tanderup *v.* Hansen (1894), 5 S. D. 164, 58 N. W. 578; Zander *v.* Valentine Blatz Brewing Co. (1897), 95 Wis. 162, 70 N. W. 164.

But it was held in Commonwealth Title Ins. Co. *v.* Dokko (1898), 71 Minn. 533, 74 N. W. 891, that "if defendant was a trespasser plaintiff could not waive the tort, and sue him on contract as his tenant." Same holding in McLane *v.* Kelly (1898), 72 Minn. 395, 75 N. W. 601.]

[1] Roth *v.* Palmer, 27 Barb. 652, and cases cited; Kayser *v.* Sichel, 34 Barb. 84; s. c. on app. *sub nom.* Wigand *v.* Sickel, 3 Keyes, 120, approving Roth *v.* Palmer. See Claffin *v.* Taussig, 7 Hun, 223; National Trust Co. of N. Y. *v.* Gleason, 77 N. Y. 400; Western Assur. Co. *v.* Towle, 65 Wis. 247; Farmers' Nat. Bk. *v.* Fonda, 65 Mich. 533; Hurt *v.* Barnes, 24 Neb. 782.

[2] Byxbie *v.* Wood, 24 N. Y. 607, 610; Union Bk. of N. Y. *v.* Mott, 27 N. Y. 633, 636. It will be noticed that these two cases were alike in all their essential facts, and that in one of them the tort was held to have been waived, and in the other not to have been waived; and this distinction was in fact made, not upon any difference in the allegations, but because it subserved the ends of justice, and defeated an objection of mere form. A peculiar instance of fraud was presented in the recent case of Booth *v.* Farmers' & Mech. Bk. of Rochester, 1 N. Y. S. C. 45, 49. See the opinion of Mullen J., given in full, *supra*, § *539.

[It was held in Kansas City, etc. R. R. Co. *v.* Becker (1899), 67 Ark. 1, 53 S. W. 406, that a servant of a railroad company who is injured when in the service of his employer, has an election to recover damages either by an action on the express contract or by an action *ex delicto*]

law. It is very clear that whenever the promise will be implied, if the acts or omissions from which it is inferred are at the same time tortious, the election to sue for the tort or for a breach of the contract must necessarily exist, or else it must be denied on some mere arbitrary and insufficient ground. The whole discussion is thus reduced to the single question, When is a promise implied by the law? The comprehensive principle which furnishes a definite answer to this inquiry, applicable to all circumstances and relations, has been well stated by the courts in the following terms: "When a promise is implied, it is because the party intended it should be, *or because natural justice plainly requires it in consideration of some benefit received.*"[1] It was also said by a very able English judge, that "no party is bound to sue in tort, when by converting the action into an action on contract he does not prejudice the defendant; and, generally speaking, it is more favorable to the defendant that he should be sued in contract."[2] If these quotations are correct statements of the general principle, it is plain that the rule maintained by some decisions, which would restrict the right of election to those cases in which the wrong-doer has actually received money equitably belonging to the plaintiff, is erroneous.[3]

§ 463. * 572. **Method of Indicating Election. Averment of Promise as a Test.** The foregoing examples sufficiently illustrate the scope and extent of the doctrine under consideration, and the class of liabilities to which it is applied. It remains to inquire how, under the new procedure, the plaintiff shall indicate in his pleading the fact that he has actually made his election, and has brought his action in tort or on contract, as the case may be. Under the old system no such question could arise. The election was disclosed by the form of the action itself. If the liability was to be treated as arising from contract, assumpsit was of course the action selected; if from tort, trover or case

[1] Webster *v.* Drinkwater, 5 Greenl. 322; also per Beardsley J. in Osborn *v.* Bell, 5 Denio, 370.

[2] Young *v.* Marshall, 8 Bing. 43, per Tindal C. J.

[3] It was said by Hogeboom J., while commenting upon this narrow rule in Roth *v.* Palmer, 27 Barb. 652: "Our courts recognize no such distinction. They allow the election in all cases where the plaintiff would have been allowed to pursue his remedy in tort." See also the following cases: Centre Turnp. Co. *v.* Smith, 12 Vt. 217; Cummings *v.* Vorce, 3 Hill, 282; Osborn *v.* Bell, 5 Denio, 370; Camp *v.* Pulver, 5 Barb. 91; Butts *v.* Collins, 13 Wend. 139, 154; Lightly *v.* Clouston, 1 Taunt. 113; Hill *v.* Perrott, 3 Taunt. 274; Young *v.* Marshall, 8 Bing. 43.

or replevin, or sometimes trespass, was the proper instrument. Since these forms have been abolished, and all the technical phrases which distinguished one proceeding from another are abandoned, it is only by the substantial nature and contents of the allegations themselves — the facts which they aver — that the election can, if at all, be now indicated. In other words, as the pleader can express his design by means of no arbitrary symbols in the complaint or petition, he must show that he has chosen to sue either in tort or on contract by the very substance of the averments which constitute the cause of action. In a recent case the New York Supreme Court proposed a certain test, and declared that when the plaintiff claims to have waived the tort, and to have sued upon an implied contract, the only possible mode of showing this election is by expressly alleging a promise to have been made by the defendant; that in no other manner can the design of making the action one *ex contractu*, and of distinguishing it from one *ex delicto*, be disclosed on the face of the pleading.[1] It has already been shown that this conclusion is directly opposed to the fundamental principles of the reformed pleading, and that it is a return to the most technical and purely fictitious dogmas and distinctions of the common-law system. It is also opposed to decisions and judicial dicta in relation to this very question which declare that such a mode of stating the cause of action is inadmissible, and that the facts alone which constitute it must be averred as they actually took place.[2]

§ 464. *573. **No Difficulty where Promise is Express. Summons Suggested as Means of Indicating Election in Case of Implied Promise.** Whenever the contract relied upon is express, there can be no difficulty in showing the election upon the face of the

[1] Booth *v.* Farmers' & Mech. Bk. of Rochester, 1 N. Y. S. C. 45, 49. See the opinion of Mullen J., *supra*, § *539.

[2] Byxbie *v.* Wood, 24 N. Y. 607, 610; Chambers *v.* Lewis, 2 Hilt. 591. In Byxbie *v.* Wood, the learned judge proceeds as follows: "Under the code, this implied promise is treated as a fiction, *and the facts out of which the prior law raised the promise are to be stated without any designation of a form of action;* and the law gives such judgment as, being asked for, is appropriate to the facts. Of course we cannot now say *that a particular phrase makes a particular form of action,* so that a party by its use may shut himself out from the remedy which his facts would give him." As the court were here discussing the doctrine of election, and as they held that the complaint stated a cause of action on contract, and not one on tort, *although no promise was alleged*, this language, and the decision upon it, are entirely inconsistent with the position taken and the test suggested by the Supreme Court in Booth *v.* Farmers' & Mech. Bank. In Chambers *v.* Lewis, the court simply said that whether a waiver has been made must now be shown by the facts averred in the complaint and by the prayer.

pleading. If the plaintiff chooses to bring an action *ex contractu*, his complaint or petition will simply state the terms of the agreement, and the facts which constitute the breach thereof. If he chooses to bring an action *ex delicto* for a violation by the defendant of his general duty, his complaint or petition will set out the facts showing his own primary right and the defendant's duty, disregarding the contract, and will then allege the tortious acts or omissions by which that right and duty were violated.[1] Although the same actual transaction between the parties would be stated in either case, the form and manner of the statement would be entirely and plainly different. An ordinary claim against a common carrier for the loss of goods furnishes a familiar example of these two modes. But when the contract relied upon is implied, and is simply the fictitious promise which the law infers from the tortious acts themselves, it may be doubted whether it is possible, in accordance with the true principles of the reformed pleading, to frame a complaint or petition in all cases which shall show on its face that the plaintiff has elected to bring his action either in tort or on contract. In one class of liabilities it is certainly possible to do so; namely, in those which result from the defendant's fraudulent representations and deceits. The allegation of a *scienter* is indispensable in the action *ex delicto* based upon such a liability, and distinguishes it in a marked manner from the correlative action based upon the implied promise. But when the liability results from the wrongful taking or conversion of chattels, from trespasses, negligences, or other similar kinds of wrongs, the very facts which are alleged in the action of tort are the facts from which the promise is inferred; and, according to the true theory of pleading, these facts must also be stated in the action *ex contractu*, without any legal inferences or conclusions. It conclusively follows, that, in this general class of liabilities, as the facts which constitute the cause of action are the same in each, the averments of the complaint or petition must be the same in each kind of action, if the essential principles of the reformed system are complied with, so that it is impossible to indicate upon the face of the pleading ~~alone the~~ election which the plaintiff has made.[2] The form of summons

[1] [See Fordyce *v.* Nix (1893), 58 Ark. 136, 23 S. W. 967, where a somewhat ambiguous complaint was held to declare on a tort.]

[2] [In Braithwaite *v.* Akin (1893), 3 N. D. 365, 56 N. W. 133, the court said: "To establish a cause of action in assumpsit the waiver must be averred either

adopted would therefore seem to be the only certain test, in this class of cases, by which the nature of the action can be determined, and the fact of an election can be made known to the adverse party. The only other alternative is, to insert in the complaint certain legal conclusions or descriptive phrases which, in reference to the statement of the cause of action, are purely immaterial and redundant.[1]

expressly or by the manner of stating the cause of action, for without the waiver no cause of action in assumpsit arises. It is not the wrong which gives the injured party the right to sue on contract; it is the wrong coupled with the waiver of the tort." But see Lenhardt *v.* French (1900), 57 S. C. 493, 35 S. E. 761, where the court said, respecting an election to waive a tort and sue in contract, "the code requires no specific words claiming that such an election has been made. It is enough if it appears to be made in effect in the pleadings."

It was held in Tanderup *v.* Hansen (1894), 5 S. D. 164, 58 N. W. 578, that where plaintiff sets out facts showing a cause of action in trespass, and then proceeds to allege that he waives the tort aforesaid, and for further cause of action alleges a fictitious promise to pay based on the same facts as set out in the trespass, the fictitious averments of promise will be disregarded as surplusage, and the cause of action as appearing in the facts shown will not be considered vitiated by the subsequent averments.]

[1] [*Election.*

In regard to the general subject of election, it is a well recognized rule that in order to apply the doctrine of election of remedies the party must actually have at command inconsistent remedies: Elliott *v.* Collins (1898), Idaho, 55 Pac. 301; Easton *v.* Somerville (1900), 111 Ia. 164, 82 N. W. 475; Austin Mfg. Co. *v.* Decker (1899), 109 Ia. 277, 80 N. W. 312; City of Omaha *v.* Redick (1901), 61 Neb. 163, 85 N. W. 46; State *v.* Bank of Commerce (1900), 61 Neb. 22, 85 N. W. 43; Fuller-Warren Co. *v.* Harter (1901), 110 Wis. 80, 85 N. W. 698; Marshall *v.* Rugg (1896), 6 Wyo. 270, 44 Pac. 700.

An election, to be binding, must be made with full knowledge of the facts: Blaker *v.* Morse (1898), 60 Kan. 24, 55 Pac. 274; City of Larned *v.* Jordan (1895), 55 Kan. 124, 39 Pac. 1030; Deere, Wells, & Co. *v.* Morgan (1901), 114 Ia. 287, 86 N. W. 271; Jones Co. *v.* Daniel (1899), 67 Ark. 206, 53 S. W. 890. Where the court orders an election the ruling will not be disturbed on appeal except in case of an abuse of discretion: Phillips *v.* Carver (1898), 99 Wis. 561, 75 N. W. 432.

An election once made is conclusive: Wright, Barrett, etc. Co. *v.* Robinson (1900), 79 Minn. 272, 82 N. W. 632; Blaker *v.* Morse (1898), 60 Kan. 24, 55 Pac. 274; City of Larned *v.* Jordan (1895), 55 Kan. 124, 39 Pac. 1030; Carroll *v.* Fethers (1899), 102 Wis. 436, 78 N. W. 604; Theusen *v.* Bryan (1901), 113 Ia. 496, 85 N. W. 802; Remington *v.* Hudson (1902), 64 Kan. 43, 67 Pac. 636.

Where a complaint contains inconsistent counts, the remedy is a motion to strike: Keller *v.* Strong (1898), 104 Ia. 585, 73 N. W. 1071; Fox *v.* Graves (1896), 46 Neb. 812, 65 N. W. 887. A motion to require plaintiff to elect is also proper: Fox *v.* Graves (1896), 46 Neb. 812, 65 N. W. 887.

Cases in which remedies were held to be inconsistent: Missouri Pac. Ry. Co. *v.* Henrie (1901), 63 Kan. 330, 65 Pac. 665, damages for refusal to issue railway passes in consideration of right of way, and action for value of land appropriated; Franey *v.* Wauwatosa Park Co. (1898), 99 Wis. 40, 74 N. W. 548, rescission of contract and damages for fraud in obtaining it; Limited Inv. Co. *v.* Glendale Inv. Ass'n (1898), 99 Wis. 54, 74 N. W. 633, same; Hildebrand *v.* Tarbell (1897), 97 Wis. 446, 73 N. W. 53, insisting on rights under an assignment and bringing action to have it set aside; Ludington *v.* Patton

SECTION FOURTH.

THE FORM OF THE COMPLAINT OR PETITION.

§ 465. * 574. **Introductory.** Having thus discussed and determined the fundamental principles and general doctrines of the reformed pleading, which apply to all causes of action, and to

(1901), 111 Wis. 208, 86 N. W. 571, action on contract for damages and action to rescind; First Nat. Bank *v.* Tootle (1899), 59 Neb. 44, 80 N. W. 264, action on contract on account for goods sold under fraudulent representations, and rescission of sale; First Nat. Bank *v.* McKinney (1896), 47 Neb. 149, 66 N. W. 280, same; Hargadine-McKittrick Dry Goods Co. *v.* Warden (1899), 151 Mo. 578, 52 S. W. 593, same; City of Cincinnati *v.* Emerson (1897), 57 O. St. 132, 48 N. E. 667, contesting validity of assessment on a ground common to plaintiff and all other owners of abutting lots, and on a ground pertaining to plaintiff's lot alone; MacMurray-Judge, etc. Co. *v.* City of St. Louis (1896), 138 Mo. 608, 39 S. W. 467, damages for injury to property and injunction restraining such injury; Davis *v.* Tubbs (1895), 7 S. D. 488, 64 N. W. 534, action on express contract and on implied contract; Hackett *v.* Louisville, etc. R. R. Co. (1894), 95 Ky. 236, 24 S. W. 871, damages for death and for suffering; Thomas's Adm'r *v.* Maysville Gas Co. (1900), 108 Ky. 224, 56 S. W. 153, same; Owensboro & Nashville Ry. Co. *v.* Barclay's Adm'r (1897), 102 Ky. 16, 43 S. W. 177, same; Seymore *v.* Rice (1894), 94 Ga. 183, 21 S. E. 293, fraud and breach of warranty; Vaule *v.* Steenerson (1895), 63 Minn. 110, 65 N. W. 257, damages for refusing to make a levy by virtue of an execution, and damages for levying another execution issued on the same judgment and appropriating the proceeds.

Cases in which remedies were held not to be inconsistent: Bent *v.* Barnes (1895), 90 Wis. 631, 64 N. W. 428, replevin for portion of goods and equitable action to enforce a trust in funds derived from the remainder; Simons *v.* Fagan (1901), 62 Neb. 287, 87 N. W. 21, damages for maliciously attaching property and action on the attachment bond; Easton *v.* Somerville (1900), 111 Ia. 164, 82 N. W. 475, conversion against a guardian for buying a mortgage with funds of the ward and an action against one who received these funds with knowledge of the facts; Savage *v.* Savage (1899), 36 Ore. 268, 59 Pac. 461, action on a note and on the original indebtedness; Johnson-Brinkman Co. *v.* Mo. Pac. Ry. Co. (1894), 126 Mo. 344, 28 S. W. 870, attachment against a vendee and replevin; Saunders *v.* United States Marble Co. (1901), 25 Wash. 475, 65 Pac. 782, action on express contract and on retaining benefits from such contract; Humphrey *v.* Ringler (1895), 94 Ia. 182, 62 N. W. 685, prayers in the alternative that a deed be set aside for fraud, or that contract price be recovered.

Theory of Case.

A complaint must proceed upon some definite theory and must be good upon that theory: Yorn *v.* Bracken (1899), 153 Ind. 492, 55 N. E. 257; Terre Haute, etc. R. R. Co. *v.* McCorkle (1894), 140 Ind. 613, 40 N. E. 62; Pittsburg, etc. Ry. Co. *v.* Sullivan (1894), 141 Ind. 83, 40 N. E. 138; Citizens' Street Ry. Co. *v.* Willoeby (1893), 134 Ind. 563, 33 N. E. 627; Grentner *v.* Fehrenschield (1902), 64 Kan. 764, 68 Pac. 619; Codding *v.* Munson (1897), 52 Neb. 580, 72 N. W. 846; Truesdell *v.* Bourke (1895), 145 N. Y. 612, 40 N. E. 83.

A party cannot try his case upon one theory and on appeal adopt another: Lebcher *v.* Lambert (1900), 23 Utah, 1, 63 Pac. 628; Gray *v.* Worst (1895), 129 Mo. 122, 31 S. W. 585; Anderson *v.* Foster (1898), 105 Ga. 563, 32 S. E. 373; Shropshire *v.* Ryan (1900), 111 Ia. 677, 82 N. W. 1035; McHale *v.* Maloney (1903),

all defences by way of confession and avoidance or of affirmative relief, I shall now briefly consider the rules which pertain to the form of the complaint or petition, and which regulate the manner of stating and arranging its allegations. These rules are few and simple; and their object is to render the issues single and certain, and to present the cause of action for a decision upon its merits, and not upon any technical, incidental, or collateral questions. In one important feature the new system stands in marked contrast with the old, — the entire absence of all special phrases or formulas by which the kinds of actions are distinguished, or by which the pleadings or any parts of them are characterized.

§ 466. *575. **Separate Statement of Different Causes of Action. Inducement and Prayer need not be repeated.** When a complaint or petition contains two or more causes of action, all the codes require that they shall be distinctly and separately stated and numbered; and the method by which a violation of this requirement is to be corrected has already been explained.[1] It is a settled rule, that if the pleading is of this kind, each separate division or count must be complete by itself, and must contain all the averments necessary to a perfect cause of action.[2] Defects and omissions in one cannot be supplied by the allegations found in another; nor can the pleader, by merely referring to material facts properly set forth in a former count, incorporate them into and make them part of a subsequent one. In other words, all the issuable or material facts constituting the ground for a recovery must be stated in each cause of action, even though some repetition might thereby become necessary.[3] This requirement,

— Neb. —, 93 N. W. 677; Lansing *v.* Commercial Union Assurance Co. (1903), — Neb. —, 93 N. W. 756.

Want of a definite theory is not ground for a demurrer, but for a motion to make more definite: Scott *v.* Cleveland, etc. Ry. Co. (1895), 144 Ind. 125, 43 N. E. 133. See also, upon the general subject of theory of complaint, Mark *v.* North (1900), 155 Ind. 575, 57 N. E. 902; Cleveland, etc. Ry. Co. *v.* Gray (1897), 148 Ind. 266, 46 N. E. 675.]

[1] See *supra*, §§ *447, *450.

[2] [Clark *v.* Ross (1895), 96 Ia. 402, 65 N. W. 1340; Johns *v.* Northwestern Mut. Relief Ass'n (1894), 87 Wis. 111, 58 N. W. 76; Moore *v.* Halliday (1903), 43 Ore. 243, 72 Pac. 801. But a failure to allege that they are separate is not ground for demurrer: Gunderson *v.* Thomas (1894), 87 Wis. 406, 58 N. W. 750.

"If any one count of a petition or any separate defence set up in an answer is adjudged insufficient, such ruling does not affect the other counts of the petition or the other separate defences:" Munford *v.* Keet (1900), 154 Mo. 36, 55 S. W. 271.]

[3] [In McKay *v.* McDougal (1897), 19 Mont. 488, 48 Pac. 988, the court said:

however, applies only to the material and issuable facts which constitute the cause of action. Matter which is simply introductory or by way of inducement, and not part of the *gravamen*, after having been once set out at the commencement of the pleading, need not be repeated in each paragraph, but should be referred to merely. And this introductory matter includes all descriptions of the character, capacity, or particular right in respect of which the plaintiffs and defendants are made parties to the action, as executors, trustees, public officers, and the like. These and similar statements properly form the commencement or introduction of the complaint, distinct from the several causes of action, and equally applicable to all of them. Whenever, therefore, a cause of action is attacked by a demurrer directed either against it alone or against the entire pleading, it must stand or fall by its own averments, and cannot be helped out by any facts, however sufficient in themselves, alleged in another paragraph or count.[1] But the particular sum of damages claimed

"Each separate division or count of the complaint must be complete in itself, and the pleader, by merely referring to material facts properly set forth in a former count, cannot incorporate them into and make them part of a subsequent one. This rule should not be extended to the inclusion of a description of the property itself, nor to a point requiring exhibits to be repeated, but it should be held to embrace those material and issuable facts of ownership which constitute the plaintiff's action."

In support of this view, see Cooper *v.* Portner Brewing Co. (1900), 112 Ga. 894, 38 S. E. 91; Aulbach *v.* Dahler (1896), Idaho, 43 Pac. 322; Corbey *v.* Rogers (1898), 152 Ind. 169, 52 N. E. 748.

But in other States it is held that material facts alleged in one count may be made a part of another count by appropriate reference. To this effect see Treweek *v.* Howard (1895), 105 Cal. 434, 39 Pac. 20; Hopkins *v.* Contra Costa Co. (1895), 106 Cal. 566, 39 Pac. 933; Ramsey *v.* Johnson (1897), 7 Wyo. 392, 42 Pac. 1084; Hutson *v.* King (1894), 95 Ga. 271, 22 S. E. 615; Realty Revenue, etc. Co. *v.* Farm, etc. Co. (1900), 79 Minn. 465, 82 N. W. 857. In this last case the court held the allegation that "plaintiff realleges and reaffirms all the allegations of paragraphs 1, 2, and 3 of plaintiff's cause of action," a sufficient reference.]

[1] Abendroth *v.* Boardley, 27 Wis. 555; Durkee *v.* City Bk. of Kenosha, 13 Wis. 216, 222; Curtis *v.* Moore, 15 Wis. 134; Sabin *v.* Austin, 19 Wis. 421, 423; Catlin *v.* Pedrick, 17 Wis. 88, 91; Barlow *v.* Burns, 40 Cal. 351, 353; Potter *v.* Earnest, 45 Ind. 416; Mason *v.* Weston, 29 Ind. 561; Day *v.* Vallette, 25 Ind. 42; Leabo *v.* Detrick, 18 Ind. 414; Nat. Bk. of Mich. *v.* Green, 33 Iowa, 140 (answer); Silvers *v.* Junction R. Co, 43 Ind. 435, 446 (reply). See also Scott *v.* Robards, 67 Mo. 289; State *v.* Yellow Jacket S. Min. Co., 14 Nev. 220; Birdsall *v.* Birdsall, 52 Wis. 208; McCarnan *v.* Cochran, 57 Ind. 106; Killian *v.* Eigenman, 57 id. 480; Barnes *v.* Stephens, 62 id. 226; Pennsylvania Co. *v.* Holderman, 69 id. 18; Haskell *v.* Haskell, 54 Cal. 262; Sharp *v.* Miller, 54 id. 329; see also Jasper *v.* Hazen, 2 N. Dak. 401; Neier *v.* Missouri Pac. Ry. Co., 12 Mo. App. 35; Aull Sav. Bk. *v.* Lexington, 74 Mo. 104; Boeckler *v.* Mo. Pac. Ry. Co., 10 Mo. App. 448; Farris *v.* Jones, 112 Ind. 498; Bidwell *v.* Babcock, 87 Cal. 29; Yost *v.* Commercial Bk. of Santa Ana, 94 Cal. 494; Green *v.* Clifford, 94 Cal. 49;

in each cause of action need not necessarily be given at its close; it is sufficient if the aggregate amount is alleged and demanded at the end of the complaint.[1]

§ 467. *576. **Rule as to Statement of Same Cause of Action in Different Counts.** Since the reformed pleading requires the facts to be averred as they actually took place, it does not in general permit a single cause of action to be set forth in two or more different forms or counts, as was the familiar practice at the common law. The rule is undoubtedly settled, that, under all ordinary circumstances, the plaintiff who has but one cause of action will not be suffered to spread it upon the record in differing shapes and modes, as though he possessed two or more distinct demands; and when he does so without special and sufficient reason, he will be compelled, either by a motion before the trial or by an application and direction at the trial, to select one of these counts, and to abandon the others.[2] It is certain that different causes of action in the complaint or petition must, as

Pennie *v.* Hildreth, 81 Cal. 127; but see St. Louis Gas Light Co. *v.* St. Louis, 86 Mo. 495. As to what are *not* separate causes of action, so that they *may* be stated in one count, see Rayan *v.* Day, 46 Iowa, 239 (two promissory notes, *sed qu.*); State *v.* Milwaukee, L. S. & W. Ry. Co., 45 Wis. 579 (distinct grounds of forfeiture).

[1] Spears *v.* Ward, 48 Ind. 541; Blanchard *v.* Jefferson, 28 Abb. N. Cas. 236.

[It is held in Connecticut that good pleading requires the claim or claims for relief, no matter how many counts there may be, to be set out at the end of the entire complaint: Goodrich *v.* Stanton (1899), 71 Conn. 418, 42 Atl. 74; Baxter *v.* Camp (1898), 71 Conn. 245, 41 Atl. 803. In support of the rule stated in the text see H. B. Claflin Co. *v.* Simon (1898), 18 Utah, 153, 55 Pac. 376.]

[2] [In support of this proposition, see Reed *v.* Poindexter (1895), 16 Mont. 294, 40 Pac. 596; Leonard *v.* Roberts (1894), 20 Colo. 88, 36 Pac. 880; Bassett *v.* Shares (1893), 63 Conn. 39, 27 Atl. 421; Palmer *v.* Hartford Dredging Co. (1900), 73 Conn. 182, 47 Atl. 125; Finken *v.* Elm City Brass Co. (1900), 73 Conn. 423, 47 Atl. 670; Brown *v.* Wilcox (1900), 73 Conn. 100, 46 Atl. 827; Goodrich *v.* Stanton (1899), 71 Conn. 418, 42 Atl. 74; Freeman's Appeal (1899), 71 Conn. 708, 43 Atl. 185; Oley *v.* Miller (1901), 74 Conn. 304, 50 Atl. 744; Wehmhoff *v.* Rutherford (1895), 98 Ky. 91, 32 S. W. 288.

The practice of setting out the facts in different form in the several counts to meet the exigencies of proof, has been held proper in the following cases: Estrella Vineyard Co. *v.* Butler (1899), 125 Cal. 232, 57 Pac. 980; Rucker *v.* Hall (1895), 105 Cal. 425, 38 Pac. 962; Bernstein *v.* Downs (1896), 112 Cal. 197, 44 Pac. 557; Stockton, etc. Works *v.* Glens Falls Ins. Co. (1898), 121 Cal. 167, 53 Pac. 565; Rinard *v.* Omaha, etc. Ry. Co. (1901), 164 Mo. 270, 64 S. W. 124; Willard *v.* Carrigan (1902), Ariz., 68 Pac. 538; Armstrong *v.* Penn (1898), 105 Ga. 229, 31 S. E. 158; Cawker City Bank *v.* Jennings (1893), 89 Ia. 230, 56 N. W. 494.

Cawker City Bank *v.* Jennings (1893), 89 Ia. 230, 56 N. W. 494: The first count of plaintiff's petition declared on a promissory note executed by defendant to plaintiff. The second count expressly purported to set up the same cause of action, and declared on money advanced and loaned to the defendant. Held, that the second

a general rule, imply as many distinct causes of action actually held or claimed to be held by the plaintiff.[1] It cannot be said, however, that this rule is absolutely inflexible. As it is one of convenience simply, it must sometimes yield to the demands of justice and equity. Under peculiar circumstances, when the exact legal nature of the plaintiff's right and of the defendant's liability depends upon facts in the sole possession of the defendant, and which will not be developed until the trial, the plaintiff may set forth the same single cause of action in varied counts and with differing averments, so as to meet the possible proofs which will for the first time fully appear on the trial. This proposition is plainly just and right, and is sustained by the authority of able courts.[2]

§ 468. *577. **Effect of Demurring to Entire Complaint when Made up of Several Counts. Joint Demurrers by Two or More Defendants.** When a complaint or petition contains two or more distinct causes of action, a demurrer to it as a whole, or to all or some of the causes of action jointly, must fail and be overruled if any one of the separate causes of action included in the demurrer is good; and the same rule applies to separate defences in an answer.[3] The defendant should never demur to an entire com-

count did not set up a new cause of action.

Where two causes of action are identical, the remedy is not a motion for an election but a motion to strike out as surplusage: Pollock *v.* Whipple (1895), 45 Neb. 844, 64 N. W. 210.]

[1] Sturges *v.* Burton, 8 Ohio St. 215; Muzzy *v.* Ledlie, 23 Wis. 445; Lackey *v.* Vanderbilt, 10 How. Pr. 155; Nash *v.* McCauley, 9 Abb. Pr. 159; Sipperly *v.* Troy & B. R. Co., 9 How. Pr. 83; Hillman *v.* Hillman, 14 How. Pr. 456; Churchill *v.* Churchill, 9 How. Pr. 552; Ford *v.* Mattice, 14 How. Pr. 91; Dunning *v.* Thomas, 11 How. Pr. 281; Bishop *v.* Chicago & N. W. Ry. Co., 67 Wis. 610.

[2] Whitney *v.* Chicago & N. W. Ry. Co., 27 Wis. 327, 340–342. The plaintiff had shipped wool on defendant's road for Chicago, and it was never delivered. He did not know whether it had been lost in the transit, or had been burned at a fire which had consumed defendant's warehouse in Chicago. He therefore set forth in his complaint two distinct causes of action — (1) against the defendant as a common carrier, and (2) against defendant as a warehouseman — for the negligent loss of the goods. This manner of pleading was held proper under the circumstances, and the plaintiff could not be compelled to elect on the trial. The subject is exhaustively discussed by Dixon C. J., pp. 340–342. See also Smith *v.* Douglass, 15 Abb. Pr. 266; Jones *v.* Palmer, 1 Abb. Pr. 442. And as further examples, Van Brunt *v.* Mather, 48 Iowa, 503; Pearson *v.* Milwaukee, etc. R. Co., 45 id. 497; La Pointe T. Sup. *v.* O'Malley, 46 Wis. 35; Brinkman *v.* Hunter, 73 Mo. 172; Cramer *v.* Oppenstein, 16 Colo. 504; Manders *v.* Craft (Colo. App. 1893), 32 Pac. Rep. 836; Plummer *v.* Mold, 22 Minn. 15; Hawley *v.* Wilkinson, 18 Minn. 525.

[3] Curtis *v.* Moore, 15 Wis. 134; Jeffersonville, M. & I. R. Co. *v.* Vancant, 40 Ind. 233; Heavenridge *v.* Mondy, 34 Ind. 28; Hale *v.* Omaha Nat. Bank, 49 N. Y.

plaint or petition consisting of several distinct causes of action, nor to two or more causes of action jointly, unless he is certain that they are all insufficient; and, under all circumstances, it is the better and safer practice to demur in express terms to each separately, for each will then stand or fall upon its own merits.[1] The same rule also applies to a demurrer for want of sufficient facts by two or more defendants jointly; it will be overruled as to all who unite in it if the complaint or petition states a good

626, 630; Ward *v.* Guyer, 3 N. Y. S. C. 58; Alexander *v.* Thacker, 30 Neb. 614; Pinkum *v.* Eau Claire, 81 Wis. 301; Silvers *v.* Junction R. Co., 43 Ind. 435, 442, 445. In the last case the question arose on a reply which contained several paragraphs or defences. The defendant demurred as follows: "Now comes the defendant and demurs to the second, third, and fourth paragraphs of the plaintiff's reply, upon the following grounds: *First*, said second paragraph does not state facts sufficient, etc.; *second*, said third paragraph does not state facts, etc.; *third*, said fourth paragraph does not," etc. This demurrer was held to be joint, and not several; and the rule of the text was enforced. The opinion carefully discusses the question, what language makes a demurrer or an answer joint, and what several, citing on this topic Lane *v.* State, 7 Ind. 426; Barner *v.* Morehead, 22 Ind. 354; Jewett *v.* Honey Creek Draining Co., 39 Ind. 245; Parker *v.* Thomas, 19 Ind. 213; Fankboner *v.* Fankboner, 20 Ind. 62; Aiken *v.* Bruen, 21 Ind. 137; Hume *v.* Dessar, 29 Ind. 112. The following cases are further illustrations of both branches of the rule, — a demurrer to all the causes of action or defences, and a demurrer by the defendants jointly: Collier *v.* Erwin, 2 Mont. 335; Dann *v.* Gibson, 9 Neb. 513; Hyde *v.* Kenosha Cy. Sup, 43 Wis. 129; American Button-hole, etc. Co. *v.* Gurnee, 44 id. 49; Lamon *v.* Hackett, 49 id. 261; Schiffer *v.* Eau Claire, 51 id. 385; Stanford *v.* Davis, 54 Ind. 45; Wilkerson *v.* Rust, 57 id. 172; Romine *v.* Romine, 59 id. 346; Price *v.* Sanders, 60 id. 310; Carter *v.* Zenblin, 68 id. 436; Farman *v.* Chamberlain, 74 id. 82; Shafer *v.* State, 49 id. 460, and cases cited; Kelsey *v.* Henry, 48 id. 37.

[Raymond *v.* Wathen (1895), 142 Ind. 367, 41 N. E. 815; Palmer *v.* Breed (1896), Ariz., 43 Pac. 219; Mayor *v.* Smith (1900), 111 Ga. 870, 36 S. E. 955; Harris County *v.* Brady (1902), 115 Ga. 767, 42 S. E. 71; Pryor *v.* Brady (1902), 115 Ga. 848, 42 S. E. 223; Kearney Stone Works *v.* McPherson (1894), 5 Wyo. 178, 38 Pac. 920; Florence *v.* Pattillo (1898), 105 Ga. 577, 32 S. E. 642; Brake *v.* Payne (1893), 137 Ind. 479, 37 N. E. 140; Rownd *v.* State (1898), 152 Ind. 39, 51 N. E. 914; A. E. Johnson Co. *v.* White (1899), 78 Minn. 48, 80 N. W. 838; Barbre *v.* Goodale (1896), 28 Ore. 465, 43 Pac. 378; Asevado *v.* Orr (1893), 100 Cal. 293, 34 Pac. 777; Hurst *v.* Sawyer (1894), 2 Okla. 470, 37 Pac. 817; Hanenkratt *v.* Hamil (1900), 10 Okla 219, 61 Pac. 1050; Carter *v.* Wann (1899), Idaho, 57 Pac. 314; Corns *v.* Clouser (1893), 137 Ind. 201, 36 N. E. 848; Lake Erie & W. R. R. Co. *v.* Charman (1903), — Ind. —, 67 N. E. 923.

It was held in Maynard *v.* Waidlich (1900), 156 Ind. 562, 60 N. E. 348, that a demurrer as follows: "The defendant, Harriet Maynard, demurs to the second, third, and fourth paragraphs of plaintiff's reply to the second paragraph of the answer of the said defendant, and says that neither of said paragraphs of said reply states facts sufficient to avoid said answer," is joint and not several.]

[1] Durkee *v.* City Bk. of Kenosha, 13 Wis. 216, 222; Terre Haute & L. R. Co. *v.* Sherwood, 132 Ind. 129; Glass *v.* Murphy (Ind. App. 1892), 30 N. E. Rep. 1097.

[But a demurrer does not lie to a single paragraph of a complaint unless it purports to present a complete cause of action: Lowman *v.* West (1894), 8 Wash. 355, 36 Pac. 268.]

cause of action against even one of them.[1] A different rule, however, prevails in some States.[2]

§ 469. *578. **Admission by Failure to deny.** It is expressly provided in all the codes, that material allegations of the complaint or petition not controverted by the answer are admitted, and they need not be proved; the same is of course true of averments expressly admitted. A denial of the legal conclusion, such as the indebtedness, while the answer is silent with respect to the issuable facts from which the conclusion follows, is a mere nullity, and raises no issue.[3] What averments are material, and are thus admitted unless controverted, is a question of law to be decided by the court, and not by the jury.[4] The result just mentioned does not arise from a failure to deny immaterial allegations; such statements are not issuable, and their truth is not conceded for the purposes of the trial by the defendant's neglect

[1] McGonigal *v.* Colter, 32 Wis. 614; Webster *v.* Tibbits, 19 Wis. 438; Shore *v.* Taylor, 46 Ind. 345; Owen *v.* Cooper, 46 Ind. 524. See also Benedict *v.* Farlow, Ind. App. 160; Conant *v.* Barnard, 103 N. C. 315; Murdock *v.* Cox, 118 Ind. 266.

[Hirsheld *v.* Weill (1898), 121 Cal. 13, 53 Pac. 402; Dalrymple *v.* Security Loan Co. (1900), 9 N. D. 306, 83 N. W. 245; Mark Paine Lumber Co. *v.* Improvement Co. (1896), 94 Wis. 322, 68 N. W. 1013; Miller *v.* Rapp (1893), 135 Ind. 614, 34 N. E. 981; Frankel *v.* Garrard (1903), — Ind. —, 66 N. E. 687; Evans *v.* Fall River County (1896), 9 S. D. 130, 68 N. W. 195; Palmer *v.* Bank of Zumbrota (1896), 65 Minn. 90, 67 N. W. 893; Burr *v.* Brantley (1893), 40 S. C. 538, 19 S. E. 199; Stahn *v.* Catawba Mills (1898), 53 S. C. 519, 31 S. E. 498; Asevado *v.* Orr (1893), 100 Cal. 293, 34 Pac. 777; Rogers *v.* Schulenburg (1896), 111 Cal. 281, 43 Pac. 899, citing the text; Stiles *v.* City of Guthrie (1895), 3 Okla. 26, 41 Pac. 383; Neal *v.* Bleckley (1897), 51 S. C. 506, 29 S. E. 249.

And similarly, a joint motion, if not good as to all, should be dismissed: Leonhardt *v.* Citizens' Bank (1898), 56 Neb. 38, 76 N. W. 472; Cortelyou *v.* McCarthy (1898), 53 Neb. 479, 73 N. W. 921; Carson *v.* Fears (1893), 91 Ga. 482, 17 S. E. 342.

Where several defendants demur "jointly, as well as separately and severally, to the first, second, and third paragraphs of the complaint, and to each of them separately," held, that it is a separate demurrer as to the paragraphs of the complaint but joint as to the parties, citing Carver *v.* Carver, 97 Ind. 497: Armstrong *v.* Dunn (1895), 143 Ind. 433, 41 N. E. 540.

A separate demurrer by one of several joint defendants must be considered as though the demurrant were the sole defendant: Frankel *v.* Garrard (1903), — Ind. —, 66 N. E. 687; Cummings *v.* Town of Lake Realty Co. (1893), 86 Wis. 382, 57 N. W. 43.]

[2] Wood *v.* Olney, 7 Nev. 109. The demurrer was sustained as to some, and overruled as to the others.

[3] Skinner *v.* Clute, 9 Nev. 342; Jenkins *v.* N. C. Ore Dressing Co., 65 N. C. 563. See also Trapnall *v.* Hill, 31 Ark. 345; Mohr *v.* Barnes, 4 Col. 350; Dole *v.* Burceigh, 1 Dak. 227; Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279; Bonham *v.* Craig, 84 N. C. 224; Bensley *v.* McMillan, 49 Iowa, 517; Alston *v.* Wilson, 44 id. 130; Fellows *v.* Webb, 43 id. 133; Blake *v.* Johnson Cy. Com'rs, etc., 18 Kan. 266; Wands *v.* School Dist., 19 id. 204; Murray *v.* N. Y. L. Ins. Co., 85 N. Y. 236, 239; Lange *v.* Benedict, 73 id. 12; Marsh *v.* Pugh, 43 Wis. 507; Tracy *v.* Craig, 55 Cal. 91.

[4] Becker *v.* Crow, 7 Bush, 198.

to controvert them. In this class are included all species of immaterial and non-issuable matter, such as details of evidence, conclusions of law, and averments of time, place, value, amount, and the like, in all ordinary circumstances.[1] An important question presents itself in this connection as to the effect of a qualified admission contained in the defendant's answer, and the decisions in respect to it are somewhat conflicting. The rule is settled by one group of cases, that when the answer expressly admits certain material averments of the complaint or petition, but at the same time accompanies this concession with the statement of affirmative matter in explanation and qualification by the way of defence, the plaintiff may avail himself of the admissions without the qualifications; he is not bound to take the defendant's entire statement; he is freed from the necessity of proving his own averments that are admitted, while the defendant must prove those which he sets up.[2] Other cases seem to lay down a different rule, denying to the plaintiff the full benefit of the admission, and requiring him to accept it, if at all, with the defendant's qualifying matter.[3] When different defendants have put in separate answers, an admission by one cannot be used against the others;[4] and the same doctrine extends to separate defences of one party in a single answer; the admissions in a defence of confession and avoidance do not overcome the effect of a denial contained in another.[5]

§ 470. * 579. **Defective Complaint Aided by Averments in Answer.** A defective complaint or petition may be supplemented, and substantial issues may thus be presented by the answer itself.[6] When the plaintiff has failed to state material

[1] Doyle *v.* Franklin, 48 Cal. 537, 539; Gates *v.* Salmon, 46 Cal. 361, 379 (evidence); Chicago & S. W. R. Co. *v.* N. W. U. Packet Co., 38 Iowa, 377, 382 (value of goods); People *v.* Marlboro' H. Com'rs, 54 N. Y. 276, 279 (conclusion of law). See also Sands *v.* St. John, 36 Barb. 628; 23 How. Pr. 140; Fry *v.* Bennett, 5 Sandf. 54; Newman *v.* Otto, 4 Sandf. 668; Oechs *v.* Cook, 3 Duer, 161; Harlow *v.* Hamilton, 6 How. Pr. 475; Connoss *v.* Meir, 2 E. D. Smith, 314; Mayor, etc. of Albany *v.* Cunliff, 2 N. Y. 165, 171.

[2] Dickson *v.* Cole, 34 Wis. 621, 626, 627; Sexton *v.* Rhames, 13 Wis. 99; Hartwell *v.* Page, 14 Wis. 49; Orton *v.* Noonan 19 Wis. 350; Farrell *v.* Hennesy, 21 Wis. 632.

[3] Troy & R. R. Co. *v.* Kerr, 17 Barb. 581. As to the effect of admissions, see also Simmons *v.* Law, 8 Bosw. 213; 3 Keyes, 217; Paige *v.* Willett, 38 N. Y. 31; Tell *v.* Beyer, 38 N. Y. 161; Robbins *v.* Codman, 4 E. D. Smith, 325.

[4] Swift *v.* Kingsley, 24 Barb. 541; Troy & R. R. Co. *v.* Kerr, 17 Barb. 581, 599.

[5] Vassear *v.* Livingston, 13 N. Y. 256; 4 Duer, 285; Ayres *v.* Covill, 18 Barb. 264; 9 How. Pr. 573.

[6] [State *ex rel.* *v.* Thum (1898), Idaho, 55 Pac. 858. But a complaint demurred

facts, so that no cause of action is set forth, but these very facts are supplied by the averments of the answer, the omission is immaterial, and the defect is cured.[1] This rule should properly be confined to the case where the answer affirmatively alleges the very fact that is missing from the complaint;[2] but it has in some instances been enforced, although the answer simply contained a denial of the necessary fact which should have been averred by the plaintiff.[3] A statement in the reply, however, of a fact which

to *ore tenus* at the trial cannot be aided by the answer: Wisconsin Lakes Ice Co. *v.* Ice Co. (1902), 115 Wis. 377, 91 N. W. 988.

In Shute *v.* Austin (1897), 120 N. C. 440, 27 S. E. 90, the court said: "The doctrine of aider can only be invoked in aid of a defective statement of a good cause of action; but cannot be used to aid the statement of a bad or defective cause of action." See also Harrison *v.* Garrett (1903), 132 N. C. 172, 43 S. E. 594.

[1] [Ricketts *v.* Hart (1899), 150 Mo. 64, 51 S. W. 825; Doerner *v.* Doerner (1901), 161 Mo. 407, 61 S. W. 802; Casler *v.* Chase (1901), 160 Mo. 418, 60 S. W. 1040; Ogden *v.* Ogden (1894), 60 Ark. 70, 28 S. W. 796; Ware *v.* Long (1902), Ky., 69 S. W. 797; Louisville, etc. R. R. Co. *v.* Pittman (1901), Ky., 64 S. W. 460; Daggett *v.* Gray (1895), 110 Cal. 169, 42 Pac. 568; Shively *v.* Semi-Tropic Land Co. (1893), 99 Cal. 259, 33 Pac. 848, quoting the text; Crowder *v.* McDonnell (1898), 21 Mont. 367, 54 Pac. 43; Beebe *v.* Latimer (1899), 59 Neb. 305, 80 N. W. 904; Hess *v.* Adler (1900), 67 Ark. 444, 55 S. W. 843; Railway Officials, etc. Ass'n. *v.* Drummond (1898), 56 Neb. 235, 76 N. W. 562.

Where a material fact is omitted from a complaint, and such fact is found in a special finding, this will not cure the complaint: Goodwine *v.* Cadwallader (1901), 158 Ind. 202, 61 N. E. 939; Cleveland, etc. Ry. Co. *v.* Parker (1899), 154 Ind. 153, 56 N. E. 86.

Where a complaint states facts only inferentially, an admission of such facts in the answer will be considered, for jurisdictional purposes, in aid of the complaint: Lockhart *v.* Bear (1895), 117 N. C. 298, 23 S. E. 484. Where defendant, by its answer, shows that it understands the nature of a claim set forth defectively in the complaint, there is no reason why it should be surprised or injured by trying the issues raised by the pleadings: Whiteley *v.* Southern Ry. Co. (1896), 119 N. C. 724, 25 S. E. 1018.]

[2] [In Vanalstine *v.* Whelan (1901), 135 Cal. 232, 67 Pac. 125, a material averment was omitted in the complaint, and a denial of the said omitted averment was contained in the answer. It was claimed by the plaintiff that the defect was cured by the answer. The court said: "The principle is, that an omission of a material fact is cured by the express averment of that very fact in the defendant's pleadings. But there is nothing of the kind in the case at bar. The contention of respondent rests on the fact that defendants, in their answers, say, among other things, that the plaintiff was not the owner or entitled to the possession of the goods at the time alleged in the complaint, 'or at any other time,' which, it is said, included the time of the commencement of the action. But that is the very converse of the averment which respondent ought to have made in his complaint, — namely, that at the time of the commencement of the action he *was* the owner, etc. The judgment must therefore be reversed for the insufficiency of the complaint." See also Windsor *v.* Miner (1899), 124 Cal. 492, 57 Pac. 386. Both these cases seem at variance with Vance *v.* Anderson (1896), 113 Cal. 532, 45 Pac. 816. In Nye *v.* Bill Nye Mining Co. (1903), 42 Ore. 560, 71 Pac. 1043, it was held that an answer consisting of specific denials only cannot aid a complaint.]

[3] Dayton Ins. Co. *v.* Kelley, 24 Ohio St. 345, 357; Miller *v.* White, 6 N. Y. S. C. 255; Garrett *v.* Trotter, 65 N. C. 430, 432; Bate *v.* Graham, 11 N. Y. 237; Louisville & P. Canal Co. *v.* Murphy, 9 Bush, 522, 529 (a simple denial in the

ought to have been alleged in the complaint or petition, is not sufficient, and does not cure the defect.[1]

§ 471. * 580. **Prayer for Relief.**[2] The prayer for relief is generally regarded as forming no part of the cause of action,[3] and as having no effect upon it, and as furnishing no test or criterion

answer); but see Scofield *v.* Whitelegge, 49 N. Y. 259, 261, which expressly holds that a denial merely in the answer is not sufficient; Shartle *v.* Minneapolis, 17 Minn. 308, 312. See also De la Mar *v.* Hurd, 4 Col. 442; Herschfield *v.* Aiken, 3 Mont. 442; Haggard *v.* Wallen, 6 Neb. 271; Worthley's Adm. *v.* Hammond, 13 Bush, 510; Quaid *v.* Cornwall, 13 id. 601; Howland Coal, etc. Works *v.* Brown, 13 id. 681; Grigsby *v.* Barr, 14 id. 330; Pearce *v.* Mason, 78 N. C. 37; Goff *v.* Outagamie Cy. Sup., 43 Wis. 55; Kretser *v.* Carey, 52 id. 374; Wiles *v.* Lambert, 66 Ind. 494; Allen *v.* Chouteau, 102 Mo. 309; Donaldson *v.* Butler Cy., 98 Mo. 163; Henry *v.* Sneed, 99 Mo. 407; Cohen *v.* Knox, 90 Cal. 266; Hegard *v.* Cal. Ins. Co. (Cal., June, 1886), 11 Pac. Rep. 594; Schenk *v.* Hartford F. Ins. Co., 71 Cal. 28; Cohu *v.* Husson, 113 N. Y. 662; Sengfelder *v.* Mut. Ins. Co. of N. Y., 31 Pac. Rep. (Wash., 1893) 428.

[Vance *v.* Anderson (1896), 113 Cal. 532, 45 Pac. 816; City of Louisville *v.* Snow's Adm'r (1900), 107 Ky. 536, 54 S. W. 860; Main *v.* Ray (1900), Ky., 57 S. W. 7; Western Union Tel. Co. *v.* Parsons (1903), Ky., 72 S. W. 800. An answer which assumes that the complaint contains an allegation, supplies the omission of it: Lynch *v.* Bechtel (1897), 19 Mont. 548, 48 Pac. 1112. And where a complaint is merely ambiguous, an answer which clears up the ambiguity cures the defect: Hamilton *v.* Great Falls Ry. Co. (1895), 17 Mont. 334, 42 Pac. 860.]

[1] Webb *v.* Bidwell, 15 Minn. 479, 485.

[But where plaintiff omitted certain essential allegations from his petition, and defendant alleged the absence of such omitted facts, and plaintiff filed a reply denying the averments of the answer, an issue was thereby raised as to the omitted facts: Chesapeake & Ohio R. R. Co. *v.* Thieman (1895), 96 Ky. 507, 29 S. W. 357. So, also, a reply may aid a defective counter-claim: Gaskins *v.* Davis (1894), 115 N. C. 85, 20 S. E. 188.

But in Water Supply, etc. Co. *v.* Larimer, etc. Co. (1898), 25 Colo. 87, 53 Pac. 386, the court said: "A defective complaint may be aided, and omissions supplied, by the answer, or an allegation in the replication, if acquiesced in."]

[2] [Farwell Co. *v.* Lykins (1898), 59 Kan. 96, 52 Pac. 99.]

[3] [The relief to be granted depends upon the facts alleged and proved and not upon the prayer for relief: Dennison *v.* Chapman (1895), 105 Cal. 447, 39 Pac. 61; Rutenic *v.* Hamaker (1902), 40 Ore. 444, 67 Pac. 192; Hendon *v.* North Carolina R. R. Co. (1900), 127 N. C. 110, 37 S. E. 155; Adams *v.* Hayes (1897), 120 N. C. 383, 27 S. E. 47; Gillam *v.* Life Ins. Co. (1897), 121 N. C. 369, 28 S. E. 470; Stubblefield *v.* Gadd (1901), 112 Ia. 681, 84 N. W. 917; McClure *v.* La Plata County (1896), 23 Colo. 130, 46 Pac. 677; Miller *v.* Rapp (1893), 135 Ind. 614, 34 N. E. 981; State *ex rel. v.* Horton, etc. Co. (1901), 161 Mo. 664, 61 S. W. 869; Sherrin *v.* Flinn (1900), 155 Ind. 422, 58 N. E. 549; French *v.* Woodruff (1898), 25 Colo. 339, 54 Pac. 1015; Johnson *v.* Polhemus (1893), 99 Cal. 240, 38 Pac. 908 (in an equity case); Kleinschmidt *v.* Steele (1894), 15 Mont. 181, 38 Pac. 827 (in an equity case); State *ex rel. v.* Tooker (1896), 18 Mont. 540, 46 Pac. 530 (in an equity case); Toy *v.* McHugh (1901), 62 Neb. 820, 87 N. W. 1059; Topping *v.* Parish (1897), 96 Wis. 378, 71 N. W. 367.

A general prayer for relief is sufficient to warrant the court in granting any relief consistent with the pleadings and evidence: Mackay *v.* Smith (1902), 27 Wash. 442; 67 Pac. 982; Dormitzer *v.* German Savings Bank (1900), 23 Wash. 132, 62 Pac. 862; Yarwood *v.* Johnson (1902), 29 Wash. 643, 70 Pac. 123; Kelley *v.* Wehn (1902), 63 Neb. 410, 88 N. W. 682; Rees *v.* Shepherdson (1895), 95 Ia. 431, 64 N. W. 286 (in an equity case); Hession *v.*

by which its nature may be determined.[1] This prevailing view

Linastruth (1895), 96 Ia. 483, 65 N. W. 399 (in an equity case); McHugh *v.* Louisville Bridge Co. (1901), Ky., 65 S. W. 456. See, however, Schmitt *v.* Schneider (1899), 109 Ga. 628, 35 S. E. 145; Hairalson *v.* Carson (1900), 111 Ga. 57, 36 S. E. 319; Steed *v.* Savage (1902), 115 Ga. 97, 41 S. E. 272.

A defective prayer for relief is not a ground for demurrer: McGillivray *v.* McGillivray (1896), 9 S. D. 187, 68 N. W. 316; Levy *v.* Noble (1902), 135 Cal. 559, 67 Pac. 1033.

The entire omission of any prayer for relief would not subject the petition to a general demurrer: Fox *v.* Graves (1896), 46 Neb. 812, 65 N. W. 887. But in Chicago, B. & Q. R. R. Co. *v.* Martelle (1902), — Neb. —, 91 N. W. 364, the court suggested a *quære* whether such a complaint would sustain a verdict and judgment. "A prayer for judgment is only a matter of form:" Carson *v.* Butt (1896), 4 Okla. 133, 46 Pac. 596.

A complaint is not demurrable when its allegations show that the plaintiff is entitled to some relief, though not to the relief prayed for: Conner *v.* Ashley (1897), 49 S. C. 478, 27 S. E. 473; Kenaston *v.* Lorig (1900), 81 Minn. 454, 84 N. W. 323; Morey *v.* City of Duluth (1897), 69 Minn. 5, 71 N. W. 694; Whitehead *v.* Sweet (1899), 126 Cal. 67, 58 Pac. 376. But not so when only nominal damages could be recovered and a judgment for nominal damages would not carry costs: Kenyon *v.* West. Union. Tel. Co. (1893), 100 Cal. 454, 35 Pac. 75. *Contra*, Copeland *v.* Cheney (1902), 116 Ga. 685, 43 S. E. 59.

The amount in controversy is determined by the allegations of the complaint, not by the prayer for judgment: Town of Central City *v.* Treat (1897), 101 Ia. 109, 70 N. W. 110. And, similarly, the allegations, not the prayer, determine the question of jurisdiction: Sams Car Coupler Co. *v.* League (1898), 25 Colo. 129, 54 Pac. 642; Lehnhardt *v.* Jennings (1897), 119 Cal. 192, 48 Pac. 56; Prince *v.* Takash (1903), 75 Conn. 616, 54 Atl. 1003.

A prayer for excessive relief does not render the complaint demurrable: Siegel *v.* Town of Liberty (1901), 111 Wis. 470, 87 N. W. 487; Citizens' Loan & Trust Co. *v.* Witte (1901), 110 Wis. 545, 86 N. W. 173; Allen *v.* Frawley (1900), 106 Wis. 638, 82 N. W. 593; Howard *v.* Seattle Nat. Bank (1894), 10 Wash. 280, 38 Pac. 1040; Laird-Norton Co. *v.* Herker (1895), 6 S. D. 509, 62 N. W. 104; Level Land Co. *v.* Sivyer (1901), 112 Wis. 442, 88 N. W. 317; Hudson *v.* Archer (1893) 4 S. D. 128, 55 N. W. 1099; Crossen *v.* Grandy (1902), 42 Ore. 282, 70 Pac. 906. *Contra*, Seals *v.* Augusta Ry. Co. (1897), 102 Ga. 817, 29 S. E. 116.

In Brown *v.* Iowa Legion of Honor (1899), 107 Ia. 439, 78 N. W. 73, it was held that a relief not included in the prayer must be denied. See also Nichols & Shepard Co. *v.* Wiedemann (1898), 72 Minn. 344, 75 N. W. 208, where the same rule substantially was applied, though the court sought to make a distinction. See also Bank of California *v.* Dyer (1896), 14 Wash. 279, 44 Pac. 534; Overstreet *v.* Citizens' Bank (1903), 12 Okla. 383, 72 Pac. 379.

Costs need not be asked for in the petition: Reed *v.* Corrigan (1901), 114 Ia. 638, 87 N. W. 676. The prayer of the complaint in Johns *v.* Northwestern Relief Ass'n (1894), 87 Wis. 111, 58 N. W. 76, was held so ambiguous as to be subject to a motion to make more definite and certain. Alternative reliefs may be prayed for: Grant *v.* Grant (1893), 53 Minn. 181, 54 N. W. 1059.]

[1] Goodall *v.* Mopley, 45 Ind. 355, 359; Lowry *v.* Dutton, 28 Ind. 473; Bennett *v.* Preston, 17 id. 291; Cincinnati & C. R. Co. *v.* Washburn, 25 id. 259; Hale *v.* Omaha Nat. Bank, 49 N. Y. 626, 631. This doctrine cannot, of course, be true in the one or two States whose codes provide for a demurrer when the facts alleged show that the plaintiff *is not entitled to the relief demanded in his petition or complaint.* For further illustrations of the general rule that the relief actually granted after a trial depends upon the *facts* properly alleged, and not upon the prayer, see Shilling *v.* Rominger, 4 Col. 100; Radford *v.* So. Mut. L. Ins. Co., 12 Bush, 434; First Div. St. Paul & Pac. R. Co. *v.* Rice, 25 Minn. 278; Saline Co. *v.* Sappington, 64 Mo. 72; Mo. Valley Land Co. *v.* Bushnell, 11 Neb. 192; Gilman *v.*

was well expressed by a recent decision of the New York Court of Appeals in language which I quote: "The relief demanded by no means characterizes the action, or limits the plaintiff in respect to the remedy which he may have. If there be no answer, the relief granted cannot exceed that which the plaintiff shall have demanded in his complaint. But the fact, that after the allegation of the facts relied upon the plaintiff has demanded judgment for a sum of money by way of damages, does not preclude the recovery of the same amount upon the same state of facts by way of equitable relief. The relief in the two cases would be precisely the same; the difference would be formal and technical. If every fact necessary to the action is stated, the plaintiff may even, when no answer is put in, have any relief to which the facts entitle him consistent with that demanded in the complaint."[1] Although this theory has been accepted by most of the courts, and is approved in numberless cases, at least one tribunal of high character has suggested that the prayer for relief may be properly appealed to as the test by which the nature of the action can be determined in all cases where the pleader has, by his mode of alleging the facts, left his intention in doubt.[2] I have thus discussed and stated those fundamental principles

Filmore, 7 Ore. 374; Balle *v.* Mossley, 13 S. C. 439; Dawson *v.* Graham, 48 Iowa, 378; Herring *v.* Hely, 43 id. 157; Mackey *v.* Auer, 8 Hun, 180; Benedict *v.* Benedict, 85 N. Y. 625; Tewksbury *v.* Schulenberg, 41 Wis. 584; Gibson *v.* Gibson, 46 id. 449; Acker *v.* McCullough, 50 Ind. 447; Rogers *v.* Lafayette Co., 52 id. 297; Bonnell *v.* Allen, 53 id. 130; Sohn *v.* Marion, etc. Co., 73 id. 78; Carpenter *v.* Brenham, 50 Cal. 549; Hall *v.* Lonkey, 57 id. 80. See also State *v.* Boone, 108 N. C. 78; Sannoner *v.* Jacobson, 47 Ark. 31; Korrady *v.* L. S. & M. S. Ry. Co., 131 Ind. 261; Alworth *v.* Seymour, 42 Minn. 526; Crosby *v.* Farmers' Bk., 107 Mo. 436; Ross *v.* Purse, 17 Colo. 24. In judgment by default plaintiff can have no *greater* relief than is demanded by the prayer: Maxwell *v.* Dudley, 13 Bush, 403; Hansford *v.* Holdam, 14 id. 210; Peck *v.* N. Y. & N. J. Ry. Co., 85 N. Y. 246; Bullard *v.* Sherwood, 85 id. 253.

[1] Bradley *v.* Aldrich, 40 N. Y. 504; Hale *v.* Omaha Nat. Bank, 49 N. Y. 626, 631, per Allen J.

[2] Gillett *v.* Treganza, 13 Wis. 472, 475, per Dixon C. J.: "Under our present system, the test by which we are to determine the character of actions in those cases where the facts stated indicate two or more actions must be the relief demanded. We may, at least, safely adopt this rule in cases of doubt, and in cases like the present, where the pleader, conceiving himself entitled to prosecute several actions, has so stated his facts as to leave it uncertain which he intended to pursue."

[See also O'Brien *v.* Fitzgerald (1894), 143 N. Y. 377, 38 N. E. 371, where the court hold that the prayer for relief may be looked to in determining whether the action is legal or equitable, where the facts alleged would support equally an action at law or in equity. In Georgia it is held that the prayer for relief should generally be considered as indicating the nature of the action, whether legal or equitable: Steed *v.* Savage (1902), 115 Ga. 97, 41 S. E. 272.]

and general doctrines of the reformed pleading which are common to all causes of action. The more special rules which prescribe the manner and form of averring particular facts, and which determine the mode of alleging the various causes of action considered separately and individually, must be omitted from the present volume.[1] They will find their appropriate place in the

[1] [*Necessity and Form of Particular Allegations.*

The author did not undertake to discuss this subject, and the editor has not aimed to treat it at all exhaustively in this note. But the cases dealing with it which have appeared during the period covered by this revision have been classified and briefly summarized as follows: —

Account.

Statutes in many of the States allow an account to be pleaded by copy thereof. See p. 438, note 2. See McArthur *v.* Clarke Drug Co. (1896), 48 Neb. 899, 67 N. W. 861, construing one of these statutes. In Fletcher *v.* Co-Operative Publishing Co. (1899), 58 Neb. 511, 78 N. W. 1070, it was held that the statute was merely permissive, and it was still proper to plead the facts.

As to method of pleading an account when payments have been made upon it, see Hammer *v.* Downing (1901), 39 Ore. 504, 65 Pac. 17, where the court said: "If any payment has been made upon the account, good pleading, under our practice, requires that the gross sum be stated as the amount in which the defendant is indebted, and also the payments, if any, at least in the aggregate, so that the amount due becomes a matter of deduction apparent upon the face of the complaint. This brings into the investigation the entire account, and the balance, when ascertained, is the amount subject to recovery."

Account Stated.

It is unnecessary, in an action upon an account stated, to set forth in the complaint the subject-matter of the original debt: Schutz *v.* Morette (1895), 146 N. Y. 137, 40 N. E. 780.

An account stated is a new and independent contract, behind which one cannot go: Converse *v.* Scott (1902), 137 Cal. 239, 70 Pac. 13; Hale *v.* Hale (1901), 14 S. D. 644, 86 N. W. 650; Schutz *v.* Morette (1895), 146 N. Y. 137, 40 N. E. 780. See Nodine *v.* First Nat. Bank (1902), 41 Ore. 386, 68 Pac. 1109, and Bailey *v.* Wilson (1899), 34 Ore. 186, 55 Pac. 973, for good discussions of the subject of account stated.

Accounting.

A complaint does not state a cause of action for an accounting which does not show the nature of the dealings between the parties and present a copy of the account as an exhibit: Gise *v.* Cook (1898), 152 Ind. 75, 52 N. E. 454.

Action for Price.

In order to support an action for an agreed price there must have been such a delivery as will pass title to the purchaser; and if title remains in the seller, and the buyer renounces his contract, the law requires the seller to treat the property as his own and to sue, if at all, for the damages he has sustained: McCormick Harvesting Mach. Co. *v.* Belfany (1899), 78 Minn. 370, 81 N. W. 10.

Agency.

Where a contract was made or other act done by an authorized agent, it is proper to allege that it was done by the principal: Shull *v.* Arie (1901), 113 Ia. 170, 84 N. W. 1031; Helena Nat. Bank *v.* Tel. Co. (1898), 20 Mont. 379, 51 Pac. 829; Chesapeake & Ohio R. R. Co. *v.* Thieman (1895), 96 Ky. 507, 29 S. W. 357; Wagener *v.* Kirven (1899), 56 S. C. 126, 34 S. E. 18; Topeka Capital Co. *v.* Remington (1900), 61 Kan. 6, 59 Pac. 1062; Blotcky *v.* Miller (1902), Neb., 91 N. W. 523; Richmond *v.* Voorhees (1894), 10 Wash. 316, 38 Pac. 1014; Higbee *v.* Trumbauer (1900), 112 Ia. 74, 83 N. W. 812.

But where orders were drawn on an agent, and not on his principal, and the only acceptance was by the agent, no

second part of the work, which will treat of the different remedies themselves that may be obtained by means of the civil action.[1]

recovery can be had on a petition alleging that they were drawn on and accepted by the principal: Winburn *v.* Fidelity, etc. Ass'n (1900), 110 Ia. 374, 81 N. W. 682.

In an action brought under § 1816 a, L. & B. Ann. St., for injuries sustained by one employee through the negligence of another, the complaint must clearly allege the relation between the negligent servant and the company: Albrecht *v.* Milwaukee, etc. Co. (1894), 87 Wis. 105, 58 N. W. 72.

Altered Contract.

Where a corporation employed the plaintiff under an agreement to pay what his services were worth, and the rate of wages was afterwards fixed by the parties, it was proper to allege in declaring on the contract that the company agreed to pay the wages fixed in the adjustment, and under such allegation proof of the original contract and the subsequent adjustment is admissible: Sandberg *v.* Victor Mining Co. (1901), 24 Utah, 1, 66 Pac. 360.

Altered Instrument.

A written instrument which has been altered by a stranger may still be used as a basis for a recovery, but it should be pleaded according to its original terms and not according to its terms as altered: Perkins Windmill & Ax Co. *v.* Tillman (1898), 55 Neb. 652, 75 N. W. 1098.

Anticipating Defences.

A pleader is not required to anticipate defences: Larson *v.* First Nat. Bank (1902), — Neb. —, 92 N. W. 729; Sawyer *v.* Wabash Ry. Co. (1900), 156 Mo. 468, 57 N. W. 108; Hamilton *v.* Love (1898), 152 Ind. 641, 53 N. E. 181; Romer *v.* Conter (1893), 53 Minn. 171, 54 N. W. 1052; Trotter *v.* Mutual Reserve Life Ass'n (1897), 9 S. D. 596, 70 N. W. 843; Indianapolis St. Ry. Co. *v.* Robinson (1901), 157 Ind. 414, 61 N. E. 936; Western Union Tel. Co. *v.* Henley (1901), 157 Ind. 90, 60 N. E. 682; Massillon Engine & Thresher Co. *v.* Prouty (1902), — Neb. —, 91 N. W. 384.

Articles of Incorporation.

It is sufficient to plead articles of incorporation and by-laws by stating their substance and legal effect, without setting them out *in hæc verba:* Seal *v.*

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[1] [*Verification:* The verification is no part of the pleading: Johnson *v.* Puritan Min. Co. (1896), 19 Mont. 30, 47 Pac. 337; Bryant *v.* Davis (1899), 22 Mont. 534, 57 Pac. 143. But where a verification is required, and is omitted, the pleading may be stricken out on motion or judgment may be had on the pleadings: Hearst *v.* Hart (1900), 128 Cal. 327, 60 Pac. 846. In Bryant *v.* Davis (1899), 22 Mont. 534, 57 Pac. 143, it was held that judgment could not be rendered on the pleadings on account of a defective verification. Verification by one co-plaintiff or co-defendant is sufficient: Butterfield *v.* Graves (1902), 138 Cal. 155, 71 Pac. 510; Claiborne *v.* Castle (1893), 98 Cal. 30, 32 Pac. 807.

Want of a verification subjects a pleading to attack by motion but not to a demurrer: Scott-Force Hat Co. *v.* Hombs (1894), 127 Mo. 392, 30 S. W. 183; Butterfield *v.* Graves (1902), 138 Cal. 155, 71 Pac. 510. Unless made before trial the objection is waived: Myers *v.* Douglass (1896), 99 Ky. 267, 35 S. W. 917. A verification may be amended in the discretion of the trial court: Cantwell *v.* Herring (1900), 127 N. C. 81, 37 S. E. 140; Steidl *v.* State (1902), 63 Neb. 695, 88 N. W. 853.

As to when a verification is necessary, see Butte & Boston Co. *v.* Montana Co. (1900), 24 Mont. 125, 60 Pac. 1039; Fisher *v.* Patton (1895), 134 Mo. 32, 33 S. W. 451; Cady *v.* Case (1895), 11 Wash. 124, 39 Pac. 375; Reichert *v.* Lonsberg (1894), 87 Wis. 543, 58 N. W. 1030.

And see the following cases for form of verification; Phifer *v.* Travelers' Ins. Co. (1898), 123 N. C. 410, 31 S. E. 716; Cole *v.* Boyd (1899), 125 N. C. 496, 34 S. E. 557; Payne *v.* Boyd (1899); 125 N. C. 499, 34 S. E. 631; Martin *v.* Martin (1902), 130 N. C. 27, 40 S. E. 822; Roosevelt *v.* Ulmer (1898), 98 Wis. 356, 74 N. W. 124.]

Cameron (1901), 24 Wash. 62, 63 Pac. 1103.

Assignment.

An allegation that a thing was assigned implies on demurrer that the assignment was valid: Gunderson *v.* Thomas (1894), 87 Wis. 406, 58 N. W. 750. See also Rollins *v.* Humphrey (1897), 98 Wis. 66, 73 N. W. 331.

Assignment for Benefit of Creditors.

An allegation that A. was duly appointed assignee of the firm of B. & Co. and thereafter duly qualified as such assignee and entered into the discharge of his trust, cannot be considered as an allegation that B. & Co. made a general assignment to A. for the benefit of creditors: Sellers *v.* First Presbyterian Church (1895), 91 Wis. 328, 64 N. W. 1031.

Attorney, Qualifications of.

In a suit for services rendered by an attorney, it is not necessary to allege that he is an attorney admitted to practice: Miller *v.* Ballerino (1902) 135 Cal. 566, 67 Pac. 1046, 68 Pac. 600.

Where an action is brought by a county and the petition is signed by reputable attorneys in its behalf, there is no necessity that their authority to so act should appear on the face of the petition: Hickory County *v.* Fugate (1898), 143 Mo. 71, 44 S. W. 789.

An allegation that an attorney of a corporation was appointed and held under said appointment for two years is a sufficient allegation that his term was for two years: Germania Spar & Bau Verein *v.* Flynn (1896), 92 Wis. 201, 66 N. W. 109.

Bond.

In an action on an official bond brought against the principal and sureties, an allegation that the bond was approved is not necessary: Fire Ass'n *v.* Ruby (1900), 60 Neb. 216, 82 N. W. 629. Nor is it necessary to separately state the several items of defalcation: State *v.* McDonald (1895), 4 Idaho, 343, 40 Pac. 312. See also State *ex rel. v.* Tittmann (1896), 134 Mo. 162, 35 S. W. 579. Compare with this last case, Pryor *v.* Kansas City (1899), 153 Mo. 135, 54 S. W. 499, which seems inconsistent therewith.

Breach of Covenants.

"In assigning breaches of the usual covenants accompanying the transfer of lands, the general rule is that the pleader may assign them generally, unless such assignment does not amount to a breach. . . . But not so as it respects the covenant against incumbrances, the covenant of warranty, and that for quiet enjoyment, as the grantor does not covenant against all possible incumbrances, or all interruptions or claims or ousters, and it therefore becomes necessary to specify the incumbrance or title paramount by reason of which the covenantee or his assigns have been ousted or disturbed in the possession:" Jennings *v.* Kiernan (1898), 35 Ore. 349, 55 Pac. 443. It was held in Evans *v.* Fulton (1896), 134 Mo. 653, 36 S. W. 230, that a breach of a covenant is well assigned by negativing the words of the covenant.

Breach of Promise to Marry.

In an action for breach of promise to marry, allegations of seduction by means of such promise may be pleaded merely in aggravation of damages, and do not subject the complaint to the charge of embracing two causes of action: Geiger *v.* Payne (1897), 102 Ia. 581, 69 N. W. 554, 71 N. W. 571.

Breach of Warranty.

The character and extent of the warranty and the nature and particulars of the breach must be alleged: Shirk *v.* Mitchell (1893), 137 Ind. 185, 36 N. E. 850. It is necessary to allege that the purchaser relied upon the warranty and was thereby deceived, in an action for its breach: Abilene Nat. Bank *v.* Nodine (1894), 26 Ore. 53, 37 Pac. 47. The petition must allege that the plaintiff was evicted by title paramount: Hampton *v.* Webster (1898), 56 Neb. 628, 77 N. W. 50.

Capacity.

The suffix "trustee" in the caption of a complaint will be treated as mere *descriptio personæ*, where there is no averment in the complaint that the plaintiff is trustee of an express or other trust or is suing for the benefit of another. "When an action is brought by a trustee, the complaint should disclose the name of the

cestui que trust, so that an issue, if necessary, may be formed upon that allegation, and also that the cestui que trust may be bound by the judgment or decree:" Marion Bond Co. *v.* Mexican Coffee Co. (1902), — Ind. —, 65 N. E. 748.

An allegation "that the plaintiff is the duly appointed, qualified, and acting administrator of the estate of Julia Collins, deceased," is good, in the absence of a special demurrer: Collins *v.* O'Laverty (1902), 136 Cal. 31, 68 Pac. 327; Willis *v.* Tozer (1894), 44 S. C. 1, 21 S. E. 617, in the absence of any other objection than oral demurrer at the trial. A general averment of capacity is sufficient: Sparks *v.* Nat. Accident Ass'n (1896), 100 Ia. 458, 69 N. W. 678.

A complaint is good against a general demurrer which in its title and body designates plaintiff as administrator of decedent, though the complaint contains no allegation of decedent's death and the issuing of letters to plaintiff: Toner *v.* Wagner (1901), 158 Ind. 447, 63 N. E. 859.

Where a plaintiff sues as executor or administrator, he should allege that he is such by virtue of letters issued out of a probate court, giving the name thereof, and the term at which such letters were granted: Hamilton *v.* McIndoo (1900), 81 Minn. 324, 84 N. W. 118.

An allegation that a cause of action was sold and assigned to plaintiff as administrator of a decedent's estate for a valuable consideration, sufficiently alleges plaintiff's legal capacity to sue: Brossard *v.* Williams (1902), 114 Wis. 89, 89 N. W. 832.

Where a guardian sues on behalf of minors it is necessary for him to allege facts showing his representative capacity, and if he does not do so, the complaint is demurrable on the ground of want of capacity to sue: Dalrymple *v.* Security Loan Co. (1900), 9 N. D. 306, 83 N. W. 245. Mere description held sufficient: Bennett *v.* Bennett (1902), — Neb. —, 91 N. W. 409. Where plaintiffs seek partition in behalf of an unincorporated church association, they should aver that they, as trustees of the church, "sue for themselves and all other members of said church:" Lilly *v.* Menke (1894), 126 Mo. 190, 28 S. W. 643.

"Where the pleadings disclose a cause of action against defendant personally, superadded words, such as 'agent,' 'executor,' or 'director,' should be rejected as *descriptio personæ:*" Andres *v.* Kridler (1896), 47 Neb. 585, 66 N. W. 649.

Conditions Precedent.

Performance of conditions precedent to liability on the part of defendant must be pleaded by the plaintiff: Albers *v.* Western Union Tel. Co. (1896), 98 Ia. 51, 66 N. W. 1040; Root *v.* Childs (1897), 68 Minn. 142, 70 N. W. 1078; Ary *v.* Chesmore (1901), 113 Ia. 63, 84 N. W. 965; Manaudas *v.* Heilner (1896), 29 Ore. 222, 45 Pac. 758; Weeks *v.* O'Brien (1894), 141 N. Y. 199, 36 N. E. 185; Boden *v.* Maher (1897), 95 Wis. 65, 69 N. W. 980; Moody *v.* Ins. Co. (1894), 52 O. St. 12, 38 N. E. 1011; Milburn *v.* Glynn County (1899), 109 Ga. 473, 34 S. E. 848; Cope *v.* Type Foundry Co. (1897), 20 Mont. 67, 49 Pac. 387; Long Creek Bldg. Ass'n *v.* State Ins. Co. (1896), 29 Ore. 569, 46 Pac. 366; Closz *v.* Miracle (1897), 103 Ia. 198, 72 N. W. 502; Charles Baumbach Co. *v.* Laube (1898), 99 Wis. 171, 74 N. W. 96; McGlauflin *v.* Wormser (1903), — Mont. —, 72 Pac. 428.

The performance of conditions precedent may be alleged generally: Miles *v.* Mutual Reserve Fund Life Ass'n (1900), 108 Wis. 421, 84 N. W. 159; McGannon *v.* Millers' Nat. Ins. Co. (1902), 171 Mo. 143, 71 S. W. 160; Kenney *v.* Bevilheimer (1902), 158 Ind. 653, 64 N. E. 215; McCullough *v.* Colfax County (1903), — Neb. —, 95 N. W. 29 (only in case of a contract). This rule is prescribed by statute in a number of States, as in Montana, Indiana, Missouri, South Carolina, and others. But these statutes are permissive only, and specific averments are equally proper: Kenney *v.* Bevilheimer (1902), 158 Ind. 653, 64 N. E. 215; Grand Lodge *v.* Hall (1903), — Ind. App. —, 67 N. E. 272; Brock *v.* Des Moines Ins. Co. (1895), 96 Ia. 39, 64 N. W. 685; Hart *v.* Accident Ass'n (1898), 105 Ia. 717, 75 N. W. 508.

As a test to determine whether a condition is precedent or subsequent, the Supreme Court of Minnesota, in Root *v.* Childs (1897), 68 Minn. 142, 70 N. W. 1078, said: "Where the obligation of a party to a contract is to pay only upon the happening of a contingency, *e. g.*, the

return of an instrument duly recorded, such contingency is in the nature of a condition precedent, and its occurrence must be alleged in the complaint. But, if payment is not to be made if a contingency happens during its continuance, *e. g.*, if the party is enjoined from using the article which is the subject-matter of the contract, he is not to pay the purchase price until the injunction is dissolved, the contingency is in the nature of a condition subsequent, and it is not necessary to allege in the complaint the non-happening or non-continuance of the contingency." For a further discussion of the same question see Moody *v.* Ins. Co. (1894), 52 O. St. 12, 38 N. E. 1011.

In Montana, in Kent *v.* Tuttle (1897), 20 Mont. 203, 50 Pac. 559, and Zion Co-operative Ass'n *v.* Mayo (1898), 22 Mont. 100, 55 Pac. 915, it was held that where the statute prescribes certain acts on the part of a foreign corporation as conditions precedent to its right to do business in the State, its complaint must allege performance or that the business done, out of which the cause of action arose, was interstate commerce. But in American Shoe Co. *v.* O'Rourke (1900), 23 Mont. 530, 59 Pac. 910, it was held that such allegations were unnecessary.

Where performance of conditions precedent is not alleged by the plaintiff, the defendant may raise the objection by demurrer, or by answer, or he may raise it on the trial: Weeks *v.* O'Brien (1894), 141 N. Y. 199, 36 N. E. 185. See also Duff *v.* Fire Ass'n (1895), 129 Mo. 460, 30 S. W. 1034.

Where a demand and refusal are conditions precedent to plaintiff's case, and defendant in his answer denies all liability so that it is apparent a demand would have been met by a refusal, defendant cannot complain that such demand was not shown: Thompson *v.* Whitney (1899), 20 Utah, 1, 57 Pac. 429.

Conditions Subsequent, Negativing.

"Must the conditions or exceptions, the existence of which may relieve the defendant from liability, be pleaded by plaintiff, or are they so far matters of defence that the burden is upon the defendant to plead and prove them? In our judgment they were not required to be pleaded or proven by plaintiff. . . . They were each and all matters of defence, but, not constituting a part of the plaintiff's case, the burden did not rest upon him either to plead or prove the absence of them, in the first instance. And not being required to negative these conditions, if he does so in his pleading such averments are unnecessary and need not be proved:" Jones *v.* Accident Ass'n (1894), 92 Ia. 652, 61 N. W. 485. See, in support of the rule above indicated, Modern Woodmen *v.* Noyes (1901), 158 Ind. 503, 64 N. E. 21; Wallace *v.* Ryan (1894), 93 Ia. 115, 61 N. W. 395; Ætna Ins. Co. *v.* Glasgow Elec. Co. (1899), 107 Ky. 77, 52 S. W. 975; Fletcher *v.* German-American Ins. Co. (1900), 79 Minn. 337, 82 N. W. 647; Schrepfer *v.* Rockford Ins. Co. (1899), 77 Minn. 291, 79 N. W. 1005; O'Conner *v.* City of Fond du Lac (1898), 101 Wis. 83, 76 N. W. 1116; Little Nestucca Road Co. *v.* Tillamook County (1897), 31 Ore. 1, 48 Pac. 465.

"Generally, a plaintiff is only required to bring his case within the terms appearing on the face of the contract in suit, and need not negative conditions and exceptions endorsed thereon:" Railway Officials, etc. Ass'n *v.* Drummond (1898), 56 Neb. 235, 76 N. W. 562.

Where an insurance policy provides that if the insured is killed in certain extra-hazardous occupations, the beneficiary should get a reduced sum, the complaint should allege that he was not so killed, else the court cannot render judgment for the sum which is due under the policy: American Accident Co. *v.* Carson (1896), 99 Ky. 441, 36 S. W. 169. But in Insurance Co. *v.* McLeod (1896), 57 Kan. 95, 45 Pac. 73, it was held that where a policy allowed concurrent insurance, and provided for prorating in such case, such concurrent insurance need not be alleged in the petition.

Consideration.

In an action upon a bond it need not be alleged that it was executed upon a consideration: Northern Assurance Co. *v.* Hotchkiss (1895), 90 Wis. 415, 63 N. W. 1020; Considine *v.* Gallagher (1903), 31 Wash. 669, 72 Pac. 469. Nor is it necessary to allege consideration in an action against a common carrier upon a contract

for the carriage of goods: Davis *v.* Jacksonville, etc. Line (1894), 126 Mo. 69, 28 S. W. 965. An assignee of a chose in action need not show that he paid a consideration for it because the complaint avers a sale as well as an assignment to him, for the allegation of sale may be treated as surplusage: Gregoire *v.* Rourke (1895), 28 Ore. 275, 42 Pac. 996.

The word "consideration" need not appear in a pleading: Ramsey *v.* Johnson (1897), 7 Wyo. 392, 42 Pac. 1084. An allegation that a contract was made "upon sufficient consideration" is sufficient: Oslin *v.* Telford (1899), 108 Ga. 803, 34 S. E. 168; Pattillo *v.* Jones (1901), 113 Ga. 330, 38 S. E. 745.

Contributory Negligence.

Contributory negligence is a matter of defence and need not be negatived in the complaint: Reading Township *v.* Telfer (1897), 57 Kan. 798, 48 Pac. 134; Whitty *v.* City of Oshkosh (1900), 106 Wis. 87, 81 N. W. 992; Randall *v.* City of Hoquiam (1902), 30 Wash. 435, 70 Pac. 1111; Walker *v.* McNeill (1897), 17 Wash. 582, 50 Pac. 518; Johnson *v.* Bellingham Bay Co. (1896), 13 Wash. 455, 43 Pac. 370; Thompson *v.* Great Northern Ry. Co. (1897), 70 Minn. 219, 72 N. W. 962; House *v.* Meyer (1893), 100 Cal. 592, 35 Pac. 308; Boyd *v.* Oddous (1893), 97 Cal. 510, 32 Pac. 569; Tucker *v.* Northern Terminal Co. (1902), 41 Ore. 82, 68 Pac. 426.

In Indiana, a long line of decisions held that it was necessary for the plaintiff to negative contributory negligence in his complaint as part of his cause of action: Gartin *v.* Meredith (1899), 153 Ind. 16, 53 N. E. 836; Cleveland, etc. Ry. Co. *v.* Klee (1899), 154 Ind. 430, 56 N. E. 234; Sale *v.* Aurora, etc. Co. (1896), 147 Ind. 324, 46 N. E. 669; Baltimore, etc. Ry. Co. *v.* Young (1896), 146 Ind. 374, 45 N. E. 479; Evansville, etc. R. R. Co. *v.* Krapf (1895), 143 Ind. 647, 36 N. E. 901. But the legislature, by the act of 1899, Burns' Rev. St., 1901, § 359a, changed this rule, making such allegation unnecessary. See Indianapolis St. Ry. Co. *v.* Robinson (1901), 157 Ind. 232, 61 N. E. 197, holding the act constitutional. Also see Aspy *v.* Botkins (1903), — Ind. —, 66 N. E. 462, construing the act.

In Iowa, the rule is firmly established that freedom from contributory negligence must be pleaded and proved by the plaintiff: Rabe *v.* Sommerbeck (1895), 94 Ia. 656, 63 N. W. 458; Gregory *v.* Woodworth (1895), 93 Ia. 246, 61 N. W. 962; Stuber *v.* Gannon (1896), 98 Ia. 228, 67 N. W. 105; Kleineck *v.* Reiger (1899), 107 Ia. 325, 78 N. W. 39; Elenz *v.* Conrad (1901), 115 Ia. 183, 88 N. W. 337; Decatur *v.* Simpson (1902), 115 Ia. 348, 88 N. W. 839. Same rule held in Idaho: Haner *v.* Northern Pac. Ry. Co. (1900), 62 Pac. 1028.

In New York, also, due care must be affirmatively shown by the plaintiff: Whalen *v.* Citizens' Gas Light Co. (1896), 151 N. Y. 70, 45 N. E. 363.

In Connecticut it was held in Brockett *v.* Fairhaven, etc. R. R. Co. (1900), 73 Conn. 428, 47 Atl. 763, that a direct allegation that an injury was caused by the negligent act of another necessarily involves the allegation that plaintiff's negligence did not contribute to it, and a separate averment to that effect is not necessary.

In Montana it is held that plaintiff's freedom from contributory negligence need be alleged only when the complaint shows that the proximate cause of the injury was plaintiff's own act: Snook *v.* City of Anaconda (1901), 26 Mont. 128, 66 Pac. 756; Cummings *v.* Helena, etc. Smelting Co. (1902), 26 Mont. 434, 68 Pac. 852.

Where a petition shows such contributory negligence as would bar a recovery if pleaded as a defence, the petition is demurrable: Stillwell's Adm'r *v.* Land Co. (1900), Ky., 58 S. W. 696.

In actions for wilful injury, no showing of freedom from contributory negligence need be made: Cleveland, etc. Ry. Co. *v.* Miller (1897), 149 Ind. 490, 49 N. E. 445.

Freedom from contributory negligence need be pleaded only in general terms: Gregory *v.* Woodworth (1895), 93 Ia. 246, 61 N. W. 962; Stuber *v.* Gannon (1896), 98 Ia. 228, 67 N. W. 105; Kleineck *v.* Reiger (1899), 107 Ia. 325, 78 N. W. 39; Carter *v.* Seattle (1898), 19 Wash. 597, 53 Pac. 1102.

Conversion.

An averment that defendant converted the property to his own use is a sufficient

averment of the fact of conversion: Lowe *v.* Ozmun (1902), 137 Cal. 257, 70 Pac. 87; Sanford *v.* Jansen (1896), 49 Neb. 766, 69 N. W. 108; First Nat. Bank *v.* Gaddis (1903), 31 Wash. 596, 72 Pac. 460; Stevens *v.* Curran (1903), 28 Mont. 366, 72 Pac. 753 (in the absence of a special demurrer); Cordill *v.* Minn. Elevator Co. (1903), 89 Minn. 442, 95 N. W. 306.

Corporate Existence.

"It is not necessary for a plaintiff corporation, in bringing suit, to allege that it is a corporation. Its legal capacity to sue will be presumed in law until the contrary is made to appear; and, unless it affirmatively appears from the face of the petition that the plaintiff has no legal capacity to sue, such question cannot be raised by demurrer. The point that plaintiff is not a corporation should be raised by a special plea in the nature of a plea in abatement. If it is not so raised before pleading to the merits, the question is waived. By pleading to the merits, a defendant admits plaintiff's capacity to maintain the action:" Leader Printing Co. *v.* Lowry (1899), 9 Okla. 89, 59 Pac. 242.

In support of the proposition that corporate existence need not be averred, except where the gist of the action involves the corporate existence, see Howland *v.* Jeuel (1893), 55 Minn. 102, 56 N. W. 581; Holden *v.* Great Western Elevator Co. (1897), 69 Minn. 527, 72 N. W. 805; Brady *v.* Nat. Supply Co. (1901), 64 O. St. 267, 60 N. E. 218; Fletcher *v.* Co-operative Pub. Co. (1899), 58 Neb. 511, 78 N. W. 1070; German Ins. Co. *v.* Frederick (1899), 57 Neb. 538, 77 N. W. 1106; Barber *v.* Crowell (1898), 55 Neb. 571, 75 N. W. 1109.

A petition by a corporation for the removal of a cause to the federal court by reason of diverse citizenship, must specifically aver that it is a corporation created under the laws of another State, and it is not enough to allege that it is a citizen of another State, for corporations are not strictly citizens. Many federal decisions cited: Springs *v.* Southern Ry. Co. (1902), 130 N. C. 186, 41 S. E. 100.

In some cases, however, it is held necessary to plead corporate existence. See Carpenter *v.* McCord Lumber Co. (1900), 107 Wis. 611, 83 N. W. 764; State *v.* Chicago, etc. Ry. Co. (1893), 4 S. D. 261, 56 N. W. 894. In the last case it was held that sec. 2908, Comp. Laws, providing that "in all civil actions brought by or against a corporation, it shall not be necessary to prove on the trial of the cause, the existence of such corporation, unless the defendant shall, in the answer, expressly aver that the plaintiff or defendant is not a corporation," does not avoid the necessity of pleading corporate existence in the complaint. Such defect can be reached only by general demurrer.

"That the defendant the Pacific Dredging Company is a corporation, organized and existing by virtue of the law, and doing business in Lemhi county," held a sufficient allegation of incorporation: Jones *v.* Pacific Dredging Co. (1903), Idaho, 72 Pac. 956.

Custom.

"A custom, special to a particular class of business operations, to be availed of, must be pleaded, and, if put in issue, proved:" First Nat. Bank *v.* Farmers' & Merchants' Bank (1898), 56 Neb. 149, 77 N. W. 50.

Damages.

Under a general allegation of damages, evidence was admitted as follows: prospective damages for the breach of an executory contract, in Rathbone, etc. Co. *v.* Wheelihan (1900), 82 Minn. 30, 84 N. W. 638; the amount of wages received by plaintiff before and after the injury complained of, in Palmer *v.* Winona Ry. & Light Co. (1901), 83 Minn. 85, 85 N. W. 941; all damages which naturally and proximately result from the act complained of, in City of Harvard *v.* Stiles (1898), 54 Neb. 26, 74 N. W. 399, and in North Point Irrigation Co. *v.* Canal Co. (1900), 23 Utah, 199, 63 Pac. 812.

Special allegations of damage were held in the following cases to be necessary to let in evidence: in an action for personal injuries, the amount paid for medical services: Macon *v.* Paducah St. Ry. Co. (1901), 110 Ky. 680, 62 S. W. 496; in an action on an open account, the amount claimed: McClendon *v.* Hernando (1896), 100 Ga. 219, 28 S. E. 152; in an action for personal injury, the amount claimed

for future pain and suffering: Schultz *v.* Griffith (1897), 103 Ia. 150, 72 N. W. 445; in an action for damages to buildings removed from land condemned for public use, the cost of raising the buildings after removal: Lamb *v.* Elizabeth City (1902), 131 N. C. 241, 42 S. E. 603; in an action for personal injuries, an allegation that the plaintiff has been permanently disabled from labor, held insufficient to admit proof of such loss of earnings: Coontz *v.* Missouri Pac. Ry. Co. (1893), 115 Mo. 669, 22 S. W. 572; in an action for breach of a contract of sale, an allegation of what the profits would have been: Singer Mfg. Co. *v.* Potts (1894), 59 Minn. 240, 61 N. W. 23; in an action to set aside a conveyance of real property on account of fraud, an allegation that the defrauded party was damaged: Srader *v.* Srader (1898), 151 Ind. 339, 51 N. E. 479; each item of damage sought to be recovered: Negley *v.* Cowell (1894), 91 Ia. 256, 59 N. W. 48; in an action for personal injuries, an allegation that the breach of duty was the cause of the injury: Bodah *v.* Town of Deer Creek (1898), 99 Wis. 509, 75 N. W. 75; consequential damages: Omaha Coal, Coke & Lime Co. *v.* Fay (1893), 37 Neb. 68, 55 N. W. 211; in an action for wrongful levy, special damages for loss of profits: Bradley *v.* Borin (1894), 53 Kan. 628, 36 Pac. 977; in an action for personal injuries, diseases not naturally resulting from the nervous shock alleged: Kleiner *v.* Third Ave. R. R. Co. (1900), 162 N. Y. 193, 56 N. E. 497.

Special damages, which must be specially pleaded, were defined to be all such damages or elements of damage as do not naturally and necessarily flow from the wrongful acts constituting a trespass, and such as the trespasser and wrongdoer is not bound to know must necessarily and inevitably result from his acts: Rauma *v.* Bailey (1900), 80 Minn. 336, 83 N. W. 191.

"Special damage" has a technical meaning when used in respect to the rules of pleading, and merely distinguishes the damages which must be pleaded from those which need not be pleaded: Platt *v.* Town of Milford (1895), 66 Conn. 320, 34 Atl. 82.

In an action for tort, where the alleged wrongful act does not in itself imply malice, the plaintiff must, if he intends to claim exemplary damages, allege in his complaint facts entitling him thereto: Vine *v.* Casmey (1902), 86 Minn. 74, 90 N. W. 158. And when both actual and exemplary damages are claimed, defendant is entitled to know how much is claimed for each: Lamb *v.* Harbaugh (1895), 105 Cal. 680, 39 Pac. 56.

It is not necessary that the petition should allege the measure of damages, as that is a matter to be regulated by the court in its instructions: St. Louis Trust Co. *v.* Bambrick (1899), 149 Mo. 560, 51 S. W. 706.

Where it is sought to recover liquidated damages, it is necessary to both plead and prove that the case falls within the terms of the exception in Civ. Code, §§ 1670, 1671, declaring all contracts for liquidated damages void except in certain cases: Long Beach, etc. District *v.* Dodge (1902), 135 Cal. 401, 67 Pac. 499.

Where plaintiff avers, in his petition in an action to recover personal property, that the property is worth at least a certain amount, and this is admitted by the answer, the pleadings fix the amount for the purposes of the case: State Bank *v.* Felt (1896), 99 Ia. 532, 68 N. W. 818. In an action to recover damages for the wrongful detention of personal property, it is not necessary to allege unusual conditions which increased its value, where the gross value is alleged: Hill *v.* Wilson (1899), 8 N. D. 309, 79 N. W. 150.

"In a civil action for assault and battery it is unnecessary to specially allege such damages as are the necessary and usual consequence of the act complained of:" Harshman *v.* Rose (1897), 50 Neb. 113, 69 N. W. 755. In an action to foreclose a mortgage, taxes cannot be recovered where plaintiff does not allege that he paid them, but merely alleges that defendant neglected to pay them and prayed judgment for principal, interest and costs: Williams *v.* Williams (1903), 117 Wis. 125, 94 N. W. 24. Loss of time in an action for illegal arrest is sufficiently pleaded by an allegation that plaintiff was deprived of his liberty: Young *v.* Gormley (1903), 120 Ia. 372, 94 N. W. 922.

Debt Due.

A complaint in an action to foreclose a mortgage should expressly allege that the

debt is due. But where facts are pleaded and supplied in an exhibit which show that the debt was due before the action was instituted, the infirmity of the pleading in this respect is thereby cured: Baldwin *v.* Boyce (1898), 152 Ind. 46, 51 N. E. 334.

Delivery.

An allegation that an instrument was executed includes the idea of delivery, and it is not necessary to allege delivery in terms: Smith *v.* Waite (1894), 103 Cal. 372, 37 Pac. 232; Jacobs *v.* Hogan (1900), 73 Conn. 740, 49 Atl. 202; Topping *v.* Clay (1896), 65 Minn. 346, 68 N. W. 34.

Demand.

Where defendant, in his answer, denies plaintiff's title, it is not necessary for plaintiff to allege and prove demand previous to bringing an action for conversion: Rosenau *v.* Syring (1894), 25 Ore. 386, 35 Pac. 845; Buffkins *v.* Eason (1893), 112 N. C. 162, 16 S. E. 916; Rich *v.* Hobson (1893), 112 N. C. 79, 16 S. E. 931. See also Gross *v.* Scheel (1903), — Neb. —, 93 N. W. 418.

An allegation of defendant's refusal to pay is equivalent to an allegation of demand, for he could not refuse unless he had been asked to pay: Worth *v.* Wharton (1898), 122 N. C. 376, 29 S. E. 370; Brossard *v.* Williams (1902), 114 Wis. 89, 89 N. W. 832.

Description.

The description of land in a complaint should be such that the land can be ascertained and located from the allegations alone: Kiernan *v.* Terry (1894), 26 Ore. 494, 38 Pac. 671; Scheffer *v.* Hines (1897), 149 Ind. 413, 49 N. E. 348; Swatts *v.* Bowen (1894), 141 Ind. 322, 40 N. E. 1057; Tracy *v.* Harmon (1895), 17 Mont. 465, 43 Pac. 500.

In Sheffer *v.* Hines (*supra*), a description employing solely the numbers of the sections, townships and ranges, without reference to any object from which a location in the state could be inferred, was held bad. But see Citizen's Bank *v.* Stewart (1894), 90 Ia. 467, 57 N. W. 957, where such a description in a decree was held sufficient. A particular description by courses and distances must control the general description when the two are in conflict: Haggin *v.* Lorenz (1895), 15 Mont. 309, 39 Pac. 285.

In actions of trover for the conversion of money it is not necessary to describe the money, but it is sufficient to state the aggregate amount taken: Salem Traction Co. *v.* Anson (1902), 41 Ore. 562, 69 Pac. 675.

Doing Equity.

In an action for equitable relief, a complaint is demurrable which does not allege facts showing that plaintiff has done or is ready to do equity: Buena Vista, etc. Co. *v.* Tuohy (1895), 107 Cal. 243, 40 Pac. 386.

Duty.

The averment of duty is but a legal conclusion, and is therefore improper and unavailing: City of Ft. Wayne *v.* Christie (1900), 156 Ind. 172, 59 N. E. 385; McPeak *v.* Mo. Pac. Ry. Co. (1895), 128 Mo. 617, 30 S. W. 170; Lang *v.* Brady (1900), 73 Conn. 707, 49 Atl. 199; Martin *v.* Sherwood (1902), 74 Conn. 475, 50 Atl. 564.

In some cases, however, an allegation of duty has been considered an allegation of fact: Berry *v.* Dole (1902), 87 Minn. 471, 92 N. W. 334; Burnett *v.* Atlantic Coast Line Ry. Co. (1903), 132 N. C. 261, 43 S. E. 797.

In Iowa it is held that in an action for negligence the particular duty neglected must be declared upon: Humpton *v.* Unterkircher (1896), 97 Ia. 509, 66 N. W. 776; citing Railroad Co. *v.* Stark, 38 Mich. 714.

This rule seems to obtain also in Wisconsin. See Greenman *v.* Chicago Northwestern R. R. Co. (1898), 100 Wis. 188, 75 N. W. 998; Lago *v.* Walsh (1898), 98 Wis. 348, 74 N. W. 212. But see, however, Jones *v.* Burtis (1894), 88 Wis. 478, 60 N. W. 785.

Election Contest.

In an action to contest an election the complaint must set forth specifically the particular facts counted upon as invalidating the election: Borders *v.* Williams (1900), 155 Ind. 36, 57 N. E. 527.

Estoppel.

An estoppel must be pleaded if it is to be available: Cloud *v.* Malvin (1899), 108 Ia. 52, 75 N. W. 645, 78 N. W. 791, Nickum *v.* Burckhardt (1897), 30 Ore. 464,

47 Pac. 888. See also note 4, p. 815, where many cases are cited to this proposition. But "a party is not bound to plead an estoppel where he is without knowledge that his demand must ultimately rest upon it:" Donnelly *v.* San Francisco Bridge Co. (1897), 117 Cal. 417, 49 Pac. 559.

See Plumb *v.* Curtis (1895), 66 Conn. 154, 33 Atl. 998, for interesting discussion of estoppel as a substantial ground of recovery.

Exception to Rule of Law.

Where a party relies upon an exception to the rule that a servant assumes the risk of defective machinery, he must first plead the exception: Malm *v.* Thelin (1896), 47 Neb. 686, 66 N. W. 650.

Exceptions in Statutes.

In stating a cause of action arising upon an enacting clause of a statute containing an exception, such exception should be negatived; but where the proviso is contained in another clause it need not be negatived: Rowell *v.* Janvrin (1896), 151 N. Y. 60, 45 N. E. 398; Walker *v.* Chester County (1893), 40 S. C. 342, 18 S. E. 936; Cleveland, etc. Ry. Co. *v.* Gray (1897), 148 Ind. 266, 46 N. E. 675; City of Kansas City *v.* Garnier (1896), 57 Kan. 412, 46 Pac. 707; Larson *v.* First Nat. Bank (1902), — Neb. —, 92 N. W. 729; Hale *v.* Mo. Pac. Ry. Co. (1893), 36 Neb. 266, 54 N. W. 517; Central Kentucky Asylum *v.* Penick (1898), 102 Ky. 533, 44 S. W. 92. In Wolff *v.* Lamann (1900), 108 Ky. 343, 56 S. W. 408, it was held that in alleging a statutory cause of action for injuries due to the bite of a dog, it is not necessary to negative the exceptions of the statute, viz., that the injury did not occur upon the premises of the owner after night or that plaintiff was not engaged in some unlawful act in the daytime. These are matters of defence.

Execution of Instrument.

An allegation that a mortgage was made, executed, and delivered includes the signing, sealing, attesting, and acknowledging: Laurent *v.* Lanning (1897), 32 Ore. 11, 51 Pac. 80.

Execution, Issuance and Return of.

A sufficient showing that a legal execution was issued on a judgment and returned unsatisfied is made by an allegation that on a day named an execution was, in due form of law, issued upon a certain judgment, to the sheriff, and that such execution was duly returned by said sheriff wholly unsatisfied: Pierstoff *v.* Jorges (1893), 86 Wis. 128, 56 N. W. 735.

Forcible Entry and Detainer.

A complaint in the words of the statute is sufficient: Locke *v.* Skow (1902), Neb., 91 N. W. 572. The rule requiring the pleader to state the facts constituting his cause of action or defence should not be applied to this action: Blachford *v.* Frenzer (1895), 44 Neb. 829, 62 N. W. 1101. For complaint held sufficient, see Moore *v.* Parker (1899), 59 Neb. 29, 80 N. W. 43.

Foreclosure.

In an action to foreclose a mortgage plaintiff need not set out the nature of, or facts constituting, the claim of another lien holder, but may allege generally that such defendant claims some interest in the mortgaged premises, advising him that his lien will be barred if he fails to appear and disclose it: Winemiller *v.* Laughlin (1894), 51 O. St. 421, 38 N. E. 111. A complaint in a suit to enforce a mortgage on a widow's dower interest must show the facts from which the portion of the mortgage debt properly chargeable to such dower interest can be ascertained: Fowle *v.* House (1896), 29 Ore. 114, 44 Pac. 692.

For the construction of a complaint in an action to foreclose a mechanic's lien upon several pieces of property, not contiguous and not of similar character, see Big Blackfoot Co. *v.* Bluebird Co. (1897), 19 Mont. 454, 48 Pac. 778.

But one action may be maintained for the recovery of any debt secured by mortgage, under C. L. 1888, § 3460: Salt Lake Loan & Trust Co. *v.* Millspaugh (1898), 18 Utah, 283, 54 Pac. 893.

Foreign Laws.

A foreign law must be pleaded like any other fact: Lowry *v.* Moore (1897), 16 Wash. 476, 48 Pac. 238; Thompson-Houston Elec. Co. *v.* Palmer (1893), 52 Minn. 174, 53 N. W. 1137; Dunham *v.* Holloway (1895), 3 Okla. 244, 41 Pac. 140; Myers *v.* Chicago, etc. Ry. Co. (1897), 69 Minn. 476,

72 N. W. 694; McDonald *v.* Bankers' Life Ass'n (1900), 154 Mo. 618, 55 S. W. 999; Showalter *v.* Rickert (1902), 64 Kan. 82, 67 Pac. 454; Smith *v.* Mason (1895), 44 Neb. 610, 63 N. W. 41. A foreign statute should be set out, not pleaded by its legal effect: Lowry *v.* Moore (1897), 16 Wash. 476, 48 Pac. 238. In pleading a foreign statute it is sufficient to allege its substance: Minneapolis Harvester Works *v.* Smith (1893), 36 Neb. 616, 54 N. W. 973; Showalter *v.* Rickert (1902), 64 Kan. 82, 67 Pac. 454. The law of another State cannot be pleaded by chapter only, but the terms, tenor, and effect of the statute are to be set out: McDonald *v.* Bankers' Life Ass'n (1900), 154 Mo. 618, 55 S. W. 999.

In pleading the common law of another State it is sufficient to state as a fact what the law is, without setting out decisions of the courts: Crandall *v.* Great Northern Ry. Co. (1901), 83 Minn. 190, 86 N. W. 10.

In the absence of allegations to the contrary, the laws of a foreign state will be presumed the same as those of the State of the forum: Greenville Nat. Bank *v.* Evans Co. (1900), 9 Okla. 353, 60 Pac. 249; Mansur-Tebbetts Co. *v.* Willet (1900), 10 Okla. 383, 61 Pac. 1066; Smith *v.* Mason (1895), 44 Neb. 610, 63 N. W. 41.

Fraud.

Fraud is never presumed, and must be alleged and proved to be available: Hampton *v.* Webster (1898), 56 Neb. 628, 77 N. W. 50; Nat. State Bank *v.* Nat. Bank (1895), 141 Ind. 352, 40 N. E. 799. And in order to be available it must have resulted in injury or damage to the party pleading it: Carrington *v.* Omaha Life Ass'n (1899), 59 Neb. 116, 80 N. W. 491.

A general allegation of fraud is not sufficient, but the facts constituting the fraud must be alleged: Murray *v.* Shoudy (1896), 13 Wash. 33, 42 Pac. 631; Cade *v.* Head Camp W. O. W. (1902), 27 Wash. 218, 67 Pac. 603; Crowley *v.* Hicks (1898), 98 Wis. 566, 74 N. W. 348; New Bank *v.* Kleiner (1901), 112 Wis. 287, 87 N. W. 1090; James *v.* Kelley (1899), 107 Ga. 446, 33 S. E. 425; Kemper *v.* Renshaw (1899), 58 Neb. 513, 78 N. W. 1071; Johnston *v.* Spencer (1897), 51 Neb. 198, 70 N. W. 982; Crosby *v.* Ritchey (1896), 47 Neb. 924, 66 N. W. 1005; Rockford Watch Co. *v.* Manifold (1893), 36 Neb. 801, 55 N. W. 236; Knox *v.* Pearson (1902), 64 Kan. 711, 68 Pac. 613; Ladd *v.* Nystol (1901), 63 Kan. 23, 64 Pac. 985; Gem Chemical Co. *v.* Youngblood (1900), 58 S. C. 56, 36 S. E. 437; Beaman *v.* Ward (1903), 132 N. C. 68, 43 S. E. 545; Leasure *v.* Forquer (1895), 27 Ore. 334, 41 Pac. 665; Schiffman *v.* Schmidt (1900), 154 Mo. 204, 55 S. W. 451; Goodson *v.* Goodson (1897), 140 Mo. 206, 41 S. W. 737; Burnham *v.* Boyd (1902), 167 Mo. 185, 66 S. W. 1088; Clough *v.* Holden (1893), 115 Mo. 336, 21 S. W. 1071; County of Cochise *v.* Copper Queen Min. Co. (1903), Ariz., 71 Pac. 946; Guy *v.* Blue (1896), 146 Ind. 629, 45 N. E. 1052; Stroup *v.* Stroup (1894), 140 Ind. 179, 39 N. E. 864; Tolbert *v.* Caledonian Ins. Co. (1897), 101 Ga. 741, 28 S. E. 991; Peckham *v.* City of Watsonville (1902), 138 Cal. 242, 71 Pac. 169; Morrill *v.* Little Falls Co. (1893), 53 Minn. 371, 55 N. W. 547.

But in Pelly *v.* Naylor (1893), 139 N. Y. 598, 35 N. E. 317, it seems to be held that the facts constituting the fraud need not be set out.

A complaint is good which alleges facts constituting fraud whether fraud is alleged in terms or not: Worth *v.* Stewart (1898), 122 N. C. 263, 29 S. E. 413; Rathbone *v.* Frost (1894), 9 Wash. 162, 37 Pac. 298.

While an intent to deceive is a necessary ingredient of fraud, it need not be alleged directly if facts are stated from which it is necessarily implied: Schoellhamer *v.* Rometsch (1894), 26 Ore. 394, 38 Pac. 344. But see McKibbin *v.* Ellingson (1894), 58 Minn. 205, 59 N. W. 1003, where it is held that allegations of facts tending to show a fraudulent intent are not equivalent to an allegation of such intent. As to necessity of alleging fraudulent intent, see Northwestern Steamship Co. *v.* Dexter Horton & Co. (1902), 29 Wash. 565, 70 Pac. 59, holding that such allegation is necessary, and Cameron *v.* Mount (1893), 86 Wis. 477, 56 N. W. 1094, holding such allegation unnecessary.

In the following cases the allegations of fraud were passed upon by the court, and sustained or condemned, as indicated: Selz *v.* Tucker (1894), 10 Utah, 132, 37 Pac. 249 (held insufficient); Wenning *v.* Teeple (1895), 144 Ind. 189, 41 N. E. 600 (held

sufficient); Leasure *v.* Forquer (1895), 27 Ore. 334, 41 Pac. 665 (held insufficient); Schiffman *v.* Schmidt (1900), 154 Mo. 204, 55 S. W. 451 (held insufficient); Kuh, Nathan & Fisher Co. *v.* Glucklick (1903), 120 Ia. 504, 94 N. W. 1105.

The general rules as to pleading fraud do not apply to ejectment and replevin: Phœnix Iron Works *v.* McEvony (1896), 47 Neb. 228, 66 N. W. 290.

Injury.

A formal allegation of injury is not necessary when facts are stated from which loss or injury is implied: Green Bay, etc. Canal Co. *v.* Kaukauna, etc. Co. (1901), 112 Wis. 323, 87 N. W. 864.

The plaintiff is not required to aver all the physical injuries which he has sustained or which may have resulted from the wrongful act complained of, if they are such as may be traced to or naturally follow from the act: Williams *v.* Oregon Short Line R. R. Co. (1898), 18 Utah, 210, 54 Pac. 991; Croco *v.* Oregon Short Line R. R. Co. (1898), 18 Utah, 311, 54 Pac. 985; Youngblood *v.* Railroad Co. (1901), 60 S. C. 9, 38 S. E. 232; Curran *v.* A. H. Stange Co. (1898), 98 Wis. 598, 74 N. W. 377; Hanson *v.* Anderson (1895), 90 Wis. 195, 62 N. W. 1055.

A claim made in a complaint for a specific injury and "other injuries" is indefinite and uncertain, but is sufficient to admit evidence of what the other injuries were: Mauch *v.* Hartford (1901), 112 Wis. 40, 87 N. W. 816.

Injury to the Person.

The court held, in Hutcherson *v.* Durden (1901), 113 Ga. 987, 39 S. E. 495, that the expression "injuries to the person," as used in the statute of limitations, was not confined to physical injuries, but embraced all actionable injuries to the individual himself, as distinguished from injuries to his property.

Innocent Purchaser.

Where a plaintiff is required to allege that he is an innocent purchaser, he must aver the facts, showing all the elements necessary, viz., that he is a purchaser in good faith, without notice, and for a valuable consideration, and each of these elements must be appropriately amplified: Young *v.* Schofield (1895), 132 Mo. 650, 34 S. W. 497.

Interest.

Where debts or claims bear interest as a matter of law, interest may be recovered upon them under a general prayer for the amount of the debt or claim and interest, without any allegation that it is due: Peterson *v.* Mannix (1902), Neb., 90 N. W. 210. In Ormond *v.* Sage (1897), 69 Minn. 523, 72 N. W. 810, it was held unnecessary to demand interest where a party is entitled to it by way of damages on money due on contract, and in Brown *v.* Doyle (1897), 69 Minn. 543, 72 N. W. 814, the court said that it need not be specially pleaded.

In suing on a promissory note it is not necessary to state how much interest is due, if the rate from a given day is alleged, yet if a certain sum is named a larger sum cannot be recovered: King *v.* Westbrooks (1902), 116 Ga. 753, 42 S. E. 1002. The exhibit being part of the complaint, a prayer asking for interest according as the same may appear to be due from the items of said exhibit at seven per cent per annum is sufficient to support a verdict for such interest: Dunham *v.* Holloway (1895), 3 Okla. 244, 41 Pac. 140.

Invalidity of Statute or Ordinance.

"When it is claimed that a statute or ordinance is invalid because it is in its substance violative of the fundamental law, the inference of invalidity being one following from the fundamental law as compared with the act in question, it is sufficient to generally allege that it is invalid. When the claim is that such act or ordinance is invalid, not because of its substance, but because not regularly passed or adopted, the defect in the proceedings must be specifically pleaded. It is insufficient to allege generally that it was not legally adopted:" City of York *v.* Chicago, B. & Q. R. R. Co. (1898), 56 Neb. 572, 76 N. W. 1065. Where it is claimed that a statute is unconstitutional, a general allegation to that effect is not sufficient, but the specific provision of the constitution infringed upon must be pointed out in the pleadings: Ash *v.* City

of Independence (1902), 169 Mo. 77, 68 S. W. 888.

Irreparable Injury.

A mere allegation, in a complaint, of great or irreparable injury to the plaintiff and his property, without the facts showing it, is not sufficient in an action for an injunction: Brass *v.* Rathbone (1897), 153 N. Y. 435, 47 N. E. 905; Wabaska Electric Co. *v.* City of Wymore (1900), 60 Neb. 199, 82 N. W. 626; Burrus *v.* City of Columbus (1898), 105 Ga. 42, 31 S. E. 124; Schuster *v.* Myers (1899), 148 Mo. 422, 50 S. W. 103. See also Placke *v.* Union Depot R. R. Co. (1897), 140 Mo. 634, 41 S. W. 915.

A stockholder's allegation that he "has good reason to fear and does fear" that the directors will sell the franchise, without any averment that they threaten to do so, is not sufficient: Quin *v.* Havenor (1903), 53 Wis. 118, 94 N. W. 642.

Judgment.

In an action upon a judgment of another State rendered by a court of general jurisdiction, it is unnecessary to allege jurisdictional facts. Want of jurisdiction is matter to be set up by answer: Trowbridge *v.* Spinning (1900), 23 Wash. 48, 62 Pac. 125; Kunze *v.* Kunze (1896), 94 Wis. 54, 68 N. W. 391; Bennett *v.* Bennett (1902), — Neb. —, 91 N. W. 409. In Gude *v.* Dakota Fire Ins. Co. (1895), 7 S. D. 644, 65 N. W. 27, a complaint alleging jurisdictional facts relative to a foreign judgment was considered and held sufficient. But see Angle *v.* Manchester (1902), — Neb. —, 91 N. W. 501.

In pleading a judgment it is only necessary to follow § 456 of the Code of Civil Procedure, and aver that the judgment was "duly given:" Edwards *v.* Hellings (1893), 99 Cal. 214, 33 Pac. 799; Buckman *v.* Hatch (1903), 139 Cal. 53, 72 Pac. 445. Same holding in Wisconsin, in Pierstoff *v.* Jorges (1893), 86 Wis. 128, 56 N. W. 735, as to judgment of a court of limited jurisdiction. Same holding in Oregon, in Fisher *v.* Kelly (1896), 30 Ore. 1, 46 Pac. 146, also as to judgment of court of limited jurisdiction.

But in pleading a judgment of a justice's court it is essential to show that the cause of action was one falling under the jurisdiction of a justice's court: Willits *v.* Walter (1898), 32 Ore. 411, 52 Pac. 24.

Jurisdiction.

A court will reverse a judgment for want of jurisdiction, not only in cases where it is shown negatively that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist: Myers *v.* Berry (1895), 3 Okla. 612, 41 Pac. 580.

Libel and Slander.

See the following cases dealing with various phases of the subject: Sharpe *v.* Larson (1897), 70 Minn. 209, 72 N. W. 961; Richmond *v.* Post (1897), 69 Minn. 457, 72 N. W. 704; Fredrickson *v.* Johnson (1894), 60 Minn. 337, 62 N. W. 388; American Book Co. *v.* Kingdom Publishing Co. (1898), 71 Minn. 363, 73 N. W. 1089; Heeney *v.* Kilbane (1899), 59 O. St. 499, 53 N. E. 262; Grand *v.* Dreyfus (1898), 122 Cal. 58, 54 Pac. 389; Schubert *v.* Richter (1896), 92 Wis. 199, 66 N. W. 107; Davis *v.* Hamilton (1902), 85 Minn. 209, 88 N. W. 744; Williams *v.* Fuller (1903), — Neb. —, 94 N. W. 118; Grubb *v.* Elder (1903), — Kan. —, 72 Pac. 790.

Names of Parties.

Parties should sue and be sued in their full Christian names, and not by initial letters: Small *v.* Sandall (1896), 48 Neb. 318, 67 N. W. 156; Scarborough *v.* Myrick (1896), 47 Neb. 794, 66 N. W. 867; Enewold *v.* Olsen (1894), 39 Neb. 59, 57 N. W. 765; Richardson *v.* Opelt (1900), 60 Neb. 180, 82 N. W. 377; Nebraska Loan & Trust Co. *v.* Kroener (1901), 63 Neb. 289, 88 N. W. 499; Gillian *v.* McDowell (1902), — Neb. —, 92 N. W. 991; Twine *v.* Kilgore (1895), 3 Okla. 640, 39 Pac. 388; Turner *v.* Gregory (1899), 151 Mo. 100, 52 S. W. 234. But in a suit upon an instrument describing the parties by their initials, suit may be brought by or against them in that form: Richardson *v.* Opelt (1900), 60 Neb. 180, 82 N. W. 377. But see the contrary view held in Gillian *v.* McDowell (1902), — Neb. —, 92 N. W. 991. Where defendant (the Louisville and Nashville Railroad Company) was sued as the "L. & N. R. R. Co.," its plea in abatement ought to have been sustained:

Louisville, etc. R. R. Co. *v.* Bloyd (1900), — Ky. —, 55 S. W. 694.

The objection that the full name is not given may be made at any time before judgment: Small *v.* Sandall (1896), 48 Neb. 318, 67 N. W. 156; but not thereafter: Shoemaker *v.* Goode (1902), Neb., 92 N. W. 629; Scarborough *v.* Myrick (1896), 47 Neb. 794, 66 N. W. 867; Schreiner *v.* Stanton (1901), 26 Wash. 563, 67 Pac. 219; Fisk *v.* Gulliford (1903), — Neb. —, 95 N. W. 494. Demurrer is not the proper remedy: McColgan *v.* Territory of Oklahoma (1897), 5 Okla. 567, 49 Pac. 1018. But where an action was brought by "Heath, Morrow & Co.," and this is the only description given of the plaintiffs in the summons or complaint, a demurrer was held proper: Heath *v.* Morgan (1895), 117 N. C. 504, 23 S. E. 489. Such objection is waived by pleading to the merits: Bell *v.* Peterson (1900), 105 Wis. 607, 81 N. W. 279.

It is sufficient to correctly state the names of the parties in the title, and they may thereafter be referred to merely as plaintiff or defendant: Chicago, etc. R. R. Co. *v.* Thomas (1896), 147 Ind. 35, 46 N. E. 73; Eisely *v.* Taggart (1897), 52 Neb. 658, 72 N. W. 1039; First Nat. Bank *v.* Hattenbach (1900), 13 S. D. 365, 83 N. W. 421.

"Where the petition or complaint states a cause of action in favor of the plaintiff personally, superadded words, such as 'agent,' 'executor,' or 'trustee,' will be regarded as *descriptio personæ* merely:" Thomas *v.* Carson (1896), 46 Neb. 765, 65 N. W. 899. Where a petition states facts constituting a cause of action against the defendant individually, a general demurrer should not be sustained because in the caption of the petition the defendant is designated as guardian: Clift *v.* Newell (1898), 104 Ky. 396, 47 S. W. 270. "A defendant known indiscriminately by either of two names may properly be designated by both in the title of the action, if they are used in such a manner as to indicate clearly that but one person is sued:" O. L. Packard Machinery Co. *v.* Laev (1898), 100 Wis. 644, 76 N. W. 596. "Where the caption of the petition gives the individual names of the members of a copartnership as defendants, and references in the pleadings, findings, and judgment to the defendants are generally in the plural, the action will be held to be one against the individuals named, even though the petition charges that the plaintiff contracted with the defendants as partners:" Burke *v.* Unique Printing Co. (1901), 63 Neb. 264, 88 N. W. 488.

In Turner *v.* Gregory (1899), 151 Mo. 100, 52 S. W. 234, the court said: "In all proceedings the Christian and surname of both the plaintiff and defendant should be set forth in the pleadings and process with accuracy. . . . One general rule has been to hold the first Christian name as essential, and to hold that the middle name is no part of a man's name, or at least not necessary to his designation." Citing Missouri cases.

Negative Averments.

"A negative allegation is to be proved only where it constitutes a part of the original substantive cause of action upon which the plaintiff relies, and this is an exception to the general rule that a party is not called upon to prove his negative averments, although they may be necessary in his pleading:" Dirks *v.* California Safe Deposit Co. (1902), 136 Cal. 84, 68 Pac. 487.

Negligence.

Negligence cannot be presumed but must be pleaded and proved: Vansyoc *v.* Freewater Cemetery Ass'n (1901), 63 Neb. 143, 88 N. W. 162; First Nat. Bank *v.* Zeims (1894), 93 Ia. 140, 61 N. W. 483.

A general allegation of negligence is sufficient to repel a demurrer for want of facts: House *v.* Meyer (1893), 100 Cal. 592, 35 Pac. 308; Stephenson *v.* Southern Pac. Co. (1894), 102 Cal. 143, 36 Pac. 407; Omaha & R. V. Co. *v.* Wright (1896), 49 Neb. 456, 68 N. W. 618 (overruling same case, 47 Neb. 886, 66 N. W. 842); Omaha & R. V. Co. *v.* Crow (1898), 54 Neb. 747, 74 N. W. 1066; Collett *v.* Northern Pac. Ry. Co. (1900), 23 Wash. 600, 63 Pac. 225; Traver *v.* Spokane St. Ry. Co. (1901), 25 Wash. 225, 65 Pac. 284; Conrad *v.* De Montcourt (1896), 138 Mo. 311, 39 S. W. 805; Foster *v.* Missouri Pac. Ry. Co. (1893), 115 Mo. 165, 21 S. W. 916; Connell *v.* Chesapeake, etc. Ry. Co. (1900), Ky., 58 S. W. 374; Baltimore, etc. Ry. Co. *v.* Young (1896), 146 Ind. 374, 45 N. E. 479;

Sale *v.* Aurora, etc. Co. (1896), 147 Ind. 324, 46 N. E. 669; Cleveland, etc. Ry. Co. *v.* Berry (1898), 152 Ind. 607, 53 N. E. 415; Rodgers *v.* Baltimore, etc. Ry. Co. (1897), 150 Ind. 397, 49 N. E. 453; Citizens' St. R. R. Co. *v.* Sutton (1897), 148 Ind. 169, 46 N. E. 462; Louisville, etc. R. R. Co. *v.* Bates (1896), 146 Ind. 564, 45 N. E. 108; Louisville, etc. R. R. Co. *v.* Berkey (1893), 136 Ind. 181, 35 N. E. 3; Rogers *v.* Truesdale (1894), 57 Minn. 126, 58 N. W. 688; McGonigle *v.* Kane (1894), 20 Colo. 292, 38 Pac. 367; Walker *v.* McCaull (1900), 13 S. D. 512, 83 N. W. 578; Jones *v.* City of Portland (1899), 35 Ore. 512, 58 Pac. 657; Chaperon *v.* Portland Electric Co. (1902), 41 Ore. 39, 67 Pac. 928; Pittsburgh, etc. Ry. Co. *v.* Wilson (1903), — Ind. —, 66 N. E. 899; Cederson *v.* Oregon Nav. Co. (1900), 38 Ore. 343, 62 Pac. 637; Chicago, B. & Q. R. R. Co. *v.* Oyster (1899), 58 Neb. 1, 78 N. W. 359.

The rule that a general allegation of negligence is sufficient to repel a demurrer for want of facts, "means, not that the pleading is good by charging that the plaintiff was injured 'by the negligence of the defendant,' but that it is sufficient if the act, stated as the cause of the injury, is alleged to have been 'negligently' done:" Cleveland, etc. Ry. Co *v.* Berry (1898), 152 Ind. 607, 53 N. E. 415.

Negligence is an ultimate fact, and not a legal conclusion: House *v.* Meyer (1893), 100 Cal. 592, 35 Pac. 308; Stephenson *v.* Southern Pac. Co. (1894), 102 Cal. 143, 36 Pac. 407; McGonigle *v.* Kane (1894), 20 Colo. 292, 38 Pac. 367; Chaperon *v.* Portland Elec. Co. (1902), 41 Ore. 39, 67 Pac. 928; Rogers *v.* Truesdale (1894), 57 Minn. 126, 58 N. W. 688; Chicago, B. & Q. R. R. Co. *v.* Grablin (1893), 38 Neb. 90, 56 N. W. 796; Hill *v.* Fairhaven, etc. R. R. Co. (1902), 75 Conn. 177, 52 Atl. 725 (holding it a mixed question of law and fact); Doolittle *v.* Laycock (1899), 103 Wis. 334, 79 N. W. 408 (mixed question of law and fact).

Where a petition contains but a general allegation of negligence it is subject to a motion to make more definite and certain: Price *v.* Water Co. (1897), 58 Kan. 551, 50 Pac. 450; Jones *v.* City of Portland (1899), 35 Ore. 512, 58 Pac. 657; Walker *v.* McCaull (1900), 13 S. D. 512, 83 N. W. 578; Louisville, etc. R. R. Co. *v.* Berkey (1893), 136 Ind. 181, 35 N. E. 3; Louisville, etc. R. R. Co. *v.* Bates (1896), 146 Ind. 564, 45 N. E. 108; Louisville, etc. R. R. Co. *v.* Lynch (1896), 147 Ind. 165, 44 N. E. 997; Conrad *v.* De Montcourt (1896), 138 Mo. 311, 39 S. W. 805; Omaha & R. V. Co. *v.* Crow (1898), 54 Neb. 747, 74 N. W. 1066.

Where a general averment of negligence in a petition is followed by an enumeration of specific facts of negligence, the plaintiff will be restricted to proof of the facts so specified: McManamee *v.* Mo. Pac. Ry. Co. (1896), 135 Mo. 440, 37 S. W. 119; Dlauhi *v.* St. Louis, etc. Ry. Co. (1897), 139 Mo. 291, 40 S. W. 890; McCarty *v.* Rood Hotel Co. (1898), 144 Mo. 397, 46 S. W. 172; Chitty *v.* St. Louis, etc. Ry. Co. (1899), 148 Mo. 64, 49 S. W. 868; Rogers *v.* Truesdale (1894), 57 Minn. 126, 58 N. W. 688; Pierce *v.* Great Falls, etc. Ry. Co. (1899), 22 Mont. 445, 56 Pac. 867; Telle *v.* Rapid Transit Ry. Co. (1893), 50 Kan. 455, 31 Pac. 1076. *Contra:* Traver *v.* Spokane St. Ry. Co. (1901), 25 Wash. 225, 65 Pac. 284. Held in Stendal *v.* Boyd (1897), 67 Minn. 279, 69 N. W. 899, that where a general charge of negligence is made as to specific acts which could not be negligent under any evidence admissible under the allegations of the complaint, the complaint is demurrable.

Negligence need not be charged in terms if the facts alleged show a *prima facie* case of negligence: Baltimore & Ohio Ry. Co. *v.* Kreager (1899), 61 O. St. 312, 56 N. E. 203; City of Geneva *v.* Burnett (1902), — Neb. —, 91 N. W. 275. "If the complaint is found to be sufficient in the statement of negligence in one respect, it is good, as against a general demurrer, even if deficient in the statement of another instance of want of care:" Hough *v.* Grant's Pass Power Co. (1902), 41 Ore. 531, 69 Pac. 655.

In an action against a common carrier it is sufficient to allege that the goods were delivered to him and were injured by his default while in his custody and care as a common carrier: Lang *v.* Brady (1900), 73 Conn. 707, 49 Atl. 199.

A complaint in an action for negligence is bad which does not allege facts requiring the inference that the negligence of the defendant was the proximate cause of the injury. Baltimore, etc. Ry. Co. *v.*

Young (1896), 146 Ind. 374, 45 N. E. 479; Chicago, B. & Q. R. R. Co. *v.* Kellogg (1898), 55 Neb. 748, 76 N. W. 462; Kelly *v.* Town of Darlington (1893), 86 Wis. 432, 57 N. W. 51.

In an action for damages based on Lord Campbell's Act, the complaint must show that the persons for whose benefit the suit was instituted had a pecuniary interest in the life of the deceased: Chicago, R. I. & Pac. R. R. Co. *v.* Young (1899), 58 Neb. 678, 79 N. W. 556; Orgall *v.* Chicago, B. & Q. R. R. Co. (1895), 46 Neb. 4, 64 N. W. 450; Union Pac. Ry. Co. *v.* Roeser (1903), — Neb. —, 95 N. W. 68. But in Chicago, etc. R. R. Co. *v.* Thomas (1900), 155 Ind. 634, 58 N. E. 1040, it was held that an averment that decedent left surviving him a wife and infant son carried with it the presumption that both were entitled to his services, and that such services were valuable, and a failure to allege that actual damages were sustained was not fatal against a demurrer.

It is not necessary for plaintiff to allege that he has suffered pecuniary loss: Haug *v.* Railway Co. (1898), 8 N. D. 23, 77 N. W. 97.

"A petition under Lord Campbell's Act should disclose the names of all the beneficiaries, but if the names of the surviving minor children of the decedent who were dependent upon him for support are averred, the omission to allege whether or not he left a widow will not render the pleading bad on demurrer:" Chicago, B. & Q. R. R. Co. *v.* Oyster (1899), 58 Neb. 1, 78 N. W. 359.

In the following cases the allegations of negligence were passed upon by the court and held sufficient or insufficient, as indicated: Redford *v.* Spokane St. Ry. Co. (1894), 9 Wash. 55, 36 Pac. 1085 (insufficient); Washington *v.* Spokane St. Ry. Co. (1895), 13 Wash. 9, 42 Pac. 628 (sufficient); Croft *v.* Northwestern Steamship Co. (1898), 20 Wash. 175, 55 Pac. 42 (sufficient); Hanson *v.* Anderson (1895), 90 Wis. 195, 62 N. W. 1055 (sufficient); Ean *v.* Chicago, M. & St. P. Ry. Co. (1897), 95 Wis. 70, 69 N. W. 997 (insufficient); Borchsenius *v.* Chicago, St. P., etc. Ry. Co. (1897), 96 Wis. 448, 71 N. W. 884 (sufficient); Anderson *v.* Hayes (1899), 101 Wis. 519, 77 N. W. 903 (sufficient); City of Aurora *v.* Cox (1895), 43 Neb. 727, 62 N. W. 66 (sufficient); Chicago, B. & Q. Ry. Co. *v.* Grablin (1893), 38 Neb. 90, 56 N. W. 796 (insufficient to admit certain evidence); Bunnell *v.* Berlin Iron Bridge Co. (1895), 66 Conn. 24, 33 Atl. 533 (sufficient).

It was held in Southern Ry. Co. *v.* O'Bryan (1900), 112 Ga. 127, 37 S. E. 161, that a plaintiff "may bring suit in the county where the failure on the part of the railroad company to discharge its duty to the passenger originated, and use the transactions occurring in the other counties as mere matters of aggravation." And in Senn *v.* Southern Ry. Co. (1896), 135 Mo. 512, 36 S. W. 367, which was an action to recover for the death of a person due to the negligence of a street car driver, recitals in the petition of a city ordinance regulating the running of street cars and prescribing the duties of those in charge of them, with an allegation that the death of the deceased was caused by a failure to observe such ordinance, do not constitute a separate cause of action on the violation of the ordinance, but are to be considered merely as affording evidence of the negligence of the driver.

Where plaintiff predicates the actionable negligence on which he relies on a course of conduct in the progress of which are several acts, all closely connected together, and leading up to and culminating in the accident, the allegation as to each act, that it was improperly and negligently done, does not make each act a separate cause of action, which must be sufficient in itself: Hill *v.* Fairhaven, etc. R. R. Co. (1902), 75 Conn. 177, 52 Atl. 725.

New Promise.

Where an action is brought upon a new promise to pay a debt barred by the statute of limitations, the petition should allege every fact necessary to a recovery on the original liability and in addition thereto a promise to pay: Meyer *v.* Zotel's Adm'r (1895), 96 Ky. 362, 29 S. W. 28.

Non-payment.

"Where the plaintiff has proved the existence of a debt sued on — at least within the period of statutory limitation, — the burden of proving payment is on the defendant. . . . The averment of non-payment, while necessary to make the complaint perfect upon its face, need not be proved by the plaintiff:" Hurley *v.* Ryan

(1902), 137 Cal. 461, 70 Pac. 292. See also Hurley *v.* Ryan (1897), 119 Cal. 71, 51 Pac. 20, and Dodge *v.* Kimple (1898), 121 Cal. 580, 54 Pac. 94, where the want of allegations of non-payment in actions on contract for money demands, were held fatal on general demurrer. See, to the same effect, Stanton *v.* Kenrick (1893), 135 Ind. 382, 35 N. E. 19, citing Smythe *v.* Scott, 106 Ind. 245, Higert *v.* Trustees, 53 Ind. 326; Wheeler, etc. Co. *v.* Worrall, 80 Ind. 297; and Brickey *v.* Irwin, 122 Ind. 51. In Baldwin *v.* Boyce (1898), 152 Ind. 46, 51 N. E. 334, facts alleged were held to constitute an inferential showing of non-payment, and were held sufficient. See also Hudelson *v.* First Nat. Bank (1897), 51 Neb. 557, 71 N. W. 304, for an excellent discussion of the subject, holding that non-payment must be alleged, although payment is an affirmative defence.

Ordinances.

A municipal ordinance may be pleaded by stating its substance and legal effect, without referring to its title or the date of its passage: Decker *v.* McSorley (1901), 111 Wis. 91, 86 N. W. 554; Moberly *v.* Hogan (1895), 131 Mo. 19, 32 S. W. 1014; Hirst *v.* Ringen Real Estate Co. (1902), 169 Mo. 194, 69 S. W. 368; Seattle *v.* Pearson (1896), 15 Wash. 575, 46 Pac. 1053. In Village of Fairmont *v.* Meyer (1901), 83 Minn. 456, 86 N. W. 457, held sufficient to describe the ordinance by its title and date of passage.

Partnership.

Where an action is brought in the name of the partners, and it is alleged that they jointly furnished the goods, it is not necessary to allege the partnership: Clark *v.* Wick (1894), 25 Ore. 446, 36 Pac. 165.

In an action by or against partners, it is not necessary that the title describe the parties as partners, and give the partnership name, if the facts appear in the complaint: Van Brunt & Co. *v.* Harrigan (1895), 8 S. D. 96, 65 N. W. 421. A statement in the bill of particulars that plaintiff is a partnership is sufficient: Biddle *v.* Spatz (1903), — Neb. —, 95 N. W. 357.

Under G. S. 1894, § 5177, an action will lie *against* the *partners* by their common name, though this statute does not authorize a suit to be brought *by* the *partners* in their common name nor against the *partnership* by the common name: Dimond *v.* Minnesota Sav. Bank (1897), 70 Minn. 298, 73 N. W. 182.

An allegation that a certain firm is a partnership organized and doing business in the State of Nebraska, is sufficient to authorize carrying the action under the firm name, under § 24 of the Code, and it need not be alleged that it is a Nebraska firm: Chamberlin Banking House *v.* Noyes (1902), — Neb. —, 92 N. W. 175. See also Winters *v.* Means (1897), 50 Neb. 209, 69 N. W. 753.

Where suit is brought in the partnership name, under R. S. § 5011, an averment as to who the partners are is mere surplusage: Phœnix Ins. Co. *v.* Carnahan (1900), 63 O. St. 258, 58 N. E. 805, citing Winters *v.* Means, 50 Neb. 209; Dimond *v.* Bank, 70 Minn. 298.

Passenger, Relation of.

An allegation in a petition against a street railway company for injuries, that plaintiff boarded a car with the intention of becoming a passenger, is not equivalent to an allegation that he was a passenger, since the law does not concern itself with mere intent not evidenced by an outward act: Raming *v.* Metropolitan St. Ry. Co. (1900), 157 Mo. 477, 57 S. W. 268. See also Southern Ry. Co. *v.* Dyson (1899), 109 Ga. 103, 34 S. E. 997, which holds that the ticket should be set out with sufficient fulness to show that plaintiff was lawfully a passenger.

Penalties, Actions for.

A complaint in an action for a statutory penalty, in the words of the statute, is sufficient. The court said: "To test the complaint in question in order to determine whether it states a cause of action, we must look to the statute creating the remedy, and not to the rules under the code which control pleadings in actions of common law origin:" Latshaw *v.* State (1900), 156 Ind. 194, 59 N. E. 471. In such an action the complaint should at least contain a reference to the statute creating and fixing such penalty: Kirby *v.* Western Union Tel. Co. (1894), 6 S. D. 1, 60 N. W. 152.

Performance.

In an action on a contract, a complaint which sets out the contract must allege

plaintiff's performance of its conditions: Ball *v.* Doud (1894), 26 Ore. 14, 37 Pac. 70. But a general allegation of performance is sufficient: Culbertson, etc. Power Co. *v.* Wildman (1895), 45 Neb. 663, 63 N. W. 947.

Possession.

In an action of forcible entry and detainer, an allegation that plaintiff was the owner of the fee of the property is not a sufficient allegation that plaintiff was in actual possession: McGrew *v.* Lamb (1903), 31 Wash. 485, 72 Pac. 100. An allegation that plaintiff and defendant were tenants in common of certain property is not an averment that they were in possession: Sterling *v.* Sterling (1903), 43 Ore. 200, 72 Pac. 741.

An allegation "that the plaintiff is now, and for more than fifteen years next prior to the date of this complaint has been, the owner in fee simple absolute, and in the actual, notorious and open possession of the following lands" (describing them), is a sufficient allegation of actual possession: Maggs *v.* Morgan (1903), 30 Wash. 604, 71 Pac. 188.

Quieting Title.

Plaintiff must allege that he is in *actual* possession of the land, the title to which is sought to be quieted: Cornelison *v.* Foushee (1897), 101 Ky. 257, 40 S. W. 680. A complaint was construed in Deacon *v.* Central Ia. Inv. Co. (1895), 95 Ia. 180, 63 N. W. 673, and held to state a cause of action to quiet title.

Facts must be alleged showing that title is in the plaintiff: Chapman *v.* Jones (1897), 149 Ind. 434, 47 N. E. 1065; Cooper *v.* Birch (1902), 137 Cal. 472, 70 Pac. 291. In the last case it was held that an allegation that plaintiff is the owner of a right to purchase is not equivalent to an allegation that plaintiff is owner of the land.

Ratification.

"We are of the opinion that, when the unauthorized agreement of an agent has been ratified by his principal, an action may be brought thereon, as though originally made by due authority, and that it is not necessary, in the first instance, to allege in the pleading the ratification, but that it may be shown in proof of the agreement:" Long *v.* Osborn (1894), 91 Ia. 160, 59 N. W. 14. See also Smith *v.* Des Moines Nat. Bank (1899), 107 Ia. 620 78 N. W. 238.

Receiver, Capacity of.

An averment "that said Luther Cummings was duly appointed and qualified as receiver of said association, and, among other things, was then and there, by said court, duly empowered, ordered, and directed to collect by suit, if necessary, all the claims due said association," was held a sufficient averment of the authority of the receiver to sue: Hatfield *v.* Cummings (1898), 152 Ind. 280, 50 N. E. 217. See also Hagerman *v.* Thomas (1901), — Neb. —, 96 N. W. 631.

Where a receiver brings an action in his own name, he must show by direct and positive averments that leave of court to institute and prosecute the action was first obtained: Hatfield *v.* Cummings (*supra*). See also Rhorer *v.* Middlesboro, etc. Co. (1898), 103 Ky. 146, 44 S. W. 448.

Reformation of Written Instrument.

In a suit to reform a written instrument, the plaintiff must set forth the terms of the original agreement, and also the agreement as reduced to writing, and point out clearly wherein there was a mistake: Citizens' Nat. Bank *v.* Judy (1896), 146 Ind. 322, 43 N. E. 259; Osborn *v.* Ketchum (1894), 25 Ore. 352, 35 Pac. 972; Sellwood *v.* Henneman (1900), 36 Ore. 575, 60 Pac. 12.

A general averment of mistake is insufficient: Knox *v.* Pearson (1902), 64 Kan. 711, 68 Pac. 613.

Replevin.

This action is not controlled by the ordinary rules of pleading: Woodbridge *v.* De Witt (1897), 51 Neb. 98, 70 N. W. 506. As to allegations of ownership in this action see subject "Title," *infra*, in this note. Replevin is a local action and the place should be alleged: Byers *v.* Ferguson (1902), 41 Ore. 77, 68 Pac. 5. An averment of wrongful possession implies an averment of right to possession: Grever & Sons *v.* Taylor (1895), 53 O. St. 621, 42 N. E. 829. It is not necessary to allege a right to *immediate* possession: Smith *v.* Wis. Inv. Co. (1902), 114 Wis. 151, 89 N. W. 829. Special damages must be al-

leged: Rosecrans *v.* Asay (1896), 49 Neb. 512, 68 N. W. 627; Armagost *v.* Rising (1898), 54 Neb. 763, 75 N. W. 534. In Bridges *v.* Thomas (1899), 8 Okla. 620, 58 Pac. 955, the court said: "While, under certain conditions, replevin will lie to recover possession of a building, a petition in replevin for the recovery of a building, in order to state a good cause of action, should specifically aver such a state of facts as will clearly show that such building is personal property, and that the plaintiff has a right to maintain the action. It is not sufficient to aver generally that such building is personal property." Syllabus by the court.

Seduction.

In Anthony *v.* Norton (1899), 60 Kan. 341, 56 Pac. 529, it was held, that under the general code provisions abolishing the old system of pleading, with its fictions and feigned issues, "a parent may maintain an action for the seduction of the daughter without averment or proof of loss of services or expenses of sickness." See also Snider *v.* Newell (1903), 132 N. C. 614, 44 S. E. 354.

Statute of Frauds, Contracts within.

It is not necessary, in suing on a contract within the statute of frauds, to allege that it is in writing, as it will be presumed to be written: Sowards *v.* Moss, (1899), 58 Neb. 119, 78 N. W. 373; Draper *v.* Macon Dry Goods Co. (1898), 103 Ga. 661, 30 S. E. 566; Bluthenthal *v.* Moore (1898), 106 Ga. 424, 32 S. E. 344; Walker *v.* Edmundson (1900), 111 Ga. 454, 36 S. E. 800; Taliaferro *v.* Smiley (1900), 112 Ga. 62, 37 S. E. 106; Sundback *v.* Gilbert (1896), 8 S. D. 359, 66 N. W. 941; Ruth *v.* Smith (1901), 29 Colo. 154, 68 Pac. 278; Kilpatrick-Koch Dry Goods Co. *v.* Box (1896), 13 Utah, 494, 45 Pac. 629; Bradford Inv. Co. *v.* Joost (1897), 117 Cal. 204, 48 Pac. 1083; Suber *v.* Richards (1901), 61 S. C. 393, 39 S. E. 540; Matthews *v.* Matthews (1897), 154 N. Y. 288, 48 N. E. 531; York Park Bldg. Ass'n *v.* Barnes (1894), 39 Neb. 834, 58 N. W. 440.

But see, for the contrary doctrine, Lowe *v.* Turpie (1896), 147 Ind. 652, 44 N. E. 25; Horner *v.* McConnell (1902), 158 Ind. 280, 63 N. E. 472; Morgan *v.* Wickliffe (1901), 110 Ky. 215, 61 S. W. 13; Graves *v.* Clark (1897), 101 Ia. 738, 69 N. W. 1046; Powder River Live Stock Co. *v.* Lamb (1893), 38 Neb. 339, 56 N. W. 1019.

Statutes.

Public statutes need not be pleaded, as courts are bound to take judicial notice of them: Ervin *v.* State *ex rel.* (1897), 150 Ind. 332, 48 N. E. 249. But private statutes must be pleaded: Nichols *v.* Bardwell Lodge (1898), 105 Ky. 168, 48 S. W. 426.

It is not necessary to formally conclude a complaint with the words, "against the form of the statute in such case made and provided," in case of a general statute: State *v.* Owsley (1895), 17 Mont. 94, 42 Pac. 105.

In McCullough *v.* Colfax County (1903), — Neb. — , 95 N. W. 29, the court said: "Where the statutes give a new remedy and prescribe prerequisite conditions, or if an action of a certain class against certain parties be authorized only after the performance of similar conditions, the performance of these conditions, whether the right of action exists at common law or is created by statute, must be alleged in the complaint and proved at the trial. And where the plaintiff wishes to avail himself of a statutory privilege or right founded upon particular facts, he must state those facts in his complaint. . . . Pleading the statute is stating the facts which bring the case within it, and counting upon it, in the strict language of pleading, is making express reference to it by apt terms to show the source of right relied on. . . . A general averment of the performance of conditions precedent is sufficient in case of contract, but in all other cases the facts showing a performance must be specially pleaded."

Stockholders, Action against.

For essential allegations see Hirshfeld *v.* Bopp (1895), 145 N. Y. 84, 39 N. E. 817.

Surgeon, Qualifications of.

A veterinary surgeon, in suing for services, need not allege that he was licensed as a veterinary surgeon: Lyford *v.* Martin (1900), 79 Minn. 243, 82 N. W. 479.

Tender.

In an action to restrain the collection of taxes on the ground that they are ex-

cessive, an allegation that plaintiff tendered to the tax collector a certain amount conceded by him to be due, which the collector refused to receive, is insufficient without a further allegation that such tender was kept good by depositing the money in court: Welch *v.* City of Astoria (1894), 26 Ore. 89, 37 Pac. 66. See, to same effect, Jacobs *v.* Oren (1897), 30 Ore. 593, 48 Pac. 431. See also Angier *v.* Equitable Bldg. Ass'n (1899), 109 Ga. 625, 35 S. E. 64; Underwood *v.* Tew (1893), 7 Wash. 297, 34 Pac. 1100.

Time.

"Generally, the time at which a material fact occurred is unimportant, and therefore need not be averred. In such cases the fact only is essential, and the date of no importance; but there are cases where time is vital to the right to recover, and in such exceptional cases the fact is unimportant, unless coupled with a statement of the date of its occurrence. In such cases it is elementary that an averment of time is essential, and the time must be truthfully stated:" Clyde *v.* Johnson (1894), 4 N. D. 92, 58 N. W. 512.

For cases where it was held that the time was immaterial, and need not be proved as laid, see p. 569, note 1.

Title.

A general allegation of ownership is sufficient as against a general demurrer: Fisher *v.* Bouisson (1893), 3 N. D. 493, 57 N. W. 505; Shannon *v.* Grindstaff (1895), 11 Wash. 536, 40 Pac. 123; Reed *v.* McRill (1894), 41 Neb. 206, 59 N. W. 775; Kavanaugh *v.* Oberfelder (1893), 37 Neb. 647, 56 N. W. 316; Bennett *v.* Lathrop (1899), 71 Conn. 613, 42 Atl. 634; Carter *v.* Wakeman (1902), 42 Ore. 147, 70 Pac. 393; Hague *v.* Niphi Irrigation Co. (1898), 16 Utah, 421, 52 Pac. 765; Osborne & Co. *v.* Stevens (1896), 15 Wash. 478, 46 Pac. 1027; Peoria, etc. Ry. Co. *v.* Attica, etc. Ry. Co. (1899), 154 Ind. 218, 56 N. E. 210; First Nat. Bank *v.* Ragsdale (1900), 158 Mo. 668, 59 S. W. 987; Duzan *v.* Meserve (1893), 24 Ore. 523, 34 Pac. 548; Atwater *v.* Spalding (1902), 86 Minn. 101, 90 N. W. 370; McArthur *v.* Clark (1902), 86 Minn. 165, 90 N. W. 369.

While a plaintiff in ejectment need not plead her title, if she chooses to do so she is bound by her pleading and cannot prove a title from a different source: Utassy *v.* Giedinghagen (1895), 132 Mo. 53, 33 S. W. 444.

An allegation that at a certain past time plaintiff was the owner of certain property, is not equivalent to an allegation of present ownership: Ryan *v.* Spieth (1896), 18 Mont. 45, 44 Pac. 403; Irish *v.* Sunderhaus (1898), 122 Cal. 308, 54 Pac. 1113. In the last case it was held that the presumption of continuance is a rule of evidence and not of pleading.

An allegation that plaintiff owns the right to purchase certain lands is not equivalent to an allegation that he is the owner of the lands: Cooper *v.* Birch (1902), 137 Cal. 472, 70 Pac. 291. In an action by the indorsee of a promissory note payable to order, an allegation that the note was "sold, assigned and delivered" to plaintiff was held sufficient to admit evidence that it was indorsed to him: Red River Valley Investment Co. *v.* Cole (1895), 62 Minn. 457, 64 N. W. 1149. An allegation "that the store or place of business of plaintiffs is situated on" a named street, held a sufficient allegation of ownership as against a general demurrer: Brunswick & Western R. R. Co. *v.* Hardey (1900), 112 Ga. 604, 37 S. E. 888. An allegation that plaintiff "has lawful title" to the described premises, is an allegation of fact and not a conclusion: Livingstone *v.* Ruff (1903), — S. C. —, 43 S. E. 678. An allegation that county warrants were issued and delivered to a certain person, is sufficient to show that he is the present owner of them: Dorothy *v.* Pierce (1895), 27 Ore. 373, 41 Pac. 668. An allegation that certain land on a certain date "was the property of O. D. Parry," is a sufficient averment of ownership in fee simple: Grace *v.* Ballou (1893), 4 S. D. 333, 56 N. W. 1075. An allegation that certain land "is held and claimed by her as her own, and was so held and claimed by her prior to the institution of this action" is not a sufficient allegation of title: DeHaven *v.* DeHaven's Adm'r (1898), 104 Ky. 41, 46 S. W. 215.

"Where a note has passed through the hands of several successive transferees, a plaintiff may ignore all intermediate transfers not necessary to show his title, and allege a transfer by the payee directly

to himself:" Crosby *v.* Wright (1897), 70 Minn. 251, 73 N. W. 162.

Defect of title is not sufficiently alleged by the statement that the grantors "were not seized in fee or possessed of the right to sell and convey" the premises in controversy: Decker *v.* Schulze (1895), 11 Wash. 47, 39 Pac. 261.

In an action on a promissory note payable to the order of a third party, a mere allegation that the plaintiff "is now the owner and holder" is not a sufficient allegation of title in the plaintiff. The court said: "We have frequently held that, where a party does not attempt to set up the source of his title to chattel or real property, a general allegation of ownership is sufficient, and will be deemed an allegation of an ultimate fact, and not of a mere conclusion of law. But we have never held that, if he alleged title to have been in a third party, it would be sufficient to then allege that he was now the owner, without alleging a transfer from such party to himself:" Topping *v.* Clay (1895), 62 Minn. 3, 63 N. W. 1038.

"Where a party relies upon his title, as obtained by prescription, he must allege the facts showing the existence of the right, or plead the prescriptive right, averring that the existence of the right was under a claim of right, was peaceable, without interruption, and open, notorious and exclusive:" Larsen *v.* Onesite (1900), 21 Utah, 38, 59 Pac. 234; Coleman *v.* Hines (1902), 24 Utah, 360, 67 Pac. 1122.

The word "owner" includes any person who has usufruct, control or occupation of real estate, and such a person may properly allege himself to be the owner of the property in an action of ejectment: Parker *v.* Minneapolis, etc. R. R. Co. (1900), 79 Minn. 372, 82 N. W. 673.

Where plaintiff in replevin relies upon a special ownership, the facts showing it must be alleged: Hill *v.* Campbell Commission Co. (1898), 54 Neb. 59, 74 N. W. 388; Raymond *v.* Miller (1897), 50 Neb. 506, 70 N. W. 22; Thompson & Sons Mfg. Co. *v.* Nicholls (1897), 52 Neb. 312, 72 N. W. 217; Paxton *v.* Learn (1898), 55 Neb. 459, 75 N. W. 1096; Meyer *v.* First Nat. Bank (1902), 63 Neb. 679, 88 N. W. 867; Musser *v.* King (1894), 40 Neb. 892, 59 N. W. 744; Sharp *v.* Johnson (1895), 44 Neb. 165, 62 N. W. 466; Camp *v.* Pollock (1895), 45 Neb. 771, 64 N. W. 231; Strahle *v.* First Nat. Bank (1896), 47 Neb. 319, 66 N. W. 415; Norcross *v.* Baldwin (1897), 50 Neb. 885, 70 N. W. 511; Griffing *v.* Curtis (1897), 50 Neb. 334, 69 N. W. 964; Hudelson *v.* First Nat. Bank (1897), 51 Neb. 557, 71 N. W. 304; Elliott *v.* First Nat. Bank (1902), 30 Colo. 279, 70 Pac. 421; Lovell *v.* Hammond Co. (1895), 66 Conn. 500, 34 Atl. 511; Kennett *v.* Peters (1894), 54 Kan. 119, 37 Pac. 999; Suckstorf *v.* Butterfield (1898), 54 Neb. 757, 74 N. W. 1076; Wilson *v.* City Nat. Bank (1897), 51 Neb. 87, 70 N. W. 501.

Under Code Civ. Pro. § 129 (similar to the statutes of several other States, for which see p. 438, note 2), no averment of title is necessary: Pollock *v.* Stanton County (1899), 57 Neb. 399, 77 N. W. 1081.

In an action by a creditor to reach land conveyed by one other than the debtor, on the ground that the debtor owns the equitable title, the facts showing the debtor's ownership should be alleged: Bevins *v.* Eisman (1900), Ky., 56 S. W. 410.

Title by adverse possession may be pleaded by alleging that plaintiff "occupied" the land for the necessary time, without alleging "actual possession." Hall *v.* Roberts (1903), Ky., 74 S. W. 199.

A petition claiming that plaintiff is heir of W. and as such entitled to certain land, is insufficient unless facts are stated showing the heirship: Craig *v.* Welch-Hackley Coal & Oil Co. (1903), Ky., 74 S. W. 1097.

Trespass.

As to who may maintain an action for trespass, see Casey *v.* Mason (1899), 8 Okla. 665, 59 Pac. 252; Chicago, R. I. & Pac. Ry. Co. *v.* Shepherd (1894), 39 Neb. 523, 58 N. W. 189.

In Meyers *v.* Menter (1902), 63 Neb. 427, 88 N. W. 662, the allegations of the petition were considered and held to state a cause of action for wilful trespass.

In an action to enjoin the commission of trespasses, it is not sufficient to plead the trespasses in general terms: Wilkeson, etc. Co. *v.* Driver (1894), 9 Wash. 177, 37 Pac. 307.

"In an action for trespass the plaintiff may charge and prove all the circumstances accompanying the act, and which were a part of the *res gestæ*, in order to show the temper and purpose with which

the trespass was committed, and the extent of the injury, under the rule that a series of unlawful acts, all aimed at a single result, and contributing to the injury complained of, may be averred in the complaint without violating the rule against duplicity:" Bingham *v.* Lipman (1902), 40 Ore. 363, 67 Pac. 98.

Value.

Allegations of value are not considered true by failure of defendant to deny them: Derrick *v.* Cole (1894), 60 Ark. 394, 30 S. W. 760; Campbell *v.* Brosius (1893), 36 Neb. 792, 55 N. W. 215.

In a petition to recover the value of shares of stock, an allegation that the corporation stock "is divided into 100,000 shares of the par value of one dollar each," is not an allegation of the value of the stock: Mining Co. *v.* Huff (1901), 62 Kan. 405, 63 Pac. 442. And the allegation "that the actual cost of making such wharf was $2,745, said sum being the value thereof as contemplated by the contract," is not a sufficient allegation of value, the words "as contemplated by the contract" rendering it defective: Hart Lumber Co. *v.* Everett Land Co. (1898), 20 Wash. 71, 54 Pac. 767. See also Plumb *v.* Griffin (1901), 74 Conn. 132, 50 Atl. 1.

Waiver.

Waiver of conditions precedent must be specially pleaded in order to be available: Burlington Ins. Co. *v.* Campbell (1894), 42 Neb. 208, 60 N. W. 599; Anders *v.* Life Ins. Co. (1901), 62 Neb. 585, 87 N. W. 331; Hartford Fire Ins. Co. *v.* Landfare (1902), 63 Neb. 559, 88 N. W. 779; Gillett *v.* Ins. Co. (1894), 53 Kan. 108, 36 Pac. 52; Hannan *v.* Greenfield (1899), 36 Ore. 97, 58 Pac. 888; Long Creek Bldg. Ass'n *v.* State Ins. Co. (1896), 29 Ore. 569, 46 Pac. 366; Closz *v.* Miracle (1897), 103 Ia. 198, 72 N. W. 502; Hensinkveld *v.* St. Paul, etc. Ins. Co. (1895), 96 Ia. 224, 64 N. W. 769; Heusinkveld *v.* Capital Ins. Co. (1895), 95 Ia. 504, 64 N. W. 594.

On the other hand, it is held in some States that waiver need not be pleaded, but may be shown under an allegation of full performance: Foster *v.* Fidelity, etc. Co. of New York (1898), 99 Wis. 447, 75 N. W. 69; Stephens *v.* Union Assurance Co. (1897), 16 Utah, 22, 50 Pac. 626; Duff *v.* Fire Ass'n (1895), 129 Mo. 460, 30 S. W. 1034; James *v.* Mutual Life Ass'n (1899), 148 Mo. 1, 49 S. W. 978; Nickell *v.* Phœnix Ins. Co. (1898), 144 Mo. 420, 46 S. W. 435; McCullough *v.* Phœnix Ins. Co., 113 Mo. 606; West *v.* Norwich Union Fire Ins. Co. (1894), 10 Utah, 442, 37 Pac. 685.

See also Reisz *v.* Supreme Council (1899), 103 Wis. 427, 79 N. W. 430, holding that the introduction of evidence of waiver where same is not pleaded is not material error. Also Deuster *v.* Mittag (1900), 105 Wis. 459, 81 N. W. 643.

It is proper to plead a waiver as such rather than to set up the matters which give rise to it by way of estoppel: Hughes *v.* Lansing (1898), 34 Ore. 118, 55 Pac. 95. A general allegation is sufficient if not objected to seasonably: Barrett *v.* Des Moines, etc. Ins. Co. (1903), 120 Ia. 184, 94 N. W. 473.

Wantonness.

This, as distinguished from negligence, must be alleged in order to admit proof of it: Holwerson *v.* St. Louis, etc. Ry. Co. (1900), 157 Mo. 216, 57 S. W. 770; McClellan *v.* Chippewa Valley Elec. Ry. Co. (1901), 110 Wis. 326, 85 N. W. 1018. See Ullrich *v.* Cleveland, etc. Ry. Co. (1898), 151 Ind. 358, 51 N. E. 95, for a full discussion of the facts necessary to constitute a good complaint on the ground of wilful killing. See also Proctor *v.* Southern Ry. Co. (1901), 61 S. C. 170, 39 S. E. 351; Schumpert *v.* Southern Ry. Co. (1903), — S. C. —, 43 S. E. 813; Stembridge *v.* Southern Ry. Co. (1903), — S. C. —, 43 S. E. 968; all of which are based on the act of 1898, which allows the commingling in one count of acts of negligence and wilful wrong.

In Stembridge *v.* Southern Ry. Co. (1903), — S. C. —, 43 S. E. 968, the court said: "A cause of action for punitive or exemplary damages does not at all consist in claiming such damages *eo nomine*, but consists in a statement of such acts of wanton or wilful wrongs as would justify the imposition of such damages within the sum demanded in the complaint."

Written Instrument.

"If the written statement was the basis of the appellant's rights, as contended in his behalf, we know of no reason for ad-

mitting it without pleading it, either in the form in which it was written, or for enforcement in a reformed condition:" Durflinger *v.* Baker (1897), 149 Ind. 375, 49 N. E. 276.

"Where a contract consists of an oral agreement, a part of which only has been reduced to writing, it is proper to allege in the complaint, as a basis for the recovery of damages resulting from its breach, the execution of a parol agreement:" American Contract Co. *v.* Bullen Bridge Co. (1896), 29 Ore. 549, 46 Pac. 138.

"Where the allegations in a pleading vary from the provisions of the instrument upon which it is founded, the provisions of such instrument control, and such allegations will be disregarded:" Citing Stengel *v.* Boyce, 143 Ind. 642; Harrison Bldg. Co. *v.* Lackey (1897), 149 Ind. 10, 48 N. E. 254.

See cases cited under Statute of Frauds, *supra*, in this note.

CHAPTER FOURTH.

THE DEFENSIVE SUBJECT-MATTER OF THE ACTION; THE FORMAL PRESENTATION OF HIS DEFENCE, OR OF HIS CLAIM FOR AFFIRMATIVE RELIEF, BY THE DEFENDANT.

SECTION FIRST.

STATUTORY PROVISIONS CONCERNING MATTERS OF DEFENCE.

§ 472. * 581. **Statutory Provisions Relating to Answers.** I collect together in one group all the sections of the various codes relating to the nature and contents of the answer, including denials, new matter, counter-claims, set-offs, affirmative relief, and cross-complaints. The clause defining the answer, and describing its contents, is substantially the same, with some unimportant variations, in all the codes; the principal, and indeed only, material differences are found in the provisions relating to counter-claims and cross-demands generally. The following are the sections which determine generally the nature of the answer as a pleading.

"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." In a few States the foregoing description is employed, with slight verbal changes, and to it is added another subdivision. The sections, as found in these codes, are given at large in the foot-note.[1]

[1] [*Arizona.* "The defendant in his answer may plead as many defences as he may have; but such pleas must be separately stated in one answer, filed at the same time and in the following order: (1) Denying the jurisdiction of the court, (2) In abatement of the suit, (3) To strike from the complaint irrelevant, redundant or uncertain matter, (4) To make the complaint definite and certain, (5) Demurrer, (6) In bar of the right to sue, (7) Denying the facts constituting the cause of action, (8) Set-off and counter-claim." Rev. St., 1901, § 1350.

Arkansas. "The answer shall contain: (1) The style of the court and the style of the action, followed by the word 'answer.' But where there are several plaintiffs and defendants, it shall only be necessary to give the one first named of each class, with the words 'and others.' (2) A denial of each allegation of the complaint contro-

§ 473. *582. **Statutory Provisions Respecting Union of Defences.** The provisions relating to the union of various defences, legal

verted by the defendant, or of any knowledge or information thereof, sufficient to form a belief. (3) A statement of any new matter constituting a defence, counter-claim or set-off, in ordinary and concise language, without repetition. (4) The defendant may set forth in his answer as many grounds of defence, counter-claim and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered. The several defences must refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished." Sand. & Hill's Dig., § 5722.

California. "The answer of the defendant shall contain: (1) A general or specific denial of the material allegations of the complaint controverted by the defendant. (2) A statement of any new matter constituting a defence or counter-claim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint." Code Civ. Pro., § 437.

Colorado. "The answer of the defendant shall contain: First, a general or specific denial of each material allegation in the complaint intended to be controverted by the defendant; second, a statement of any new matter constituting a defence, or counter-claim, in ordinary and concise language, without unnecessary repetition. In denying any allegation in the complaint not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegations in issue, for the defendant to state, as to such allegation, that he has not and cannot obtain sufficient knowledge or information upon which to base a belief." Code, 1890, § 56.

Connecticut. "The defendant in his answer shall specially deny such allegations of the complaint as he intends to controvert, admitting the truth of the other allegations, unless he intends, in good faith, to controvert all the allegations, in which case he may deny them generally, as follows: 'The defendant denies the truth of the matters contained in the plaintiff's complaint.' He may also, in his answer, state special matters of defence, and shall not give in evidence matter in avoidance, or of defence, consistent with the truth of the material allegations of the complaint, unless in his answer he states such matter specially. Under a general denial the plaintiff shall be bound to prove the material facts alleged in the complaint. If the defendant intends to controvert the right of the plaintiff to sue as an executor, or as trustee, or in any other representative capacity, or as a corporation, or to controvert the execution or delivery of any written instrument or recognizance sued upon, he shall deny the same in his answer specifically." Gen. St., 1902, § 609.

Georgia. "A defendant may either demur, plead or answer to the petition, or may file one or more, or all of these defences at once, without waiving the benefit of either, or he may file two or more pleas to the same action. In all cases demurrer, pleas and answer shall be disposed of in the order named; and all demurrers and pleas shall be filed and determined at the first term, unless continued by the court, or by consent of parties." "In all cases when the defendant desires to make a defence by plea or otherwise he shall therein distinctly answer each paragraph of plaintiff's petition, and shall not file a mere general denial, commonly known as the plea of 'general issue.' He may in a single paragraph deny any or all of the allegations, or in a single paragraph admit any or all of the allegations in any or all of the paragraphs of the petition." "Under a denial of the allegations of the plaintiff's declaration, no other defence is admissible except such as disproves the plaintiff's cause of action; all other matters in satisfaction or avoidance must be specially

or equitable, or both, and of various counter-claims, in the same answer, are similar in all the codes, with unimportant variations,

pleaded." Code, 1895, §§ 5047, 5051, 5053.

Idaho. Identical with the California Statute. Code Civ. Pro., 1901, § 3211.

Indiana. "The answer shall contain — *First.* A denial of each allegation of the complaint controverted by the defendant. *Second.* A statement of any new matter constituting a defence, counter-claim or set-off, in plain and concise language. *Third.* The defendant may set forth in his answer as many grounds of defence, counter-claim, and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered." Burns' St, 1901, § 350.

Iowa. "The answer shall contain: (1) The name of the court and county, and of the plaintiffs and defendants, but when there are several plaintiffs and defendants it shall only be necessary to give the first name of each class, with the words 'and others;' (2) A general denial of each allegation of the petition, or of any knowledge or information thereof sufficient to form a belief; (3) A special denial of each allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (4) A statement of any new matter constituting a defence; (5) A statement of any new matter constituting a counter-claim. The defendant may set forth in his answer as many causes of defence or counter-claim, whether legal or equitable, as he may have." Code, 1897, § 3566.

Kansas. "The answer shall contain: *First*, A general or specific denial of each material allegation of the petition controverted by the defendant. *Second*, A statement of any new matter constituting a defence, counter-claim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition. *Third*, When relief is sought, the nature of the relief to which the defendant supposes himself entitled. The defendant may set forth in his answer as many grounds of defence, counter-claim, set-off, and for relief, as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. Each must be separately stated and numbered, and they must refer in an intelligible manner to the causes of action which they are intended to answer." Code, 1901, § 94.

Kentucky. "The answer may contain — (1) A traverse. (2) A statement of facts which constitute an estoppel against, or avoidance of, a cause of action stated in the petition. (3) A statement of facts which constitute a set-off or counter-claim. (4) A cross-petition." Code, 1895, § 95.

Minnesota. "The answer of the defendant shall contain: First. A denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; Second. A statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition. Third. All equities existing at the time of the commencement of any action, in favor of a defendant therein, or discovered to exist after such commencement, or intervening before a final decision in such action. And if the same are admitted by the plaintiff, or the issue thereon is determined in favor of the defendant, he shall be entitled to such relief, equitable or otherwise, as the nature of the case demands, by judgment or otherwise." St., 1894, § 5236.

Missouri. Same as the provisions quoted in the text. Rev. St., 1899, § 604.

Montana. "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, or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer. (2) A statement of any new matter constituting a defence or counter-claim." Code, 1895, § 690.

Nebraska. "The answer shall contain:

and are as follows: "The defendant may set forth, by answer, as many defences and counter-claims as he may have, whether they

First — A general or specific denial of each material allegation of the petition controverted by the defendant. *Second* — A statement of any new matter constituting a defence, counter-claim or set-off, in ordinary and concise language, and without repetition." "The defendant may set forth in his answer as many grounds of defence, counter-claim and set-off as he may have. Each must be separately stated and numbered and they must refer in an intelligible manner to the cause of action which they are intended to answer." Code, 1901, §§ 99, 100.

Nevada. "The answer of the defendant shall contain: First — If the complaint be verified, a special denial of each allegation of the complaint, controverted by the defendant, or a denial thereof according to his information and belief; if the complaint be not verified, then a general denial to each of such allegations; but a general denial shall only put in issue the material and express allegations of the complaint. Second — A statement of any new matter or counter-claim, constituting a defence, in ordinary and concise language." Comp. Laws, 1900, § 3141.

New York. Identical with the provisions quoted in the text. Code Civ. Pro., § 500.

North Carolina. Identical with the provisions quoted in the text, Code, § 100.

North Dakota. Identical with the provisions quoted in the text. Rev. Codes, 1899, § 5273.

Ohio. "The answer shall contain — (1) A general or specific denial of each material allegation of the petition controverted by the defendant. (2) A statement of any new matter constituting a defence, counter-claim, or set-off, in ordinary and concise language. (3) When a defendant seeks affirmative relief therein, a demand for the relief to which he supposes himself entitled." "The defendant may set forth in his answer as many grounds of defence, counter-claim, and set-off as he may have, whether they are such as have heretofore been denominated legal or equitable, or both; but the several defences must be consistent with each other, and each must refer in an intelligible manner to the cause of action which it is intended to answer." "When the answer contains more than one defence, counter-claim, or set-off, they must be separately stated and consecutively numbered." Bates' St., 1903, §§ 5066, 5067, 5068.

Oklahoma. Identical with the Kansas statute. St., 1893, § 3972.

Oregon. "The answer of the defendant shall contain, — (1) A 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." Hill's Laws, § 72.

South Carolina. Identical with the provisions quoted in the text. Code, 1893, § 170.

South Dakota. Identical with the provisions quoted in the text. Ann. St., 1901, § 6120.

Utah. Identical with the Montana statute. Rev. St., 1898, § 2968.

Washington. Identical with the provisions quoted in the text. Bal. Code, § 4912.

Wisconsin. Identical with the provisions quoted in the text. St., 1898, § 2655.

Wyoming. "The answer shall contain: (1) A general or specific denial of each material allegation of the petition controverted by the defendant; (2) a statement of any new matter constituting a defence, counter-claim or set-off, in ordinary and concise language." "The defendant may set forth in his answer as many grounds of defence, counter-claim and set-off, as he has, whether they are such as have been heretofore denominated legal or equitable, or both; he may claim therein relief touching the matters in question in the petition against the plaintiff, or against other defendants in the same action; and each must be separately stated and numbered, and they must refer in an intelligible manner to the causes of action which they are intended to answer." Rev. St., 1899, §§ 3543, 3544.]

be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished." Another form found in several codes is, "The defendant may set forth, by answer, as many grounds of defence, counter-claim, or set-off, as he may have, whether legal or equitable, or both." [1]

[1] [*Arizona.* See note to § * 581, *supra.*

Arkansas. See note to § * 581, *supra.*

California. "The defendant may set forth by answer as many defences and counter-claims as he may have. They must be separately stated, and the several defences must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue." Code Civ. Pro., § 441.

Colorado. "The defendant may set forth by answer as many defences and counter-claims as he may have, whether the subject matter of such defences be such as was heretofore denominated legal or equitable, or both, they shall be separately stated, and the several defences shall refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished." Code, 1890, § 59.

Connecticut. See note to § * 581, *supra.* Also Gen. St., 1902, § 612. These provisions differ widely from those in most of the code States; *Georgia.* See note to § 581, *supra; Idaho.* Identical with the California statute. Code Civ. Pro., 1901, § 3215; *Indiana.* See note to § * 581, *supra.*

Iowa. See note to § * 581, *supra.* "Each affirmative defence shall be stated in a distinct division of the answer, and must be sufficient in itself, and must intelligibly refer to that part of the petition to which it is intended to apply." Code, 1897, § 3568.

Kansas. See note to § * 581, *supra.*

Kentucky. "(2) A pleading may contain statements of as many causes of action, legal or equitable, and of as many matters of estoppel and of avoidance, legal or equitable, total or partial; and may make as many traverses; and may present as many demurrers, as there may be grounds for in behalf of the pleader. (3) If there be more than one, each must be distinctly stated in a separate, numbered paragraph; and either, which is intended to respond to part only of an adverse pleading, must show to what part it is responsive. It is the duty of the court, upon or without motion, to enforce these provisions; and for that purpose, to dismiss an action without prejudice, or to strike a pleading, or any part thereof, from the case, or to allow a new pleading. (4) If, however, a party file a pleading which contains inconsistent statements, or statements inconsistent with those of a pleading previously filed by him in the action, he shall, upon or without motion, be required to elect which of them shall be stricken from his pleading. But a party may allege, alternatively, the existence of one or another fact, if he state that one of them is true, and that he does not know which of them is true. . . . (7) A traverse is a denial, by a party, of facts alleged in an adverse pleading, if they be presumptively within his knowledge; or a denial of them, or a denial that he has sufficient knowledge or information to form a belief concerning them, if they be not presumptively within his knowledge." Code, 1895, § 113.

Minnesota. Identical, with very slight verbal changes, with the California statute. St., 1894, § 5239.

Missouri. "The defendant may set forth by answer as many defences and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, in such manner that they may be intelligibly distinguished, and refer to the cause of ac

§ 474. *583. **Same Subject.** Most of the codes are in substantial agreement as to the nature and object of the counter-claim. In a few, however, there is a departure from this common type; and in some there are special clauses relating to set-off as a form of defence different from the counter-claim. All these statutory provisions are collected in the text or in the notes. The following definition has been adopted in a majority of the States: "The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." The corresponding sections in the codes of Indiana and of Iowa are, however, quite different, and are given at length in the foot-note. It will be seen that they enlarge the scope of the counter-claim,

tion which they are intended to answer." Part of § 605, Rev. St., 1899.

Montana. "A defendant may set forth, in his answer, as many defences or counter-claims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defence or counter-claim must be separately stated and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer." Code, 1895, § 699.

Nebraska. See note to § *581, *supra.*

Nevada. Identical with the first two sentences of the California statute. Comp. Laws, 1900, § 3144.

New York. Identical with the Montana statute. Code Civ. Pro., § 507.

North Carolina. Identical with the provision first quoted in the text. Code, § 102.

North Dakota. Identical with the provision first quoted in the text. Rev. Codes, 1899, § 5274, subdiv. 2.

Ohio. See note to § *581, *supra.*

Oklahoma. See note to § *581, *supra.*

Oregon. Identical, except for very slight verbal changes, with the first two sentences of the California statute. Hill's Laws, § 73, subdiv. 2.

South Carolina. Identical with the provision first quoted in the text. Code, 1893, § 171, subdiv. 2.

South Dakota. Identical with the provision first quoted in the text. Ann. St., 1901, § 6121, subdiv. 2.

Utah. "The defendant may set forth by answer as many defences and counter-claims, legal or equitable, or both, as he may have. They must be separately stated, and the several defences must refer to the causes of action which they are intended to answer in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue, or may demur and answer at the same time." Rev. St., 1898, § 2972.

Washington. Identical with the provision first quoted in the text. Bal. Code, § 4913a.

Wisconsin. Identical, except for a very slight verbal change, with the provision first quoted in the text. St., 1898, § 2657.

Wyoming. See note to § *581, *supra.*]

and that, in Iowa, the restriction as to parties is very much modified.[1]

[1] [*Arizona.* See Rev. St., 1901, §§ 1360, 1363, 1365, 1366, which relate to counter-claims, but differ radically from the provisions quoted in the text.

Arkansas. "The counter-claim mentioned in this chapter must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action." Sand. & Hill's Dig., § 5723.

California. Identical with the provisions quoted in the text. Code Civ. Pro., § 438.

Colorado. "The counter-claim mentioned in the last section shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant between whom a several judgment might be had in the action, and arising out of one of the following causes of action: First, a cause of action arising out of the transaction set forth in the complaint or answer, as the foundation of the plaintiff's claim or the defendant's defence, or connected with the subject of the action. Second [same as subdivision 2 of text]." Code, 1890, § 57.

Connecticut. "In cases where the defendant has either in law or in equity, or in both, a counter-claim, or right of set-off, against the plaintiff's demand, he may have the benefit of any such set-offs or counter-claims by pleading the same, as such, in his answer, and demanding judgment accordingly; and the same shall be pleaded and replied to, according to the rules governing complaints and answers; provided that no counter-claim, set-off, or defense, merely equitable, shall be available in actions before justices of the peace." Gen. St., 1902, § 612.

Idaho. Identical with the provisions set out in the text. Code Civ. Pro., 1901, § 3212.

Indiana. "A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages." Burns' St., 1901, § 353.

Iowa. "Each counter-claim must be stated in a distinct count or division, and must be: (1) When the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court; (2) A cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition or connected with the subject of the action; (3) Any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff, or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held, either matured or not, if matured when so plead." Code, 1897, § 3570.

Kansas. "The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. The right to relief concerning the subject of the action mentioned in the same section must be a right to relief necessarily or properly involved in the action for a complete determination thereof, or settlement of the question involved therein." Code, 1901, § 94.

Kentucky. "A counter-claim is a cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of the contract, or transaction, stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action." Code, 1895, § 96.

Minnesota. Identical with the provisions quoted in the text. St., 1894, § 5237.

Missouri. Identical with the provisions quoted in the text. Rev. St., 1899, § 605.

Montana. "The counter-claim specified in the last section must tend, in some way, to diminish or defeat the plaintiff's

§ 475. *584. **Statutes Providing for Set-off.** The "set-off," well known prior to the new system of procedure, and which had been defined and regulated by previous statutes, English and American, is clearly embraced within the second subdivision of the section, as stated in the text, and as found in the codes of New York and of the States which have closely followed that original type. In certain States, however, a special provision is inserted in the codes defining the "set-off," of which the following is the common form: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising on contract, or

recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action. [The remainder practically identical with the two subdivisions quoted in the text.]" Code, 1895, § 691.

Nebraska. "The counter-claim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Code, 1901, § 101.

Nevada. Identical with the statute set out in the text. Comp. Laws, 1900, § 3142.

New York. Identical with the Montana statute. Code Civ. Pro., § 501.

North Carolina. Identical with the statute set out in the text. § 101.

North Dakota. Identical with the statute set out in the text. Rev. Codes, 1899, § 5274.

Ohio. "A counter-claim is a cause of action existing in favor of a defendant, and against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Bates' St., 1903, § 5069.

Oklahoma. Identical with the Kansas statute. St., 1893, § 3973.

Oregon. "The counter-claim mentioned in section 72 must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract, or transaction set forth in the complaint as the foundation of the plaintiff's claim; (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." Hill's Laws, § 73.

South Carolina. Identical with the statute set out in the text. Code, 1893, § 171.

South Dakota. Identical with the statute set out in the text. Ann. St., 1901, § 6121.

Utah. Identical with the statute set out in the text. Rev. St., 1898, § 2969.

Washington. Identical with the statute set out in the text. Bal. Code, § 4913.

Wisconsin. Identical with the statute set out in the text, with the following clauses added: "3. Where the plaintiff is a non-resident of the State any cause of action whatever, arising within the State and existing at the commencement of the action, except that no claim assigned to the defendant shall be pleaded by virtue alone of this subdivision. But each counter-claim shall be pleaded as such and be so denominated, and the answer shall contain a demand of the judgment to which the defendant supposes himself to be entitled by reason of the counter-claim therein." St., 1898, § 2656.

Wyoming. Identical with the Nebraska statute. Rev. St., 1899, § 3545.]

ascertained by a decision of the court."[1] There are additional special clauses in several of these codes regulating the procedure in respect to "set-off" and "counter-claim," particularly in their relations with the parties to the action. These sections provide for the bringing in of new parties found necessary to the determination of the issues raised by the defendant's affirmative pleading, or for the extending the benefits of a set-off or counter-claim existing in favor of a principal debtor, to his sureties, or existing in favor of one of two or more joint debtors, to the others. These sections are copied in the note.[2]

[1] [*Arkansas*, Sand. & Hill's Dig., § 5725; *Indiana*, Burns' St., 1901, § 351: "A set-off shall be allowed only in actions for money-demands upon contract, and must consist of matter arising out of debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off;" *Kentucky*, Code, 1895, § 96, subdiv. 2: "A set-off is a cause of action arising upon a contract, judgment or award in favor of a defendant against a plaintiff, or against him and another; and it cannot be pleaded except in an action upon a contract, judgment or award;" *Kansas*, Code, 1901, § 98; *Nebraska*, Code, 1901. § 104; *Ohio*, Bates' St., 1903, § 5071: "A set-off is a cause of action existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court, and can only be pleaded in an action founded on contract." *Oklahoma*, St., 1893, § 3976; *Wisconsin*, St., 1898, §§ 4258–4264, where the subject of set-off is treated with considerable detail; *Wyoming*, Rev. St., 1899, § 3548.]

[2] [*Arkansas*. "When it appears that a new party is necessary to a final decision upon the counter-claim, the court may either permit the new party to be made by a summons, to reply to the counter-claim in the answer, or may direct that it be stricken out of the answer and made the subject of a separate action." Sand. & Hill's Dig., § 5724. "Where it appears that a new party is necessary to a final decision upon the set-off, the court shall permit the new party to be made, if it also appears that, owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim, unless permitted to use it as a set-off." § 5729.

Indiana. "In all actions upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant, and against the plaintiff or any former holder of the note or other contract, may be pleaded as a set-off by the principal or any other defendant." Burns' St., 1901, § 352.

Iowa. "When a new party is necessary to a final decision upon a counter-claim, the court may either permit such party to be made, or direct that it be stricken out of the answer and made the subject of a separate action:" Code, 1897, § 3573. "A co-maker or surety, when sued alone, may, with the consent of his co-maker or principal, avail himself by way of counter-claim of a debt or liquidated demand due from the plaintiff at the commencement of the action to such co-maker or principal, but the plaintiff may meet such counter-claim in the same way as if made by the co-maker or principal himself:" Code, § 3572.

Kansas. Code, 1901, §§ 97, 99, identical, respectively, to the Arkansas statutes, §§ 5724, 5729.

Montana. The provisions of this code, which were taken from the New York Code of Civil Procedure, are very detailed respecting counter-claims. See §§ 692–697.

Nebraska. Code, 1901, §§ 103, 105,

§ 476. *585. **Statutory Provisions as to Cross-Complaints and Sham Answers.** A cross-petition or complaint is expressly authorized and its purposes defined [in several of the State codes];[1] as, for example, in that of Iowa. A section found in most of the codes provides that "sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in their discretion impose."[2]

identical, respectively, to the Arkansas statutes, §§ 5724, 5729.

New York. See Code Civil Procedure, §§ 502–506, for very detailed statutory provisions relative to counter-claims.

Ohio. Bates' St., §§ 5070, 5072, identical, respectively, except for slight verbal changes, with the Arkansas statutes, §§ 5724, 5729.

Oklahoma. St., 1893, §§ 3975, 3977, identical, respectively, except for a slight verbal change in the former, with the Arkansas statutes, §§ 5724, 5729.

Wisconsin. See St., 1898, §§ 4258–4264, for detailed statutory provisions relative to set-off.]

[1] [*Arkansas.* "When a defendant has a cause of action against a co-defendant or a person not a party to the action, and affecting the subject-matter of the action, he may make his answer a cross-complaint against the co-defendant or other person." Two other subdivisions provide how the defendant to such cross-complaint shall be summoned, how defence shall be made thereto, and that the trial shall not be delayed thereby. Sand. & Hill's Dig., § 5712.

California. "Whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint." Code Civ. Pro., § 442.

Idaho. Identical with the California statute. Code Civ. Pro., 1901, § 3216.

Iowa. "When a defendant has a cause of action affecting the subject-matter of the action against a co-defendant, or a person not a party to the action, he may, in the same action, file a cross-petition against the co-defendant or other person." The remainder of the section provides for notifying the defendants, and that the trial shall not be delayed. Code, 1897, § 3574.

Kentucky. "A cross-petition is the commencement of an action by a defendant against a co-defendant, or a person who is not a party to the action, or against both; or by a plaintiff against a co-plaintiff, or a person who is not a party to the action, or against both; and is not allowed to a defendant, except upon a cause of action which affects, or is affected by, the original cause of action; nor to a plaintiff except upon a cause of action which affects, or is affected by, a set-off or counter-claim." Code, 1895, § 96, subdiv. 3.

Utah. "When a defendant has a cause of action affecting the subject-matter of the action against a co-defendant, he may, in the same action, file a cross-complaint against the co-defendant." The remainder of the section provides for serving the defendant and that the trial shall not be delayed. Rev. St., 1898, § 2974.

Wisconsin. "A defendant or a person interpleaded or intervening may have affirmative relief against a co-defendant, or a co-defendant and the plaintiff, or a part of the plaintiffs, or a co-defendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction, or property which is the subject-matter of the action. Such relief may be demanded in the answer, which must be served upon the party," etc., providing rules of practice in respect thereto. St., 1898, § 2656 a.]

[2] New York, § 152 (538); Oregon, § 74; California, § 453; North Carolina, § 104; [Arizona, Rev. St., 1901, § 1355; Colo-

§ 477. * 586. **Statutes Allowing Demurrer to Entire Answer or to Separate Defence or Counter-Claim.** All the codes permit the plaintiff to demur to the entire answer, or to any separate defence therein containing new matter, or to any counter-claim therein, on the ground that the same is insufficient, or that the facts therein stated do not constitute a defence or a counter-claim.[1]

§ 478. * 587. **Code Provisions Respecting Reply.** In respect to the mode of raising an issue of fact upon the allegations of the answer which are not mere denials, the codes are separated into two classes, — those which require an additional pleading by the plaintiff in order to raise such issues in all instances, and those which require such additional pleading only in response to counter-claims. In the first class, a reply by the plaintiff is needed to all answers or defences that set up new matter, whether as counter-claims or as defences simply, which reply may consist either of denials or of other new matter by way of avoidance. As a consequence of this requirement, every allegation of new matter in the answer, whether by way of defence or of counter-claim, not controverted by a reply, is, in such States, admitted to be true. The reply is the last pleading of fact; the defendant may demur to it, but not rejoin any defence of fact.[2]

rado, Code, 1890, § 60; Idaho, Code Civ. Pro., 1901, § 3224; Indiana, Burns' St., 1901, § 385, in quite different form; Iowa, Code, 1897, § 3618; Kentucky, Code, 1895, § 113, subdiv. 8; Minnesota, St., 1894, § 5240; Missouri, Rev. St., 1899, § 611; Montana, Code, 1895, § 742; North Dakota, Rev. Codes, 1899, § 5276; South Carolina, Code, 1893, § 173; South Dakota, Ann. St., 1901, § 6123; Utah, Rev. St., 1898, § 2987; Washington, Bal. Code, § 4915; Wisconsin, St., 1898, § 2682.]

[1] New York, § 153 (494, 514, 516); Kansas, § 102; Nebraska, § 109; Oregon, § 76; California, §§ 443, 444; North Carolina, §§ 105, 176; [Arkansas, Sand. & Hill's Dig., § 5730; Colorado, Code, 1890, § 60; Idaho, Code Civ. Pro., 1901, §§ 3217, 3218; Indiana, Burns' St., 1901, § 360; Iowa, Code, 1897, § 3575; Minnesota, St., 1894, § 5241; Missouri, Rev. St., 1899, § 607; Montana, Code, 1895, § 710; Nevada, Comp. Laws, 1900, § 3145; North Dakota, Rev. Codes, 1899, § 5277; Ohio, Bates' St., 1903, §§ 5076, 5077; Oklahoma, St., 1893, § 3980; South Carolina, Code, 1893, § 174; South Dakota, Ann. St., 1901, § 6124; Utah, Rev. St., 1898, §§ 2976, 2977; Washington, Bal. Code, § 4916; Wisconsin, St., 1898, §§ 2658, 2659; Wyoming, Rev. St., 1899, §§ 3541, 3542.]

[2] [Colorado, Code, 1890, § 60; Connecticut, Gen. St., 1902, § 610; Indiana, Burns' St., 1901, § 360; Iowa, Code, 1897, § 3576, requires a reply in case of counter-claim, and also when plaintiff wishes to avail himself of matter in avoidance; Kansas, Code, 1901, § 4536; Kentucky, Code, 1895, § 98; Minnesota, St., 1894, § 5241; Missouri, Rev. St., 1899, § 607; Nebraska, Code, 1901, § 109; New York, Code Civ. Pro., §§ 514, 516, provides for a reply in case of a counter-claim and also, in the discretion of the court, on defendant's application, where new matter in defence is set up in the answer; North Dakota, Rev. Codes, 1899, § 5277, same as New York; North Carolina, § 105, same as New York; Ohio, Bates' St., 1903, § 5078; Oklahoma, St., 1893, § 3980; Oregon, Hill's Laws, § 76; South Carolina, Code, 1893, § 174, same as New York; South Dakota, Ann. St.,

§ 479. *588. **Same Subject.** In the second class of codes, a reply is only necessary to a counter-claim. Whenever an answer contains new matter by way of defence, and not constituting a counter-claim, an issue of fact is raised by operation of law, and the plaintiff may prove, in response thereto, any facts by way of denial or of confession and avoidance. If a counter-claim is pleaded, the plaintiff must reply thereto either by denials or by confession and avoidance; and in the absence of such reply, the allegations of the counter-claim are admitted to be true. No pleading is permitted in response to the reply except a demurrer, which may be used to raise an issue of law.[1]

1901, § 6124, same as New York; Washington, Bal. Code, § 4917; Wyoming, Rev. St., 1899, § 3553.

Cases Concerning these Provisions.

See Nat. Lumber Co. *v.* Ashby (1894), 41 Neb. 292, 59 N. W. 913; Burnet *v.* Cavanagh (1898), 56 Neb. 190, 76 N. W. 578; Peaks *v.* Lord (1894), 42 Neb. 15, 60 N. W. 349; Sullivan *v.* Traders' Ins. Co. (1901), 169 N. Y. 213, 62 N. E. 146; Solt *v.* Anderson (1901), 62 Neb. 153, 86 N. W. 1076; Grant *v.* Bartholomew (1899), 57 Neb. 673, 78 N. W. 314; Beagle *v.* Smith (1897), 50 Neb. 446, 69 N. W. 956; Phœnix Ins. Co. *v.* Bachelder (1894), 39 Neb. 95, 57 N. W. 996; Mollyneaux *v.* Wittenberg (1894), 39 Neb. 547, 58 N. W. 205; Meeh *v.* Railway Co. (1900), 61 Kan. 630, 60 Pac. 319; Davis *v.* Crookston, etc. Co. (1894), 57 Minn. 402, 59 N. W. 482; Smith *v.* L. & N. R. R. Co. (1893), 95 Ky. 11, 23 S. W. 652; Stapleton *v.* Ewell (1900), Ky., 55 S. W. 917; Girard *v.* St. Louis Car Wheel Co. (1894), 123 Mo. 358, 27 S. W. 648; Wade *v.* Strever (1901), 166 N. Y. 251, 59 N. E. 825; Kearney Stone Works *v.* McPherson (1894), 5 Wyo. 178, 38 Pac. 920; Sexton *v.* Shriver (1903), — Neb. —, 95 N. W. 594; Hibbard *v.* Trask (1903), — Ind. —, 67 N. E. 179.] See Kimberlin *v.* Carter, 49 Ind. 111; Payne *v.* Briggs, 8 Neb. 75; Scofield *v.* State Nat. Bk. of Lincoln, 9 id. 499; Williams *v.* Evans, 6 id. 216; Ridenour *v.* Mayo, 29 Ohio St. 138; Titus *v.* Lewis, 33 id. 304; Hixon *v.* Gurge, 18 Kan. 253; Netcott *v.* Porter, 19 id. 131; Kirk *v.* Woodbury Cy., 55 Iowa, 190; Clapp *v.* Cunningham, 50 id. 307; Cassidy *v.* Caton, 47 id. 22; Davis *v.* Payne, 45 id. 194.

[1] [Arkansas, Sand. & Hill's Dig., § 5732; California provides for no reply in any case, Code Civ. Pro., § 422; Idaho provides for no reply in any case, Code Civ. Pro., 1901, § 3202; Iowa, Code, 1897, § 3576, requires a reply in case of counter-claim and also when plaintiff wishes to avail himself of matter in avoidance; Montana, Code, 1895, § 720; Nevada provides for no reply in any case, Comp. Laws, 1900, § 3133; New York, Code Civ. Pro., §§ 514, 516, provides for a reply in case of counter-claim and also, in the discretion of court, on defendant's application, where new matter in defence is set up in the answer; North Carolina, § 105, same as New York; North Dakota, Rev. Codes, 1899, § 5277, same as New York; South Carolina, Code, 1893, § 174, same as New York; South Dakota, Ann. St., 1901, § 6124, same as New York; Utah, Rev. St., 1898, § 2980; Wisconsin, St., 1898, § 2661.

Cases Concerning these Provisions.

See Sterling *v.* Smith (1893), 97 Cal. 343, 32 Pac. 320; Alspaugh *v.* Reid (1898), 6 Idaho, 223, 55 Pac. 300; Higley *v.* Burlington, etc. Ry. Co. (1896), 99 Ia. 503, 68 N. W. 829; Oskaloosa St. Ry. Co. *v.* Oskaloosa (1896), 99 Ia. 496, 68 N. W. 808; Kinkead *v.* McCormick, etc. Co. (1898), 106 Ia. 222, 76 N. W. 663; Ashland *v.* W. C. R. R. Co. (1902), 114 Wis. 104, 89 N. W. 888; Babcock *v.* Maxwell (1898), 21 Mont. 507, 54 Pac. 943; Cornwall *v.* McKinney (1896), 9 S. D. 213, 68 N. W. 333; Levister *v.* Railway Co. (1899), 56 S. C. 508, 35 S. E. 207; Stubbs *v.* Motz

§ 480. * 589. **Miscellaneous Statutory Provisions.** The foregoing is the general scheme of pleading as set forth, with slight

(1893), 113 N. C. 458, 18 S. E. 387; Askew *v.* Koonce (1896), 118 N. C. 526, 24 S. E. 218; James *v.* Western N. C. R. R. Co. (1897), 121 N. C. 530, 28 S. E. 537; Strause *v.* Ins. Co. (1901), 128 N. C. 64, 38 S. E. 256; Parno *v.* Iowa, etc. Ins. Co. (1901), 114 Ia. 132, 86 N. W. 210; Parsons *v.* Grand Lodge, etc. (1899), 108 Ia. 6, 78 N. W. 676; Trezona *v.* Chicago, etc. Ry. Co. (1898), 107 Ia. 22, 77 N. W. 486; Rowe *v.* Barnes (1897), 101 Ia. 302, 70 N. W. 197; Runkle *v.* Hartford Ins. Co. (1896), 99 Ia. 414, 68 N. W. 712; Smith *v.* Griswold (1895), 95 Ia. 684, 64 N. W. 624; Nichols *v.* Chicago, etc. Ry. Co. (1895), 94 Ia. 202, 62 N. W. 769; Schulte *v.* Coulthurst (1895), 94 Ia. 418, 62 N. W. 770; McQuade *v.* Collins (1894), 93 Ia. 22, 61 N. W. 213; Brown *v.* Baker (1901), 39 Ore. 66, 65 Pac. 799; Sims *v.* Mutual Fire Ins. Co. (1899), 101 Wis. 586, 77 N. W. 908; Coleman *v.* Perry (1903), 28 Mont. —, 72 Pac. 42.

General Rules as to Reply.

It is not the office of a reply to introduce a new cause of action: Merrill *v.* Suing (1902), — Neb. —, 92 N. W. 618; Plummer, Perry & Co. *v.* Rohman (1900), 61 Neb. 61, 84 N. W. 600; Wigton *v.* Smith (1895), 46 Neb. 461, 64 N. W. 1080; Piper *v.* Woolman (1895), 43 Neb. 280, 61 N. W. 588; Collins *v.* Gregg (1899), 109 Ia. 506, 80 N. W. 562; Ellis *v.* Soper (1900), 110 Ia. 631, 82 N. W. 1041; Olmstead *v.* City of Raleigh (1902), 130 N. C. 243, 41 S. E. 292; Osten *v.* Winehill (1894), 10 Wash. 333, 38 Pac. 1123.

New matter in a reply constituting a departure will be stricken out on motion: Merrill *v.* Suing (1902), — Neb. —, 92 N. W. 618; Maddox *v.* Teague (1896), 18 Mont. 512, 46 Pac. 535; Hunt *v.* Johnston (1898), 105 Ia. 311, 75 N. W. 103; Williams *v.* Ninemire (1901), 23 Wash. 393, 63 Pac. 534; Snyder *v.* Johnson (1903), — Neb. —, 95 N. W. 692. The objection may be raised by demurrer: Brown *v.* Baker (1901), 39 Ore. 66, 65 Pac. 799.

But a departure may be waived: Farmers' & Merchants' Ins. Co. *v.* Dobney (1901), 62 Neb. 213, 86 N. W. 1070; Consolidated Kansas City, etc. Co. *v.* Osborne (1903), — Kan. —, 71 Pac. 838; Asplund *v.* Mattson (1896), 15 Wash. 328, 46 Pac. 341; Gregory *v.* Kaar (1893), 36 Neb. 533, 54 N. W. 859. Or it may be avoided by an amendment of the complaint: Whitney *v.* Priest (1901), 26 Wash. 48, 66 Pac. 108.

As to what constitutes a departure, see Shaw *v.* Jones (1900), 156 Ind. 60, 59 N. E. 166; Wilcke *v.* Wilcke (1897), 102 Ia. 173, 71 N. W. 201; Hunt *v.* Johnston (1898), 105 Ia. 311, 75 N. W. 103; Minneapolis, etc. Ry. Co. *v.* Home Ins. Co. (1896), 64 Minn. 61, 66 N. W. 132; James *v.* City of St. Paul (1898), 72 Minn. 138, 75 N. W. 5; Hoxsie *v.* Kempton (1899), 77 Minn. 462, 80 N. W. 353; Van Bibber *v.* Fields (1894), 25 Ore. 527, 36 Pac. 526; Mayes *v.* Stephens (1901), 38 Ore. 512, 63 Pac. 760; Crown Cycle Co. *v.* Brown (1901), 39 Ore. 285, 64 Pac. 451; Hammer *v.* Downing (1901), 39 Ore. 504, 64 Pac. 651; Kiernan *v.* Kratz (1902), 42 Ore. 474, 69 Pac. 1027; Orient Ins. Co. *v.* Clark (1900), Ky., 59 S. W. 863; Massillon Engine & Thresher Co. *v.* Carr (1903), Ky., 71 S. W. 859; Coombs Commission Co. *v.* Block (1895), 130 Mo. 668, 32 S. W. 1139; St. Joseph Union Depot Co. *v.* Chicago, etc. Ry. Co. (1895), 131 Mo. 291, 31 S. W. 908; Com. Elec. Light & Power Co. *v.* Tacoma (1897), 17 Wash. 661, 50 Pac. 592; Ross *v.* Howard (1901), 25 Wash. 1, 64 Pac. 794; McCorkle *v.* Mallory (1903), 30 Wash. 632, 71 Pac. 186; Dudley *v.* Duval (1902), 29 Wash. 528, 70 Pac. 68; Brown *v.* Baruch (1901), 24 Wash. 572, 64 Pac. 789; Fulton *v.* Ryan (1900), 60 Neb. 9, 82 N. W. 105; Foley *v.* Holtry (1894), 43 Neb. 133, 61 N. W. 120; Union Casualty & Surety Co. *v.* Bragg (1901), 63 Kan. 291, 65 Pac. 272; Johnson *v.* Bank (1898), 59 Kan. 250, 52 Pac. 860; Rainsford *v.* Massengale (1893), 5 Wyo. 1, 35 Pac. 774; Union St. Ry. Co. *v.* First Nat. Bank (1903), 42 Ore. 606, 72 Pac. 586; Childs Lumber Co. *v.* Page (1902), 28 Wash. 128, 68 Pac. 373; Gleckler *v.* Slavens (1894), 5 S. D. 364, 59 N.W. 323.

The reply may be waived by proceeding to trial as though it had been filed: Killman *v.* Gregory (1895), 91 Wis. 478, 65 N. W. 53; Missouri Pac. Ry. Co. *v.* Palmer

variations of form, and with no real variations of principle, in all the codes. A few additional provisions are found in some of the codes which do not in any manner affect the common theory, but which were evidently inserted for purposes of exactness, or to put at rest some doubts as to the construction of the statute. These clauses I have collected in the note.[1]

§ 481. * 590. **Liberality of the Codes in Furtherance of Justice.** While the very central principle of the reformed procedure is, that all causes of action, and all defences, except those of general denial, must be specially pleaded, — that is, pleaded in accordance with the actual facts, — and while, as a necessary consequence, there must be an agreement between the facts proved and the facts alleged, yet the codes are careful to prevent any failure of justice by reason of a mere failure to comply with this rule. Ample means of correcting mistakes are

(1898), 55 Neb. 559, 76 N. W. 169; Merchants' Nat. Bank *v.* Barlow (1900), 79 Minn. 234, 82 N. W. 364; Lyford *v.* Martin (1900), 79 Minn. 243, 82 N. W 479; Minard *v.* McBee (1896), 29 Ore. 225, 44 Pac. 491; North St. Louis Bldg. Ass'n *v.* Obert (1902), 169 Mo. 507, 69 S. W. 1044; Ferguson *v.* Davidson (1899), 147 Mo. 664, 49 S. W. 879; Turner *v.* Butler (1894), 126 Mo. 131, 28 S. W. 77; Chicago, R. I. & Pac. Ry. Co. *v.* Frazier (1903), — Kan. —, 71 Pac. 831; Elder *v.* Webber (1902), — Neb. —, 92 N. W. 126.

Complaint and reply are to be construed together when not repugnant: Molino *v.* Blake (1898), Ariz., 52 Pac. 366. A bad reply is good enough for a bad answer: Peden *v.* Cavins (1892) 134 Ind. 494, 34 N. E. 7. It is not error to strike out so much of a reply as has already been alleged in the petition: West *v.* West (1898), 144 Mo. 119, 46 S. W. 139. In Connecticut a pleading entitled a "Reply and demurrer" may be filed, raising issues of law as to part of a defence and issues of fact as to the residue: Church *v.* Pearne (1903), 75 Conn. 350, 53 Atl. 955. See Davis *v.* Ford (1896), 15 Wash. 107, 45 Pac. 739, for a reply which was held to constitute what at common law was designated a new assignment.] See Johnson *v.* White, 6 Hun, 587; Dambman *v.* Schulting, 4 id. 50; Claflin *v.* Taussig, 7 id. 223; Metrop. L. Ins. Co. *v.* Meeker, 85 N. Y. 614; Colton L. & W. Co. *v.* Raynor, 57 Cal. 588.

[1] Missouri, R. S., 1899, § 613: "*Duplicity* is a substantial objection to the petition or other pleading, and shall, on motion, be stricken out." § 624: "In all actions founded on contract, and instituted against several defendants, the plaintiff shall not be nonsuited by reason of his failure to prove that all the defendants are parties to the contract, but may have judgment against such of them as he shall prove to be parties thereto." Kansas, § 104: "When the answer contains new matter constituting a right to relief against a co-defendant, concerning the subject of the action, such co-defendant may demur or reply to such matter in the same manner as if he were plaintiff, and subject to the same rules so far as applicable." Iowa, § 3578: "Any number of defences, negative or affirmative, are pleadable to a counter-claim; and each affirmative matter of defence in the reply shall be sufficient in itself, and must intelligibly refer to the part of the answer to which it is intended to apply." Indiana, § 359: "All defences, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially." § 380: "Under a mere denial of any allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove."

provided. The utmost liberality in this respect runs through them all, and the provisions are the same in substance, and almost identical in language. As these clauses apply alike to the pleadings by the plaintiff and by the defendant, they have already been stated in the preceding chapter.[1]

§ 482. * 591. **Outline of Treatment of Code Theory of Defence.** Upon the basis of the foregoing citations, I am prepared to present the theory of the defence as formulated in the codes, and as wrought out by the judicial interpretation thereof. The fundamental principles of pleading adopted by the reformed American system, and applicable alike to the allegations made by the plaintiff and by the defendant, have already been discussed in the preceding chapter; and I shall, therefore, confine myself to matters purely defensive. Following an order suggested alike by the mode of arrangement pursued in the statute, and by the logical development of the subject-matter itself, the chapter will be separated into sections, which will treat respectively, I. Of the general requisites of an answer, and of the general rules applicable to all answers; II. Of answers or defences consisting of denials either general or specific; III. Of answers or defences consisting of new matter; IV. Of the union of different defences, whether legal or equitable, in one answer; V. Of counter-claims, and other affirmative relief.

SECTION SECOND.

THE GENERAL REQUISITES OF AN ANSWER, AND THE GENERAL RULES APPLICABLE TO ALL ANSWERS.

§ 483. * 592. **Introductory.** Before examining the different kinds of defence possible under the codes, and the particular rules relating to each, I shall state and explain the few doctrines and rules which apply to *all forms* of answer, and which have not been already embraced in the discussion of the general principles of pleading contained in the preceding chapter. There are a few doctrines, practical rather than theoretical, pertaining to the answer considered as an independent pleading, which should be investigated before proceeding with the mass of detail which will make up the bulk of the present chapter.

[1] *Supra*, § * 435.

§ 484. * 593. **Two Kinds of Answer — Denials and New Matter.** Answers are separated by the codes into two classes, — those which consist of denials, and therefore serve the sole purpose of raising a direct issue upon the plaintiff's allegations; and those which state what the codes call "new matter," — that is, facts different from those averred by the plaintiff, and not embraced within the judicial inquiry into their truth. The latter class is again subdivided into those in which the "new matter" is simply defensive, and, if true, destroys or bars the plaintiff's right of action; and those in which the "new matter" is the statement of an independent cause of action in favor of the defendant against the plaintiff, which is to be tried at the same time with that set up by the plaintiff, to the end that a recovery upon it may be used in opposition to the recovery upon the plaintiff's demand, by either diminishing, equalling, or exceeding the same. It is plain, from this brief description, that the answers included in the latter subdivision are not, in any true sense of the word, *defences;* they do not defeat or bar the plaintiff's right of action. They are, in truth, independent causes of action in favor of the defendant, — cross-demands, — which, for purposes of convenience merely, are tried and determined at one and the same time. There are two suits, to neither of which, perhaps, exists any defence, litigated and decided in the one judicial proceeding; and the final balance in favor of one party is awarded to him by the single judgment of the court. This is the true theory of the answers embraced in the last subdivision; and it is fully approved and adopted by decisions of authority which will be cited in the subsequent section, which treats of the "counter-claim."

§ 485. * 594. **Two Kinds of Questions. Those of Form.** Two kinds of questions may arise in reference to all answers, — namely, (1) those of substance and (2) those of form. The first class relates to the sufficiency of the pleading, assuming that its allegations are correct in respect to their merely formal character; the second class relates exclusively to the form and external mode of setting forth the facts, assuming that, if properly stated, they would be sufficient to constitute a valid answer. It is difficult to conceive that a question of substance should arise upon an answer consisting only of denials. Such an answer might be insufficient: it might raise no complete issue,

because its denials were too limited, and were interposed to a part only of the plaintiff's allegations, thus admitting by their silence other averments to such an extent that a cause of action in his favor was conceded upon the record; but here the question of substance would not arise from the matter contained in the answer, but from the absence of matter therein. The questions that can arise upon an answer of denials must, therefore, be those of form, — questions whether the denials themselves are in such a form that the averments of the complaint, or some of them, are sufficiently negatived in order to present an issue or issues for trial and decision. If the answer falls within the second class, — that is, if it sets up new matter, either by way of defence, or by way of counter-claim, set-off, or cross-demand, — the questions arising upon it may be either of substance or of form.

§ 486. * 595. **Questions of Substance.** What can be the possible nature of these questions of substance? The section of the codes enumerating the grounds of demurrer to the complaint or petition contains a complete list of such questions. As found in most of the codes, they are six in number, — namely, (1) want of jurisdiction in the court over the person of the defendant, or the subject-matter of the action; (2) want of legal capacity to sue in the plaintiff; (3) the pendency of another action between the same parties for the same cause; (4) defect of parties plaintiff or defendant; (5) a misjoinder of causes of action; (6) failure to state facts constituting a cause of action. To these there is added, in one or two codes, (7) a misjoinder of parties plaintiff or defendant. It is very plain that, except in a special case to be mentioned hereafter, only one of these species of substantial questions can possibly arise in respect to the answer, namely, the sixth, whether the facts stated are sufficient to constitute a defence. Objections as to the jurisdiction of the court, the legal capacity of the plaintiff to sue, the pendency of another action, and the misjoinder of causes of action, must necessarily be confined to and be decided by the complaint or petition. If the plaintiff's pleading is free, the answer can in no manner be exposed to any of them. It may, of course, set up these objections as matters of defence; but the objection would still inhere in the plaintiff's cause of action and pleading, and would not be involved in the answer itself. The same is true in respect to

the nonjoinder or misjoinder of parties in all cases where the answer is simply defensive. It may certainly aver a nonjoinder or a misjoinder as a defence; but the question thus raised would still depend upon the complaint or petition; the answer could not by itself, as the initiative, create a nonjoinder or misjoinder of parties. There is one special case, however, in which the answer may, for the first time, involve the question as to the proper joinder of parties. Where it sets up a counter-claim or set-off, and the defendant thus makes himself, in respect to such demand, a plaintiff in fact, though not in name, the answer may be governed by the same rules which govern the complaint or petition. The cause of action thus alleged may be of such a character that the original parties to the record are either too few or too many. An answer of this class may therefore, in itself, and by means of its own averments, independently of the plaintiff's pleading, raise and involve questions of substance relating to the proper joinder of parties to the action. The codes of several States recognize this fact, and expressly provide for the bringing in of additional parties made necessary by the allegations of a counter-claim or set-off. With this single exception, it is plain that the only questions of substance which can arise in respect to any answer must relate to the sufficiency of the facts alleged to constitute a defence, or counter-claim, or set-off. Upon this assumption, the language employed by the legislature in some of the States permits a demurrer to the answer on the ground of "insufficiency;" in others, "where, upon its face, it does not constitute a counter-claim or defence;" and, in others still, "where the facts alleged do not constitute a defence or counter-claim." And recognizing the further fact, that these questions of substance cannot arise upon answers which consist only of denials, the language of several codes confines the demurrer to "new matter," set up in the answer by way of defence or counter-claim.

§ 487. * 596. **Purpose of Demurrer.**[1] **Special Demurrer Abolished. Motion Substituted.** Under the common-law system of

[1] [*General Rules as to Demurrers. What a Demurrer admits.*

A demurrer to a pleading admits all facts well pleaded therein: Goodson *v.* Goodson (1897), 140 Mo. 206; Peatman *v.* Centerville Light Co. (1896), 100 Ia. 245, 69 N. W. 541; Graham *v.* Marks (1895), 98 Ga. 67, 25 S. E. 931; Smith *v.* Usher (1899), 108 Ga. 231, 33 S. E. 876; Crew *v.* Hutcheson (1902), 115 Ga. 511, 42 S. E. 16; Stedman *v.* City of Berlin (1897), 97

procedure, the questions of substance in the defendant's pleas, if the objection appeared on their face, were raised by a general demurrer, while those of form were raised by a "special demurrer." The reformed procedure retains the general demurrer for the same purpose which it subserved at the common law. Where the answer, as in some States, or the new matter in the answer, as in others, does not state facts constituting a defence, or counter-claim, or set-off, as the case may be, a demurrer, on the ground of insufficiency, is the proper mode of raising and presenting the question for decision to the court. Special demurrers, however, are utterly abolished. If the defect is one merely of form; if the denials, for example, — although sufficiently addressed to the plaintiff's allegations to indicate the in-

Wis. 505, 73 N. W. 57; Allen *v.* Chicago & N. W. Ry. Co. (1896), 94 Wis. 93, 68 N. W. 873; Hand *v.* City of St. Louis (1900), 158 Mo. 204, 59 S. W. 92; Shields *v.* Johnson County (1898), 144 Mo. 76, 47 S. W. 107; Blaine *v.* Knapp & Co. (1897), 140 Mo. 241, 41 S. W. 787; McArthur *v.* Clarke Drug Co. (1896), 48 Neb. 899, 67 N. W. 861; State *v.* Porter (1903), — Neb. —, 95 N. W. 769.

But the demurrer admits the truth of the allegations of the pleading attacked only for the purpose of determining their legal effect: Jacobs *v.* Vaill (1903), — Kan. —, 72 Pac. 530.

A demurrer does not admit conclusions of law: Longshore Printing Co. *v.* Howell (1894), 26 Ore. 527, 38 Pac. 547; Rankin *v.* Railroad Co. (1900), 58 S. C. 532, 36 S. E. 997; American Water Works Co. *v.* State (1895), 46 Neb. 194, 64 N. W. 711; State *ex rel. v.* Aloe (1899), 152 Mo. 466, 54 S. W. 494; State *ex rel. v.* Withrow (1900), 154 Mo. 397, 55 S. W. 460; John D. Park & Sons Co. *v.* Druggists' Ass'n (1903), 175 N. Y. 1, 67 N. E. 136.

A demurrer does not admit the conclusions of the pleader: Southern Ry. Co. *v.* Covenia (1896), 100 Ga. 46, 29 S. E. 219; Eliot's Appeal (1902), 74 Conn. 586, 51 Atl. 558; State *ex rel. v.* Archibald (1894), 52 O. St. 1, 38 N. E. 314.

But see Standard Oil Co. *v.* Hoese (1899), 57 Neb. 665, 78 N. W. 292, where a demurrer was held to admit a conclusion reasonably inferable from the facts alleged.

In passing upon a demurrer for misjoinder of causes of action, it will be assumed that the facts alleged in each count constitute a cause of action: Vaule *v.* Steenerson (1895), 63 Minn. 110, 65 N. W. 257.

Searching the Record.

A demurrer searches the record, and should be carried back to the first pleading which is insufficient: Tribune Printing Co. *v.* Barnes (1898), 7 N. D. 591, 75 N. W. 904; Barr *v.* Little (1898), 54 Neb. 556, 74 N. W. 850; State *ex rel. v.* Stuht (1898), 52 Neb. 209, 71 N. W. 941; State *v.* Moores (1897), 52 Neb. 770, 73 N. W, 299; West Point Water, etc. Co. *v.* State (1896), 49 Neb. 223, 68 N. W. 507; Hawthorne *v.* State (1895), 45 Neb. 871, 64 N. W. 359; Oakley *v.* Valley County (1894), 40 Neb. 900, 59 N. W. 368; Johnson *v.* Wynne (1902), 64 Kan. 138, 67 Pac. 549; Baxter *v.* McDonnell (1897), 154 N. Y. 432, 48 N. E. 816; Alkire *v.* Alkire (1892), 134 Ind. 350, 32 N. E. 571; Gilreath *v.* Furman (1898), 53 S. C. 463, 31 S. E. 291; Chesapeake, etc. Ry. Co. *v.* Riddle's Adm'x (1903), Ky., 72 S. W. 22; Hoskins *v.* Southern Nat. Bank (1903), Ky., 73 S. W. 786.

See Goldsmith *v.* Chipps (1899), 154 Ind. 28, 55 N. E. 855, where the court said: "A demurrer to an answer in abatement does not search the record, and cannot be carried back and sustained to the complaint."

tended issues, — are so formally defective that it is a question whether the denial or denials attempted to be made do in fact accomplish the purpose for which they were designed; or if the averments of new matter in some sort embrace or refer to facts which, if properly pleaded, would amount to a defence or counter-claim, but are stated in such an uncertain, ambiguous, inferential manner, that it is a question whether they can avail to the defendant, — in such cases it is settled that the demurrer is not the proper mode of reaching the defect. Instead of the special demurrer, the codes have substituted the motion to make the pleading more definite and certain.[1] If no such motion is made, and

Where an answer purports to answer only a part of a complaint, a demurrer to such answer can only be carried back and sustained to so much of the complaint as it assumes to answer: State *ex rel. v.* Halter (1897), 149 Ind. 292, 47 N. E. 665.

Ruling on Demurrer as Res Judicata.

If a demurrer is sustained on the ground that a complaint fails to state a cause of action, a judgment of dismissal thereon is no bar to a subsequent action in which there is a good complaint: Swanson *v.* Great Northern Ry. Co. (1898), 73 Minn. 103, 75 N. W. 1033; Watson *v.* St. Paul City Ry. Co. (1899), 76 Minn. 358, 79 N. W. 308; Potter *v.* Benge (1902), Ky., 67 S. W. 1005, citing Pepper *v.* Donnelly, 87 Ky. 260; Taylor *v.* Matteson (1893), 86 Wis. 113, 56 N. W. 829; State *ex rel. v.* Cornell (1897), 52 Neb. 25, 71 N. W. 961; O'Hara *v.* Parker (1895), 27 Ore. 156, 39 Pac. 1004.

If the judgment determined the merits of the case, it is *res judicata:* Wilson *v.* Lowry (1898), Ariz., 52 Pac. 777; Kleinschmidt *v.* Binzel (1893), 14 Mont. 31, 35 Pac. 460; Fain *v.* Hughes (1899), 108 Ga. 537, 33 S. E. 1012; Plant *v.* Carpenter (1898), 19 Wash. 621, 53 Pac. 1107; Day *v.* Mountin (1903), 89 Minn. 297, 94 N. W. 887.

A judgment on the sole ground that the action is premature is not a bar to a subsequent suit for the same cause: Peck *v.* Easton (1902), 74 Conn. 456, 51 Atl. 134.

A demurrer on the ground that a complaint does not state a cause of action, having been once made and overruled, cannot be renewed at any subsequent trial on the same or any other specifications: Turner *v.* Interstate Ass'n (1897), 51 S. C. 33, 27 S. E. 947; Burrows *v.* McCalley (1897), 17 Wash. 269, 49 Pac. 508. But see Roche *v.* Spokane County (1900), 22 Wash. 121, 60 Pac. 59.

The court is not bound by its own ruling, and when a demurrer has been sustained to a petition, and an amended petition is filed essentially like the original, to which also a demurrer is filed, the court may sustain or overrule it as it sees fit. If the defendant wished to hold the court to its first ruling, he should have moved to have the amended petition stricken from the files: Van Werden *v.* Equitable Assurance Society (1896), 99 Ia. 621, 68 N. W. 892. See also Noyes *v.* Loughead (1894), 9 Wash. 325, 37 Pac. 452; Hoyt *v.* Beach (1897), 104 Ia. 257, 73 N. W. 492; Schoenleber *v.* Burkhart (1896), 94 Wis. 575, 69 N. W. 343.

Where a demurrer is filed on several grounds, and it is sustained generally, it will be presumed to have been sustained on the ground not affecting the merits: Kleinschmidt *v.* Binzel (1893), 14 Mont. 31, 35 Pac. 460, citing and differing from

[1] [Conversely, a motion cannot be used to raise questions of substance: Armstead *v.* Neptune (1896), 56 Kan. 750, 44 Pac. 998; Wattels *v.* Minchen (1895), 93 Ia. 517, 61 N. W. 915; Gjerstadengen *v.* Hartzell (1899), 8 N. D. 424, 79 N. W. 872. But in McQuade *v.* Collins (1894), 93 Ia. 22, 61 N. W. 213, it was held that where affirmative matter is pleaded which constitutes no defence it may be stricken out on motion.]

the plaintiff goes to trial upon the answer as it stands, he will

People *v.* Stevens, 51 How. Pr. 235, which held the presumption to be that the demurrer was sustained upon all the grounds.

In Gregory *v.* Woodworth (1899), 107 Ia. 151, 77 N. W. 837, it was held that where a plaintiff failed to amend his petition by adding a material averment, and a demurrer thereto had been sustained by the lower court and by the Supreme Court, the judgment on the demurrer was a final adjudication which bars another action for the same cause, under Code, 1873, § 2654, which provides that on the decision of a demurrer, if the unsuccessful party fails to amend or plead over, the same consequences shall ensue as though a verdict had passed against the plaintiff, or the defendant had made default. Given J. dissented on the ground that the omission of the averment, being in fact a doubtful question, was not negligence, and hence plaintiff ought to be allowed to commence a second suit under Code § 2537, which provides that "If, after the commencement of an action, the plaintiff shall fail therein for any cause, except negligence in its prosecution, and a new suit shall be brought within six months thereafter, the second suit shall, for the purpose herein contemplated, be deemed a continuation of the first."

Error in overruling a demurrer for misjoinder of causes of action is harmless: Coddington *v.* Canaday (1901), 157 Ind. 243, 61 N. E. 567.

The statute providing that "but one motion and one demurrer assailing such pleading shall be filed, unless such pleading be amended after the filing of a motion thereto," does not prohibit filing a demurrer after a motion to the same pleading, even though the pleading has not been amended in the mean time: Gross *v.* Miller (1894), 93 Ia. 72, 61 N. W. 385.

Demurrer as "Answer."

A demurrer is a sufficient "answer" to warrant the granting of relief not prayed for, under R. S., § 2886: Viles *v.* Green (1895), 91 Wis. 217, 64 N. W. 856. See also Wagener *v.* Boyce (1898), Ariz., 52 Pac. 1122. But there is no such pleading as a "demurrer by way of answer:" Smith *v.* Kibling (1897), 97 Wis. 205, 72 N. W. 869. See also Quayle *v.* Bayfield Co. (1902), 114 Wis. 108, 89 N. W. 892, where an answer contained a demurrer but the defect was held to be waived.

Predicating Error on Ruling.

Where a demurrer is sustained generally, the ruling will be sustained if any of the grounds of the demurrer are well taken: Krause *v.* Lloyd (1897), 100 Ia. 666, 69 N. W. 1062; Crittenden *v.* Southern Home Ass'n (1900), 111 Ga. 266, 36 S. E. 643.

An order sustaining a demurrer, if right, will be sustained, even if the reasons given by the trial court were erroneous: Hughes *v.* Hunner (1895), 91 Wis. 116, 64 N. W. 887.

Error, if any, in ruling upon a demurrer will not be considered on appeal where the alleged defect has been obviated by an amendment on the trial: Maris *v.* Clevenger (1902), 29 Wash. 395, 69 Pac. 1089; Kingman *v.* Pixley (1898), 7 Okla. 351, 54 Pac. 494. *Contra*, Corcoran *v.* Sonora Min. & Mill. Co. (1902), Idaho, 71 Pac. 127.

When a demurrer has been sustained to a complaint, and plaintiff fails to apply for an amendment, he must be held to have elected to stand on his pleading: Iowa, etc. Tel. Co. *v.* Schamber (1902), 15 S. D. 588, 91 N. W. 78.

Pleading over is a waiver of any error in overruling a demurrer: Wheeler *v.* Barker (1897), 51 Neb. 846, 71 N. W. 750; Citizens' Bank *v.* Pence (1900), 59 Neb. 579, 81 N. W. 623; Lederer *v.* Union Sav. Bank (1897), 52 Neb. 133, 71 N. W. 954; Hardin *v.* Emmons (1898), 24 Nev. 329, 53 Pac. 854; Shroeder *v.* Webster (1893), 88 Ia. 627, 55 N. W. 569; First Nat. Bank *v.* Farmers' & Merchants' Bank (1903), Neb., 95 N. W. 1062. *Contra*, Mechanics Bank *v.* Woodward (1902), 74 Conn. 689, 51 Atl. 1084; Thelin *v.* Stewart (1893), 100 Cal. 372, 34 Pac. 861; Hunter's Appeal (1898), 71 Conn. 189, 41 Atl. 557.

A party cannot complain of a ruling in his own favor: Pritchett *v.* McGaughey (1898), 151 Ind. 638, 52 N. E. 397.

A general demurrer to a complaint put in by stipulation after answer and treated by the parties and the trial court as an

not be suffered to raise the objection there for the first time, and

ordinary demurrer will be so treated on appeal: McCord *v.* Hill (1899), 104 Wis. 457, 80 N. W. 735.

"A judgment will not be reversed on account of the sustaining of an informal demurrer to an answer that does not state facts sufficient to constitute a cause of defence:" Bollman *v.* Gemmill (1900), 155 Ind. 33, 57 N. E. 542; Hanson *v.* Cruse (1900), 155 Ind. 176, 57 N. E. 904.

An order sustaining a demurrer is appealable although no final judgment was entered or rendered by the court: Bradley *v.* Miller (1896), 100 Ia. 169, 69 N. W. 426.

An appeal will lie wherever a writ of error could be sustained: O'Donnell *v.* Sargent & Co. (1897), 69 Conn. 476, 38 Atl. 216.

The overruling of a demurrer to one paragraph of a complaint will not be reviewed on appeal when the case was tried and judgment rendered for plaintiff on another paragraph: Robinson *v.* Dickey (1895), 143 Ind. 205, 42 N. E. 679.

Nor can error be predicated on the court's action in sustaining a demurrer to an answer when the facts averred in the answer were admissible under a general denial pleaded: Troxel *v.* Thomas (1900), 155 Ind. 519, 58 N. E. 725; Nowlin *v.* State *ex rel.* Board of Commissioners (1903), — Ind. —, 66 N. E. 54; Smith *v.* Pinnell (1895), 143 Ind. 485, 40 N. E. 798. See Clause Printing Co. *v.* Chicago, etc. Bank (1896), 145 Ind. 682, 44 N. E. 256, where same rule was announced in respect to a counter-claim and answer in bar.

Where two defences are pleaded, one good and the other bad, the error in overruling a demurrer to the latter defence is not available, the former constituting a complete bar to the action: Fire Extinguisher Co. *v.* City of Perry (1899), 8 Okla. 429, 58 Pac. 635.

Where it clearly appears that no injury resulted to defendant by reason of the improper overruling of a demurrer for misjoinder, the judgment subsequently rendered upon the complaint will not be reversed: Thelin *v.* Stewart (1893), 100 Cal. 372, 34 Pac. 861; Asevado *v.* Orr (1893), 100 Cal. 293, 34 Pac. 777.

"Where a demurrer to a petition which states no ground for substantial damages is sustained, this court will not reverse the decision merely because the facts stated would entitle plaintiff to nominal damages:" Cook *v.* Smith (1903), — Kan. —, 72 Pac. 524.

Scope of Demurrer.

A demurrer will not lie to a portion of a statement of a cause of action: McCann *v.* Pennie (1893), 100 Cal. 547, 35 Pac. 158; Lewis *v.* Town of Brandenburg (1898), 105 Ky. 14, 47 S. W. 862; Sloan *v.* Railway Co. (1902), 64 S. C. 389, 42 S. E. 197; Buist *v.* Salvo (1894), 44 S. C. 143, 21 S. E. 615; Steenerson *v.* Great Northern Ry. Co. (1896), 64 Minn. 216, 66 N. W. 723; Nelson *v.* Merced County (1898), 122 Cal. 644, 55 Cal. 421. But see Freeman's Appeal (1899), 71 Conn. 708, 43 Atl. 185.

"Where a pleading is tested by demurrer it must stand or fall by its own averments. It can find neither weakness nor strength from other parts of the record:" Pittsburgh, etc. Ry. Co. *v.* Moore (1898), 152 Ind. 345, 53 N. E. 290. See also Davidson *v.* Gregory (1903), 132 N. C. 389, 43 S. E. 916; Strawhacker *v.* Ives (1901), 114 Ia. 661, 87 N. W. 669; Anderson *v.* Hilton & Dodge Co. (1899), 110 Ga. 263, 34 S. E. 365.

But see Chicago Bldg. Co. *v.* Creamery Co. (1898), 106 Ga. 84, 31 S. E. 809. Held in Douglas *v.* Coonley (1898), 156 N. Y. 521, 51 N. E. 283, that where an answer is demurred to, all the allegations of the complaint referred to in the answer are to be taken as incorporated in it.

Where a demurrer is specifically directed to the second cause of action contained in a cross-bill, and the other causes of action therein are substantially the same as the second, the demurrer will be considered as if it went to the entire cross-bill: Hughes *v.* Pratt (1900), 37 Ore. 45, 60 Pac. 707.

Form of Demurrer.

A demurrer in the words of the statute is sufficient: O'Rourke *v.* City of Sioux Falls (1893), 4 S. D. 47, 54 N. W. 1044; Van Dyke *v.* Doherty (1896), 6 N. D. 263, 69 N. W. 200. The section of the code

to exclude evidence of the defence or counter-claim on the ground that it is informally pleaded.[1]

requiring that the demurrer shall distinctly specify the grounds of the objection to the complaint held to mean only that "when the first ground is relied on the demurrer must specify whether the want of jurisdiction is as to the person or subject-matter; and when the fourth is relied on the parties must specify whether the defect is in parties plaintiff or defendant," but in other cases it is sufficient to specify which ground is relied on as the statute names them: Hudson *v.* Archer (1893), 4 S. D. 128, 55 N. W. 1099.

A demurrer to an answer generally on the ground that it "does not state facts sufficient to show that the plaintiff is estopped from maintaining the said action," does not state a ground for demurrer under the code, and should be disregarded: Hill *v.* Walsh (1894), 6 S. D. 421, 61 N. W. 440. See also Tootle *v.* Berkley (1896), 57 Kan. 111, 45 Pac. 77, where the demurrer was held insufficient, not stating a ground for a demurrer under the code.

But in Iowa a general demurrer in the words of the statute is not sufficient in a law action under Code § 3562, which provides that "A demurrer must specify and number the grounds of objection to the pleadings, and it shall not be sufficient to state the objection in the terms of the preceding section, except that a demurrer to an equitable petition for the fifth reason of said section may be stated in the terms thereof." See Stokes *v.* Sprague (1899), 110 Ia. 89, 81 N. W. 195. Held, in *In re* Estate of McMurray (1899), 107 Ia. 648, 78 N. W. 691, that a demurrer in a special proceeding must specify the grounds of objection. And in Miller *v.* Cross (1900), 73 Conn. 538, 48 Atl. 213, a demurrer which did not point out the insufficiency was held radically defective.

In South Carolina, by Circuit Court Rule 18, the demurrant must state in writing "wherein the pleading objected to is insufficient;" and it was held a sufficient compliance with this rule to demur in the words of the statute and on the hearing submit the specific grounds of objection in writing: Riggs *v.* Home Fire Ass'n (1901), 61 S. C. 448, 39 S. E. 614.

A demurrer to an answer in these words, "It does not state facts sufficient to make a good answer to the complaint," is not sufficient to present any question upon the answer. The demurrer should state that the answer does not state facts sufficient to constitute a cause of defence.

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[1] This general rule is illustrated by the following cases, which also furnish examples of insufficient and imperfect allegations: Becker *v.* Boon, 61 N. Y. 317; West U. Tel. Co. *v.* Fenton, 52 Ind. 1; Jones *v.* Frost, 51 id. 69; Langsdale *v.* Girton, 51 id. 99; Ready *v.* Sommer, 37 Wis. 265; Bushey *v.* Reynolds, 31 Ark. 657; Simpson Cent. Coll. *v.* Bryan, 50 Iowa, 293; Penn. Coal Co. *v.* Blake, 85 N. Y. 226, 235; Holcraft *v.* Mellott, 57 Ind. 539; State *v.* Newlin, 69 id. 108; White *v.* San Rafael, etc. R. Co., 50 Cal. 417; Spiers *v.* Duane, 54 Cal. 176; examples of defective answers, Indianapolis, B. & W. R. Co. *v.* Risley, 50 Ind. 60; Shipman *v.* State, 43 Wis. 381; Nys *v.* Biemeret, 44 id. 104; Elmore *v.* Hill, 46 id. 618; Coltzhauser *v.* Simon, 47 id. 103; nature and effect of *sham answers*, Womble *v.* Fraps, 77 N. C. 198; Ranson *v.* Anderson, 9 S. C. 438; Greenbaum *v.* Turrill, 57 Cal. 285; of *frivolous answers*, Munger *v.* Shannon, 61 N. Y. 251; Cottrell *v.* Cramer, 40 Wis. 555; Hemme *v.* Hays, 55 Cal. 337; Fay *v.* Cobb, 51 id. 313; Dail *v.* Harper, 83 N. C. 4; Hull *v.* Carter, 83 id. 249; Brogden *v.* Henry, 83 id. 274; Larimore *v.* Wells, 29 Ohio St. 13; Sargent *v.* Steubenville, etc. R. Co., 32 id. 449; Ross *v.* Ross, 25 Hun, 642; Lerdall *v.* Charter Oak Ins. Co., 51 Wis. 426.

[Where a defence is irrelevant it may be stricken out on motion: Nat. Distilling Co. *v.* Cream City Co. (1893), 86 Wis. 352, 56 N. W. 864. A motion does not reach back, like a demurrer, to the first defective pleading: Smith *v.* Kibling (1897), 97 Wis. 205, 72 N. W. 869.]

§ 488. * 597. **Conflict of Decisions.** This general rule is well settled; but there has been some conflict of decisions in its

Citing Thomas *v.* Goodwine, 88 Ind. 458; Dawson *v.* Eads (1894), 140 Ind. 208, 39 N. E. 919.

Issues which may be raised by Demurrer.

Whether the allegations of the complaint entitle the plaintiff to equitable relief: Devereux *v.* McCrady (1895), 46 S. C. 133, 24 S. E. 77; Meyer *v.* Garthwaite (1896), 92 Wis. 571, 66 N. W. 704; Glover *v.* Hargadine-McKittrick Co. (1901), 62 Neb. 483, 87 N. W. 170 (general demurrer); Gullickson *v.* Madsen (1894), 87 Wis. 19, 57 N. W. 965 (general demurrer).

But this issue cannot be raised by demurrer *ore tenus* at the trial: Meyer *v.* Garthwaite (1896), 92 Wis. 571, 66 N. W. 704; Pierstoff *v.* Jorges (1893), 86 Wis. 128, 56 N. W. 735; Bigelow *v.* Town of Washburn (1898), 98 Wis. 553, 74 N. W. 362; Lederer *v.* Union Sav. Bank (1897), 52 Neb. 133, 71 N. W. 954.

Whether a claim is too stale for equity to recognize it: Wilson *v.* Wilson (1902), 41 Ore. 459, 69 Pac. 923. Whether an action is prematurely brought: Dickerman *v.* New York, etc. R. R. Co. (1899), 72 Conn. 271, 44 Atl. 228; Fiore *v.* Ladd (1896), 29 Ore. 528, 46 Pac. 144.

Whether suit is brought in the name of the real party in interest: J. I. Case Threshing Co. *v.* Pederson (1894), 6 S. D. 140, 60 N. W. 747; Smith *v.* Security Co. (1899), 8 N. D. 451, 79 N. W. 981; Meyer *v.* Barth (1897), 97 Wis. 352, 72 N. W. 748.

Jurisdiction. Cannot be raised by general demurrer: Woods *v.* Sheldon (1896), 9 S. D. 392, 69 N. W. 602.

Corporate capacity, when plaintiff fails to allege it: Calnan Construction Co. *v.* Brown (1899), 110 Ia. 37, 81 N. W. 163, citing Sweet *v.* Ervin, 54 Ia. 101, and Andre *v.* Railway Co., 30 Ia. 107. But a general demurrer will not raise this issue: Sly *v.* Palo Alto Mining Co. (1902), 28 Wash. 485, 68 Pac. 871.

Authority to sue. Cannot be raised by demurrer: Milwaukee *v.* Zoehrlaut Co. (1902), 114 Wis. 276, 90 N. W. 187.

Whether the facts stated entitle the plaintiff to *any* relief: George *v.* Edney (1893), 36 Neb. 604, 54 N. W. 986; Western Union Tel. Co. *v.* Mullins (1895), 44 Neb. 732, 62 N. W. 880.

Statute of frauds: Wiseman *v.* Thompson (1895), 94 Ia. 607, 63 N. W. 346; Powder River Live Stock Co. *v.* Lamb (1893), 38 Neb. 339, 56 N. W. 1019; Graves *v.* Clark (1897), 101 Ia. 738, 69 N. W. 1046; Crane *v.* Powell (1893), 139 N. Y. 379, 34 N. E. 911; Tynon *v.* Despain (1896), 22 Colo. 240, 43 Pac. 1039; Mendelsohn *v.* Banov (1900), 57 S. C. 147, 35 S. E. 499. *Contra*, Hemmings *v.* Doss (1899), 125 N. C. 400, 34 S. E. 511.

In Wetztein *v.* Boston & M. Min. Co. (1903), 28 Mont. 451, 72 Pac. 865, the court said: "Section 680 of the Code of Civil Procedure provides that a demurrer may be interposed to a complaint upon the following ground: '(3) That there is another action pending between the same parties for the same cause.' In order to invoke successfully this ground of demurrer, it must appear from the face of the complaint (1) that another action is pending, (2) that it is between the same parties, and (3) that it is for the same cause." Each one of these requisites is carefully considered in relation to the pleadings in the case."

Demurrer Ore Tenus.

The Supreme Court of Wisconsin, in discussing this subject, said in Smith *v.* Kibling (1897), 97 Wis. 205, 72 N. W. 869, — "No practice is known whereby it was competent for the defendant to challenge the sufficiency of the complaint by an oral demurrer. Under the present practice all pleadings are required to be in writing. The time was when all pleadings were oral. Then it was competent to demur *ore tenus*, or orally. It is now familiar practice to raise the question of the sufficiency of the complaint at the trial by an objection to the reception of evidence under the complaint. This objection is something like the demurrer *ore tenus* of the ancient practice, and some of its consequences are the same; and because of this similarity it is, for convenience, called a demurrer *ore tenus*. But it is not a demurrer at all, within the con-

practical application, and judges have occasionally made use of very inaccurate language while invoking it, which has tended to add confusion to a matter which should be kept clear and certain. Thus, judges of great learning and ability, and who are usually guarded in their choice of expressions, in discussing the character of pleadings, both complaints or petitions and answers, when the objection to them was presented for the first time at the trial, and evidence in support of the cause of action or defence was opposed on the ground then first stated, that the allegations were insufficient, have said, that although the pleading was in fact defective, *and even though it was so defective as to be demurrable*, yet, as the adverse party had not demurred, nor moved to make it more certain, but had gone to trial upon it, he had thereby waived all objection to its sufficiency.[1] This lan-

templation of the statute. In practice, this objection is properly made upon the trial when evidence under the complaint is first offered. The ruling upon the objection is a mere ruling upon the trial, to be preserved in the bill of exceptions."

Speaking Demurrer.

A demurrer which introduces a new averment or assumes that the pleading demurred to contains an allegation which it does not contain, is a speaking demurrer, and should be overruled: Clarke *v.* East Atlanta Land Co. (1901), 113 Ga. 21, 38 S. E. 323; Mathis *v.* Fordham (1901), 114 Ga. 364, 40 S. E. 324; Woods *v.* Colony Bank (1901), 114 Ga. 683, 40 S. E. 720; Teasley *v.* Bradley (1900), 110 Ga. 497, 35 S. E. 782; Beckner *v.* Beckner (1898), 104 Ga. 219, 30 S. E. 622.

Demurrer Exclusive.

Defects which appear on the face of the pleading and which are grounds for demurrer, cannot be raised by answer: Bender *v.* Zimmerman (1896), 135 Mo. 53, 36 S. W. 210; Medland *v.* Walker (1895), 96 Ia. 175, 64 N. W. 797; Clark *v.* Ross (1895), 96 Ia. 402, 65 N. W. 340; Griffith *v.* Cromley (1900), 58 S. C. 448, 36 S. E. 738.

A plaintiff may demur to an answer on the ground that it does not state a defence, and also move to have it struck out as frivolous: Badham *v.* Brabham (1899), 54 S. C. 400, 32 S. E. 444. A demurrer and motion to dismiss are in legal effect the same, and proceed upon substantially the same grounds: Cofer *v.* Riseling (1900), 153 Mo. 633, 55 S. W. 235. A demurrer on the ground of another action pending cannot be sustained where there is nothing in the complaint indicating the pendency of such other action: Jackson *v.* McAuley (1895), 13 Wash. 298, 43 Pac. 41.

Frivolous Demurrer.

The Supreme Court of Minnesota, in Olsen *v.* Cloquet Lumber Co. (1895), 61 Minn. 17, 63 N. W. 95, said: "A demurrer should not be struck out as frivolous unless it is manifest, without argument, from a mere inspection of the pleading, that there was no reasonable ground for interposing it. It should not be struck out where there is such room for debate as to the sufficiency of the pleading demurred to that an attorney of ordinary intelligence might have interposed a demurrer in entire good faith." See also, Littlefield *v.* Wm. Bergenthal Co. (1894), 87 Wis. 394, 58 N. W. 743; Geilfus *v.* Gales (1894), 87 Wis. 395, 58 N. W. 742.]

[1] [In First Nat. Bank *v.* Zeims (1894), 93 Ia. 140, 61 N. W. 483, the court said: "If matter pleaded as a defence is not attacked by motion or demurrer, and there is testimony to sustain it, it will defeat the action, although it may not have amounted

guage is certainly inaccurate, and unnecessarily confuses a subject which is in itself not free from difficulty. It is, beyond a doubt, true, that if the answer or other pleading is defective in such a manner, and to such an extent only, that the proper method of correction is a motion to make it more definite and certain, and if the adverse party omits to make the motion, but goes to trial, he thereby waives the objection, and cannot raise it by attempting to shut out evidence of the cause of action or defence. But if the defect is of such a nature that a demurrer is proper, and the pleading would be held insufficient upon a demurrer, it is equally certain that the adverse party does not waive the objection by going to trial without demurring.[1] If the pleading was a complaint or petition, the ground of demurrer would necessarily be, that it did not state facts sufficient to constitute a cause of action; and, by an express provision of all the codes, this ground is not waived by answering and going to trial. If the pleading was an answer, the ground of demurrer would still be that the facts stated did not constitute a defence or counter-claim; and if it did not, in fact, allege a defence or counter-claim none could be proved under it at the trial.[2] The rule, with its proper limitations, is a correct one, and operates in the interests of justice and good faith; but if acted upon in the broad manner as above recited, it would tend to destroy all certainty and accuracy in pleading. If the deficiencies are such that a motion is the proper mode of cure, they are necessarily of form, and not of substance; the adverse party is not in fact misled; and a neglect on his part to apply the remedy in an early stage of the cause ought to be and is a waiver of all objection, so that the cause of action or defence, as the case may be, can be proved, notwithstanding the ambiguity and indefiniteness of the averments.

§ 489. * 598. **Same Subject.** Adopting the rule in this restricted scope, there are still cases of doubt and of conflict in its application. In some answers a defect of substance is plain;

to a legal defence." Citing Conger *v.* Crabtree, 83 Ia. 536, 55 N. W. 335; Linden *v.* Green, 81 Ia. 365, 46 N. W. 1108; Benjamin *v.* Veith, 80 Ia. 149, 45 N. W. 731.]

[1] [See note on Waiver of Defects of Substance, p. 605. But see also Wilson *v.* Aberdeen (1901), 25 Wash. 614, 66 Pac. 95; Klotz *v.* James (1896), 97 Ia. 337, 66 N. W. 190.]

[2] [See Wintrode *v.* Renbarger (1898), 150 Ind. 556, 50 N. E. 570, where it was held that a demurrer on the ground that facts were not stated "sufficient to constitute a good answer to the complaint of the plaintiff" does not raise the question of the sufficiency of the answer to state a defence.]

the facts alleged clearly constitute no defence: in others the deficiencies are as plainly formal; the necessary facts are all mentioned; no doubt can exist as to the actual intent and meaning, but still some requirements as to form and method have not been complied with. Between these two extremes there are cases bordering upon the dividing-line, in which it is difficult to determine with certainty whether the defect is one of form merely, or whether it passes the limit, and is one of substance. In such instances we shall naturally find a conflict of decision among different judges, and we shall even discover the same court vacillating, in one case applying the liberal doctrine and holding the objection waived, and, in another not essentially different, enforcing the stricter rule, pronouncing the answer entirely bad, and wholly rejecting it. In some of the decisions to which I shall refer, it would seem that able courts have neglected their own precedents, and forgotten the rule imposed upon them by the statute, which abrogates the inequitable common-law doctrine of an interpretation adverse to the pleader, and requires a liberal construction with a view to substantial justice between the parties. It is only by a comparison and analysis of these decisions that a practical result can be reached, and a general principle deduced; and I shall therefore cite, either in the text or in the notes, the leading cases which have passed upon this important question.

§ 490. * 599. **Defects of Form are Curable by Motion.** The authorities are uniform that a mere defect of form, as it has been already described, must be cured by a motion, and not by a demurrer.[1] In an action to foreclose a purchase-money mort-

[1] [*General Rules as to Motions.*

The determination of a motion is not *res judicata*, so as to prevent parties from drawing the same matters in question again in an action: Heidel *v.* Benedict (1894), 61 Minn. 170, 63 N. W. 490. The test as to whether the ruling on a motion is appealable before judgment is this: "Does the part of the pleading assailed show a distinct cause of action, or is it a mere incident thereto? Does the ruling go to the plaintiff's right to recover, or merely to the amount of his recovery on a ground otherwise pleaded? If the order relates to the former, it is appealable. If to the latter, it can only be considered on appeal from the final judgment." Allen *v.* Church (1897), 101 Ia. 116, 70 N. W. 127. A motion to strike out a pleading and the ruling of the court thereon can only be made a part of the record by bill of exceptions or by order of court: Allen *v.* Hollingshead (1900), 155 Ind. 178, 57 N. E. 917. A pleading which sets up the proper facts will be considered as a motion although not so designated: Waldo *v.* Thweatt (1897), 64 Ark. 126, 40 S. W. 782.

Pleading over after a motion has been overruled waives objection to the ruling:

gage of land conveyed by the plaintiff to the defendant, the answer set up covenants in the deed of conveyance, and a breach of them, namely, "that the plaintiff was not seised of the premises, as of a good and indefeasible estate in fee," etc., negativing all the covenants. To this the plaintiff replied, and instead of averring "that he was seised," etc., said, "And the plaintiff denies that at the time, etc., he was not seised in fee of the said premises," etc., and in this manner met all the allegations of the answer. The defendant demurred for insufficiency. It was held by the court that "insufficiency" as a ground of demurrer implies that the allegations do not constitute any defence or denial to the adverse pleading. The insufficiency relates to the substance of the averments as a whole, rather than to the form of the expression. The reply in this case was defective in form, but the substance thereof was good; that is, it stated a *denial* in an improper manner, and the remedy therefor was not by demurrer, but by motion to render the allegations more definite and certain.[1] Although this decision was made in reference to a reply, the principle applies equally to an answer.

Walser *v.* Wear (1897), 141 Mo. 443, 42 S. W. 928; Springfield, etc. Co. *v.* Donovan (1899), 147 Mo. 622, 49 S. W. 500; Bungenstock *v.* Nishnabotna Drainage Dist. (1901), 163 Mo. 198, 64 S. W. 149.

A motion which cannot be sustained substantially as made must be overruled: Palmer *v.* Bank of Ulysses (1899), 59 Neb. 412, 81 N. W. 303; First Nat. Bank *v.* Engelbercht (1899), 58 Neb. 639, 79 N. W. 556; Dobry *v.* Western Mfg. Co. (1899), 58 Neb. 667, 79 N. W. 559; Draper *v.* Taylor (1899), 58 Neb. 787, 79 N. W. 709; Hudelson *v.* First Nat. Bank (1898), 56 Neb. 247, 76 N. W. 570; Beebe *v.* Latimer (1899), 59 Neb. 305, 80 N. W. 904.

A motion to strike another motion is not proper practice: German Savings Bank *v.* Cady (1901), 114 Ia. 228, 86 N. W. 277; Long *v.* Ruch (1897), 148 Ind. 74, 47 N. E. 156; Bonfoy *v* Goar (1894), 140 Ind. 292, 39 N. E. 56. Nor is it proper to demur to a motion: Bonfoy *v.* Goar (1894), 140 Ind. 292, 39 N. E. 56.]

[1] Flanders *v.* McVickar, 7 Wis. 372, 377. See, to the same effect, Spence *v.* Spence, 17 Wis. 448, 454; Hart *v.* Crawford, 41 Ind. 197; Snowden *v.* Wilas, 19 Ind. 10; Fultz *v.* Wycoff, 25 Ind. 321; Phœnix *v.* Lamb, 29 Iowa, 352, 354; First Nat. Bk. of New Berlin *v.* Church, 3 N. Y. S. C. 10. The answer averred that defendant "had no knowledge or information thereto," which was held to be an improper form of denial; but the plaintiff's remedy was by motion, and the defect had been waived. Seeley *v.* Engell, 13 N. Y. 542, 548, per Denio J.: "The alleged mistake was set up in the answer, and denied by the reply. If the allegation in that respect was too general in its terms, the remedy of the plaintiff was by motion, under § 160, to compel the defendant to make it more certain." See also Stringfellow *v.* Alderson, 12 Kan. 112; Lathrop *v.* Godfrey, 6 N. Y. S. C. 96; Hutchings *v.* Castle, 48 Cal. 152; Jackson Sharp Co. *v.* Holland, 14 Fla. 384, 389; *a fortiori* such an answer cannot be objected to for the first time on appeal. Green *v.* Lake Sup. & Pac. Fuse Co., 46 Cal. 408. See also McCown *v.* McSween, 29 S. C. 130; Hagely *v.* Hagely, 68 Cal. 348.

§ 491. * 600. **Defects of Form are waived by Neglect to move, and Going to Trial. Test of Formal Defects.** That all objections of mere form to the answer are waived by a neglect to move, and by going to trial thereon, is sustained by numerous cases;[1] and some of them apply the rule to answers in which the deficiencies were very considerable, even so great as to have rendered the pleading demurrable in the opinion of the court pronouncing the decision. In White *v.* Spencer,[2] which was an action for flowing plaintiff's lands, the answer set up facts showing a user and enjoyment by defendant of the easement for more than twenty years, but did not aver that this user was *adverse.* The plaintiff replied a general denial, and on his objection all evidence in support of the answer was excluded at the trial. On appeal from the judgment rendered in favor of the plaintiff, the New York Court of Appeals held that the user must be adverse, and that the plaintiff might have successfully demurred to the answer, because an averment of such adverse user was omitted; but that, by replying, and going to trial, he had waived the objection. Denio J. said: "I am of opinion that the plaintiff, having treated the allegation in the answer as a sufficient statement of defence by replying to it, and by going to trial without objection, is precluded from objecting to evidence to sustain it." He cited cases showing that the same rule prevailed under the old system,[3] and added: "We have decided, it is true, that it is the duty of the judge on the trial to reject evidence offered in support of immaterial issues.[4] But an issue is not immaterial, within the meaning of this rule, on account of the omission of some averment in a pleading which is essential to the full legal idea of the claim or defence which is attempted to be set up. *If the court can see, as in this case, what the matter really attempted to be pleaded is,* the issue is not immaterial, though it may be defectively stated." In this last sentence Mr. Justice Denio has given a very clear and accurate description of *mere defects in form,* which are waived by a neglect to

[1] [See note on Imperfect, Incomplete, and Informal Allegations, p. 599. See also Barrett *v.* Baker (1896), 136 Mo. 512, 37 S. W. 130. "A bad answer is good enough for a bad complaint: Hiatt *v.* Town of Darlington (1898), 152 Ind. 570, 53 N. E. 825.]

[2] White *v.* Spencer, 14 N. Y. 247, 249, 251.

[3] Meyer *v.* McLean, 1 Johns. 509; 2 id. 183; Reynolds *v.* Lounsbury, 6 Hill, 534.

[4] Corning *v.* Corning, 6 N. Y. 97.

correct them by motion. Whether the principle was properly applied to the case before him, is, as it seems to me, more than questionable. The answer did not attempt to state an *adverse user*, and simply fail to state it with accuracy; it omitted any such averment entirely; it therefore set up no defence at all. When it is said that, if the court can *plainly see* what the matter really attempted to be pleaded is, the deficiency is formal, it is not intended that the court may be able, from their knowledge as lawyers and their experience as judges, to *guess* with reasonable certainty what the pleader designed; they must be able to gather from the legal import of the facts which are alleged — although improperly alleged — the nature of the defence relied on; in other words, the substantial facts which constitute that defence must, in some manner, appear on the record. A defence of fraud could hardly be considered sufficient at the trial, from which all averments of the *scienter* had been omitted; and yet a fact was here wholly left out of the answer which was as essential in making up the defence as the guilty knowledge is to constitute the fraud. Although the reasoning of Mr. Justice Denio is admirable in its definition of the general rule, his conclusion cannot be reconciled with some subsequent decisions of the same court.

§ 492. * 601. **Case of Simmons v. Sisson.** In Simmons *v.* Sisson, the subject was discussed at large both upon principle and upon authority.[1] The reasoning of the court, and the

[1] Simmons *v.* Sisson, 26 N. Y. 264, 271. The action was brought by the plaintiff, treasurer of a corporation, against the defendants, as stockholders. The complaint alleged that the plaintiff had, by order of the directors, advanced and expended a certain sum more than he had received from its funds, and that the corporation was indebted to him therefor. The answer contained two defences, — 1. It denied that the corporation was indebted to the plaintiff in said sum, or in any other sum; 2. It alleged that the plaintiff had been directed by the corporation to expend the earnings thereof, and no more; that with knowledge of such direction, and of the amount of such earnings, he had expended more than said amount, contrary to the wishes and instructions of the corporation, and in his own wrong. On the trial, the referee held that this answer admitted the allegations of the complaint, that the plaintiff had expended the sum mentioned over and above the earnings, and had done this by order of the directors. On appeal from the judgment rendered in favor of the plaintiff, Selden J., who delivered the opinion of the court, declared that the first defence was the exact equivalent of *nil debet* at the common law, and was a good general denial under the code, and then proceeded as follows: "But whether the preceding position is correct or not, it was too late to object at the close of the trial that this division of the answer did not put the fact of indebtedness in issue. Under the former system of pleading, *nil debet* to an action of debt on bond or judgment was bad on

decision upon it, are, in the main, in perfect accord with the spirit and letter of the codes, and well express the liberal design of the reformed procedure. The only criticism which must be made upon the opinion — and it is a most important one — is upon that portion which draws analogies from the common-law system. Certainly none of the special common-law rules which distinguished the cases in which a particular form of general issue could be used, and which defined the office of a demurrer either general or special as applied to such pleas, are preserved; they have all been swept away, and any trace of them only serves to obscure the clear principles which find an expression in the codes.[1]

§ 493. * 602. **Additional Cases.** In an action upon a promissory note, the defendant, an accommodation-maker, pleaded the defence of payment by the payee, and on the trial proved, under objection, a delivery of lumber by said payee to the plaintiff, and the receipt thereof by him in full satisfaction of the demand.

general demurrer; but if, instead of demurring, the plaintiff went to trial on that issue, it was always held to put him to proof of his cause of action. Starkie on Ev. 140; 2 Phil. Ev. Cow. & H.'s ed. 168; 1 Ch. Pl. (Springfield ed. 1844) 433; Meyer *v.* McLean, 2 Johns. 183; Rush *v.* Cobbett, 2 Johns. Cas. 256, per Radcliff J. . . . I think, therefore, that under the strictest rules of special pleading, the first defence of the answer, if not objected to as insufficient before trial by demurrer, would always have been held sufficient, on the trial, to put in issue the cause of action; and that, in view of the provisions of the code in reference to the construction of pleadings, the referee erred in holding that the defendants had admitted the indebtedness of the corporation, when they expressly denied it. There are, I think, much stronger reasons now for holding such an answer sufficient, on the trial, to put the question of indebtedness in issue than there were when the decisions were made to which I have referred. Parties are now provided with short and cheap methods by motion to compel defective pleadings to be amended, stricken out, or that judgment be pronounced upon them summarily; and they can have no excuse for reserving such objections until the close of the trial. I am of opinion, that, when that course is taken, the party must stand upon the pleadings and evidence together; that the judgment must be such as the whole case, pleadings and evidence united, demands; and that it would be the duty of the court, under § 176, to disregard defects in the pleadings not before noticed, or to order the required amendments under §§ 170, 173. If, however, the case should be such as to satisfy the court that neither party had been misled by defects in the pleadings, it should be disposed of under § 169."

[1] Even though the general issue *nil debet*, when improperly pleaded in debt upon a specialty, might be reached by a *general* demurrer, it is very clear that the *first* defence in the case above mentioned was not *demurrable* upon any true construction of the provisions found in the codes. It was an *attempted* denial, and it actually contained denials: its real defect was that it denied the *legal* conclusion from the facts alleged by the plaintiff, and not the facts themselves. The only proper mode to correct it would have been a motion. All that was said of its resemblance to *nil debet* was utterly outside of the questions before the court.

The New York Court of Appeals, after holding that the answer was good, and that under a defence of payment the defendant may prove a payment in cash or in any other manner, added: "If the particulars of the transaction between the payee and the plaintiff were not sufficiently disclosed by the answer, the plaintiff's remedy was a motion under § 160 of the code. He could not accept the plea, and go to trial upon it, and then interpose the objection for the first time that it was not sufficiently descriptive of the particulars relied on as constituting payment."[1] In Chamberlain *v.* Painsville, etc. R. R.,[2] the Supreme Court of Ohio applied the rule sanctioned by Simmons *v.* Sisson to an answer equally faulty with the one in the latter case in its denial of legal conclusions rather than of issuable facts. The action being upon a promissory note, the answer was, "That the said note in said petition mentioned was and is wholly without consideration, and void." No motion was made to compel more specific averments, and the parties went to trial. The court, after saying that the defendant might have been required to make the defence more definite and certain, added: "Under the broad issue thus chosen by the parties, any evidence would have been admissible which tended to impeach or sustain the consideration of the note." The answers in this case and in Simmons *v.* Sisson closely resembled each other in their defects and in their violation of the principles of pleading introduced by the codes. In both, the defendants designed to raise an issue of fact which would go to the whole cause of action. The defect was not a misconception of the defence, nor a reliance on matters which constituted no defence; it was only an imperfect manner of stating a defence which was in itself perfect. Under a true construction of the codes, neither of these answers was demurrable. If the plain distinction established by the statutes is to be preserved, it is clear that a motion to make the pleading more definite and certain is the only mode of curing defects of this kind. I am aware that demurrers have been sustained to such defences, on the ground that they were conclusions of law, and not allegations of fact; but the courts have sometimes overlooked the distinctions in this respect created by the legislature.

[1] Farmers' & Cit. Bk. *v.* Sherman, 33 N. Y. 69, 79.

[2] Chamberlain *v.* Painesville & H. R. Co., 15 Ohio St. 225, 251.

§ 494. * 603. **Doctrine that Defects of Substance are waived by Failure to demur.** I repeat, the doctrine would be an anomaly that an answer may be demurrable because it fails to set up any defence or counter-claim, and still become a sufficient pleading so as to admit proof of the defence or counter-claim from the plaintiff's neglect to demur or to object in some other manner prior to the trial. This proposition has, nevertheless, been expressly sanctioned by the courts in certain cases, although it is not supported by the weight of judicial authority, and is certainly not sustained by principle.[1] Roback *v.* Powell[2] is an example of these decisions. This case goes farther than any of those before cited, and certainly farther than the rule invoked will warrant. A counter-claim is an independent cause of action, in which the defendant becomes the actor, and assumes the character of a plaintiff. The occasions and purposes in and for which it may be set up are carefully prescribed, and it was conceded that this answer did not come within the statutory definition. If the decision be correct, on the same principle it ought to be held that a defendant waives all objection to the sufficiency of a complaint or petition which does not state facts constituting a cause of action, when he answers it and goes to trial.

§ 495. * 604. **Liberal Rule of Construction not always Followed.** Notwithstanding this array of cases in which the liberal rule of construing the pleadings has been sometimes pushed even to an unwarrantable extreme, there are others in which the courts have entirely disregarded the doctrine, have overlooked their own precedents, and have gone to as great a length in the opposite direction. In Manning *v.* Tyler, an action was brought upon a promissory note against R. as maker, and T. as indorser.[3]

[1] [See note on Waiver of Defects of Substance, p. 605.]

[2] Roback *v.* Powell, 36 Ind. 515, 516. The action was upon an injunction bond given by Mrs. Roback. The injunction had restrained the plaintiff from taking down a house which stood upon her land. She pleaded, 1, a general denial, and, 2, as a counter-claim, that Powell entered upon her land in her possession, and tore down her house, and carried the same away, to her damage $2,000, for which sum she demanded judgment. The plaintiff replied by a general denial, and went to trial. All evidence in support of the counter-claim having been excluded, the Supreme Court of Indiana held, upon the defendant's appeal, that as the action was on a contract, and the counter-claim was for an alleged tort, the latter was in every way improper, and could not be sustained had it been properly objected to; but that all objection to it had been waived by the replying and going to trial, and therefore the evidence in its support should have been received.

[3] Manning *v.* Tyler, 21 N. Y. 567. See also Gaston *v.* McLeran, 3 Ore. 389, 391; Taggart *v.* Risley, 3 Ore. 306; Freitag *v.* Burke, 45 Ind. 38, 40.

Although the answer of the defendants was held to be frivolous, yet the dissenting opinion of Mr. Justice Denio, rather than that of the court, seems to express the rule established by the code. The deficiencies in this answer were certainly no greater than those in other pleadings to which the liberal mode of construction had been applied by the same court. The pleader did allege something more than the broad conclusion that the note was usurious, and the criticism of the court in this respect was without foundation in fact: he detailed the issuable facts with such minuteness and certainty, that no one could be misled as to the exact nature of the defence. The narrative was undoubtedly incomplete, and it should have been perfected upon the plaintiff's motion; but this is all that can be objected to it. The court may have been unconsciously influenced in their decision by a feeling of distaste for the defence of usury, and thus led to apply a stricter rule of construction than they would have enforced in respect to other defences.

§ 496. * 605. **Case of Lefler v. Field.** The case of Lefler *v.* Field[1] is in yet stronger contrast with the general course of authorities, and with the express requirement of the codes that the pleadings must be construed liberally with a view to substantial justice between the parties, and not adversely to the pleader. The action was for the price of barley bargained and sold. The answer set up that the barley was contracted for by an agent of the defendants, who agreed to buy it if it was good and merchantable; that the plaintiff represented said barley to be a good, first quality, merchantable article; that the agent relied on such representations; that the barley was not merchantable, which fact was known to the plaintiff, and therefore the defendants refused to accept the same. No demurrer was interposed, nor motion made; and the parties went to trial on the pleadings as they stood. The Court of Appeals held that no evidence was admissible to establish the defence; that the answer did not allege a defence of fraud, since it omitted to state two necessary elements thereof: (1) that the plaintiff made the representation with the intent to deceive, and (2) that the defendants or their agent were in fact deceived.

§ 497. * 606. **Pleadings by Joint Defendants.** When two or more defendants are sued and unite in one responsive pleading,

[1] Lefler *v.* Field, 52 N. Y. 621. Compare Hutchins *v.* Castle, 48 Cal. 152.

it must be good as to each and all of these parties, or it will be wholly bad.[1] This is the rule which prevails almost universally. Thus, if the defendants join in an answer which on demurrer proves to be insufficient as to one, it will be adjudged bad as to all; but the result will, of course, be otherwise if they plead the same answer separately.[2] On the same principle, if two or more defendants unite in a demurrer to the complaint or petition, and a good cause of action is stated against one or some of them, the demurrer will be wholly overruled.[3] The rule is extended by analogy to pleadings containing two or more separate defences or causes of action. If a demurrer is interposed to an entire answer containing two or more separate defences, or to an entire complaint containing two or more causes of action, it will be overruled if there is one good defence or one good cause of action.[4] In an action for a joint and several tort against several defendants, where the answer of one is a complete justification of the alleged wrong as to all, and the others either suffer a default or plead different defences, if the issues raised by this answer are found against the plaintiff, the verdict will operate for the benefit of all the defendants, and he cannot recover a judgment against those even who made default.[5]

§ 498. * 607. **Partial Defences.** It was an inflexible rule under the common-law system that every plea in bar must go to the whole cause of action, and must be an entire answer thereto on the record: with pleas in abatement the rule was different, for they did not purport to answer the cause of action. The spreading of a partial defence upon the record was unknown. Whenever such defences were to be relied upon, — as, for example, mitigating circumstances, — they were either proved under the general issue, or under a special plea setting up a complete defence which the pleader knew did not

[1] [Whitcomb *v.* Hardy (1897), 68 Minn. 265, 71 N. W. 263.]

[2] Morton *v.* Morton, 10 Iowa, 58.

[3] McGonigal *v.* Colter, 32 Wis. 614; Webster *v.* Tibbits, 19 Wis. 438.

[4] Jeffersonville, M. & I. R. Co. *v.* Vancant, 40 Ind. 233; McPhail *v.* Hyatt, 29 Iowa, 137; Modlin *v.* N. W. Turnp. Co., 48 Ind. 492; Excelsior Draining Co. *v.* Brown, 47 Ind. 19; Towell *v.* Pence, 47 Ind. 304; Davidson *v.* King, 47 Ind. 372; Washington Tp. *v.* Bonney, 45 Ind. 77; Silvers *v.* Junction R. Co., 43 Ind. 435, 442–445. See also Bruce *v.* Benedict, 31 Ark. 301; Everett *v.* Waymire, 30 Ohio St. 308; Nichol *v.* McCallister, 52 Ind. 586; Roberts *v.* Johannas, 41 Wis. 616. See also § * 577, *ante*.

[5] Williams *v.* McGrade, 13 Minn. 46. See also, to the same effect, Devyr *v.* Schaefer, 55 N. Y. 446.

exist. The code has certainly abolished this doctrine and the practice based upon it. Several features of the new procedure are utterly inconsistent with it. In the first place, the general or special denials of the code are not so broad as the general issues of the common law most in use had become; and, as will be particularly shown in the following section, they admit of no evidence not in direct answer to the plaintiff's allegations. In the second place, the verification of pleadings introduced by the codes cuts off all averment of fictitious defences. In the third place, the statute expressly authorizes the defendant to set forth "as many defences as he may have;" and this has been very properly construed as a direct permission, and even requirement, to plead partial as well as complete defences.[1] Notwithstanding this express statutory provision, there has been some conflict of opinion among the courts in respect to the pleading of mitigating facts and circumstances. Certain judges have found it impossible to forget the technical methods of the old procedure, and have seemed determined to treat them as still existing in full force and effect; while others have readily adopted the spirit as well as the letter of the reformed system. I shall therefore postpone the discussion of this particular subject — the pleading of mitigating circumstances — until the sections are reached which treat of the "general denial" and of "new matter."

§ 499. * 608. **Partial Defences should be pleaded as such.** While partial defences are to be pleaded, it is well settled that they must be pleaded *as such*. If a defence is set up as an answer to the whole cause of action, while it is in fact only a partial one, and even though it would be admissible as such if properly stated on the record, it will be bad on demurrer: the facts alleged will not constitute a "defence;" which word, when thus used alone, imports a complete defence.[2] The practical result of this doctrine is, simply, that the pleader must be careful to designate the defence as partial; he must not content himself with simply averring the facts as in an ordinary case, as if they constituted a full answer to the cause of action, but he must expressly state that the defence *is* partial. In the absence

[1] [Coyle *v.* Ward (1901), 167 N. Y. 240, 60 N. E. 596.]

[2] [Breyfogle *v.* Stotsenburg (1897), 148 Ind. 552, 47 N. E. 1057; United States Saving Co. *v.* Harris (1895), 142 Ind. 226, 40 N. E. 1072. See also Bowman *v.* Fur Mfg. Co. (1895), 96 Ia. 188, 64 N. W. 775, construing the Code, § 2682.]

of such statement, it will be assumed that he intended the defence to be complete.[1]

§ 500. * 609. **Criticism of Foregoing Rule.** This rule seems to be well established, but it is certainly one which may often work injustice. It is a remnant of the old system, and does not harmonize with the central design of the new, which is to elicit the truth and to decide controversies upon all the actual facts. When the defendant has set up a defence as if to the entire cause of action, which is, however, only partial, and when, if described as partial, it would have been perfectly regular, the plaintiff could not be prejudiced by allowing it to stand for what it is worth as a partial defence. He knows that it is, in fact, partial, *for the very objection assumes that knowledge.* If accurately named, he would be obliged to meet and answer it on the trial; and he would only be compelled to make the same preparation if it were suffered to remain on the record, and to fulfil its intended purpose. In short, the plaintiff could not be misled by such a proceeding; and to strike out the pleading altogether would, if its allegations were true, be depriving the defendant of certain relief to which he was in justice entitled. I repeat, the rule is nothing but a remnant of the ancient technicality, the old devo-

[1] Fitzsimmons *v.* City F. Ins. Co. of New Haven, 18 Wis. 234; Traster *v.* Snelson's Adm., 29 Ind. 96; Sayres *v.* Linkhart, 25 Ind. 145; Conger *v.* Parker, 29 Ind. 380; Stone *v.* Lewman, 28 Ind. 97; Sanders *v.* Sanders, 39 Ind. 207; Yancy *v.* Teter, 39 Ind. 305; Bouslog *v.* Garrett, 39 Ind. 338; Summers *v.* Vaughan, 35 Ind. 323, and cases cited. In Fitzsimmons *v.* City F. Ins. Co., *supra*, it was said by Cole J., at p. 240: "The appellant contends that, if this answer is not good as a total defence, it is good as a partial defence to the action. The difficulty with this position is that this answer professes and assumes to answer the entire cause of action. It is not relied on as a partial, but as a complete defence, and we have seen that for this purpose it is insufficient. Now, under the old system, when a plea professed in its commencement to answer the whole cause of action, and afterwards answered only a part, the whole plea was bad. This rule was elementary; and, upon general principles, we do not see why it is not applicable to pleadings under the code. If a party has a partial defence to an action, he should set it up, and rely on it as such, and not as a complete and entire defence." See also, to the same effect, Adkins *v.* Adkins, 48 Ind. 12, 17; Allen *v.* Randolph, 48 Ind. 496; Alvord *v.* Essner, 45 Ind. 156; Curran *v.* Curran, 40 Ind. 473; Jackson *v.* Fosbender, 45 Ind. 305; Beeson *v.* Howard, 44 Ind. 413, 416; Gulick *v.* Connely, 42 Ind. 134, 136. But this rule does not extend to an answer simply pleading a set-off less than the plaintiff's demand, since a set-off is not strictly a defence. Mullendore *v.* Scott, 45 Ind. 113; Dodge *v.* Dunham, 41 Ind. 186. See also, as examples of the rule stated in the text, Jones *v.* Frost, 51 Ind. 69; McMahan *v.* Spinning, 51 id. 187; Keller *v.* Boatman, 49 id. 104; Putnam *v.* Tennyson, 50 id. 456; Peet *v.* O'Brien, 5 Neb. 360; Peck *v.* Parchin, 52 Iowa, 46; McDaniel *v.* Pressler, 3 Wash. 636; Thompson *v.* Halbert, 109 N. Y. 329; Shortle *v.* Terre Haute & I. Ry. Co., 131 Ind. 338; Indianapolis, E. R. & S. W. R. Co. *v.* Hyde, 122 Ind. 188.

tion to external forms of logical precision which marked the common-law procedure, and which made it anything but a *practical* means of eliciting and applying the truth in judicial controversies.

SECTION THIRD.

THE DEFENCE OF DENIAL.

§ 501. * 610. **Species of Denial.** The various species of denial provided for in the codes are "general" or "specific," and positive or a denial of "knowledge or information of the matter sufficient to form a belief." In most of the codes, it is expressly permitted that the denials may be either "general" or "specific." In a few, no provision is in terms made for the general denial, and only those that are "specific" or "special" are mentioned. In one or two, the language simply speaks of "a denial."[1] According to a large majority of the codes, the denial, whether general or specific, may be either positive, or a denial of "knowledge or information thereof sufficient to form a belief;" but in a very few of them the latter form is omitted. The defendant is universally allowed to deny only such allegations of the complaint or petition as he controverts, and this permission is usually given whether he employs the "general" or the "specific" form of denial; but in the latest revision of the Iowa Code [1897], it is said with more accuracy that the general denial must be "of *each* allegation of the petition," while the specific denial is to be "of each allegation of the petition controverted" by him.

[1] In Minnesota, although the code is silent respecting the general denial, and speaks only of "a denial of each allegation," it is settled by repeated decisions that the ordinary form of the general denial is a compliance with the statute, and is entirely proper: hence the general denial is in constant use in that State; and such, I believe, is the practice in most of the States. Leyde *v.* Martin, 16 Minn. 38; Becker *v.* Sweetzer, 15 Minn. 427, 434; Kingsley *v.* Gilman, 12 Minn. 515, 517; Bond *v.* Corbet, 2 Minn. 248; Caldwell *v.* Bruggerman, 4 Minn. 270; Starbuck *v.* Dunklee, 10 Minn. 173; Montour *v.* Purdy, 11 Minn. 401. On the other hand, in North Carolina, notwithstanding that the language of the code, which is exactly the same as that in New York, expressly authorizes the general denial, the general denial in the ordinary form, as used in other States, is held to be a nullity, and an answer containing it will be struck out as sham: an altogether different construction is placed upon the language of the statute from that given in any other State. Schehan *v.* Malone, 71 N. C. 440, 443; Flack *v.* Dawson, 69 N. C. 42; Woody *v.* Jordan, 69 N. C. 189, 195. In California and a few other States, the general denial is not permitted when the complaint or petition is verified; in such a case, therefore, a general denial raises no issue, and will be struck out on motion. People *v.* Hagar, 52 Cal. 171.

§ 502. * 611. **Outline of Proposed Treatment.** In actual practice, the "general denial," wherever permitted, is only employed when the defendant desires to put the whole complaint or petition in issue, and "specific" denials when he wishes to take issue merely with certain allegations thereof. It is very plain, that in the former case the "general denial," in its brief and comprehensive form, is as efficacious as a particular traverse of each averment separately. Nothing is gained by filling the record with specific denials, when one sweeping denial of the entire pleading will answer the same purpose and admit the same proofs. I shall distribute the subject-matter of this section under the following heads, assuming in the first instance, for convenience of the discussion, that the denial is "positive:" I. The form of the "general denial," and of the "specific denials;" II. The nature of "specific denials," and what issues they raise; III. Allegations admitted by omitting to deny; IV. Denials in the form of negatives pregnant; V. Argumentative denials, and specific defences equivalent to the general denial; VI. General denial of all allegations not otherwise admitted or explained; VII. What allegations must be denied, — issuable facts, and not conclusions of law; VIII. Denials of information or belief, when proper, and their effect; IX. What can be proved under denials either general or specific; X. Some special statutory rules in reference to denials.

§ 503. * 612. **Same Subject.** The discussion which follows, and the practical rules deduced therefrom, are based in the first place upon the assumption that the denials, whether general or specific, are *positive* in their nature. The conclusions which are reached apply, however, with equal force and effect, to those cases in which the denials are of information or belief. The only object of the latter form is, that the defendant may be enabled to put the plaintiff's allegations in issue when he is obliged to verify his answer, and cannot do so from his own personal knowledge: the effect and efficacy of the traverse are not diminished nor in any manner altered by the use of this method when it is properly employed.

§ 504. * 613. **External Form of Denials, General and Specific.** Under the common-law system there were several distinct species of the "general issue" and of particular traverses, each appropriate to and only to be used in some one of the different forms

of action, or to put in issue certain classes of allegations; but all these have been abolished in the reformed procedure. One form of the general denial is sufficient for all actions and for all issues; and although it may undergo slight and unimportant variations, it is substantially the same in all the States, and in the hands of all members of the bar. The material averment, modified doubtless in its phraseology, is that the defendant "denies each and every allegation of the complaint or petition." The form in common use is, "The defendant, for answer to the complaint herein, denies each and every allegation thereof."[1] It is of course impossible to describe the forms of any specific denial. From its very name and nature, it is the special traverse of some particular averment found in the plaintiff's pleading, and must therefore depend to a very great degree upon the matter and shape of the statement which is thus controverted. How far it should merely follow and negative the exact language of the allegation to which it is directed, will be considered under the subsequent head of the section which treats of denials in the form of a negative pregnant.[2] It will there be shown that such an

[1] This form is slightly varied in the standard text-books upon pleading, and in the actual practice of the bar: but this is entirely sufficient; any additional matter would be superfluous. Examples of irregular forms held to be sufficient, Moen *v.* Eldred, 22 Minn. 538; Jones *v.* Ludlum, 74 N. Y. 61; Brothington *v.* Downey, 21 Hun, 436; Hoffman *v.* Eppers, 41 Wis. 251; but an answer "that no allegation of the complaint is true," is wholly nugatory, — raises no issue.

[The following variations have been held sufficient. A denial of "each and every allegation of new matter:" City of Crete *v.* Hendricks (1902), Neb., 90 N. W. 215; a denial of "all the allegations of each paragraph of both counts of the petition:" Ocean Steamship Co. *v.* Anderson (1900), 112 Ga. 835, 38 S. E. 102; an answer that defendant "states and alleges that he denies each and every allegation of the petition:" Reiss *v.* Argubright (1902), Neb., 92 N. W. 988; an answer that defendants "say that they deny each and every allegation:" Town of Denver *v.* Spokane Falls (1893), 7 Wash. 226, 34 Pac. 926.

In State *ex rel. v.* Butte Water Co. (1896), 18 Mont. 199, 44 Pac. 966, the court said: "We shall follow the California cases, and hold that the statutory form of denial was the only one to be sustained." To the same effect see Rossiter *v.* Loeber (1896), 18 Mont. 372, 45 Pac. 560.

The alleged insufficiency of a general denial cannot be raised for the first time on appeal: King *v.* Pony Gold Min. Co. (1903), 28 Mont. 74, 72 Pac. 309.

A general denial is not rendered bad by immaterial matter alleged in connection therewith: Ralya *v.* Atkins (1901), 157 Ind. 331, 61 N. E. 726.]

[2] ["A denial of the very words of the allegations of the petition, without denying their substance and effect, tenders no issue:" Knight *v.* Denman (1902), 64 Neb. 814, 90 N. W. 863. It is not necessary that a traverse should be expressed in negative words: Stetson *v.* Briggs (1896), 114 Cal. 511, 46 Pac. 603; Glencross *v.* Evans (1894), Ariz., 36 Pac. 212. See also State *ex rel. v.* Adams (1901), 161 Mo. 349, 61 S. W. 894.

Where suit is brought on a note payable conditionally, and the defendant denies

exact adherence to the text of the adverse averment may be dangerous, as the result may be an admission of the substantial fact intended to be put in issue.

§ 505. * 614. **Issuable Facts as Distinguished from Evidentiary Facts and from Conclusions.** The object of all denials is to put in issue the allegations of the complaint or petition. As will be shown hereafter under the head of the proofs which may be admitted in support of a simple denial, it is only the *issuable facts* which need to be controverted, and which are in fact controverted, by the defendant's traverse. It frequently, and indeed generally, happens that the cause of action depends upon the existence of a succession or group of facts. Each of these must be established in order to make out the right of action, and all are therefore "issuable facts." In addition thereto, the plaintiff's pleading will often contain other averments which must be stated, but which need not be proved as stated, among which are those of time, place, number, quantity, value, and the like. Finally, it happens too frequently, that besides the statements of these strictly "issuable facts," which are all that the pleading should comprise, the plaintiff has unnecessarily, and in a certain sense improperly, introduced averments of matters which are really the details of evidence from which the existence of the "issuable facts" is to be inferred by the jury or the court. It is not always easy to distinguish in a complaint or petition between the main conclusions of fact, — the issuable or material facts, — all and each of which are indispensable to create the right of action, and the mere details of evidence which must be proved at the trial in order to establish the essential "issuable facts;" and the careless mode of pleading which has grown up in some States, contrary to the true intent and spirit of the reformed procedure, results chiefly from a disregard of the distinction here mentioned, and is shown in a confused admixture of evidentiary matter, allegations of substantial facts, and conclusions of law, in the same complaint or petition.

§ 506. * 615. **Function of the Specific Denial.** When the series of issuable facts which would make up the plaintiff's cause of

that the conditions have been performed, and specifies the particulars in regard to which there has been non-compliance, the defendant waives all grounds not specified: Coffin *v.* Black (1899), 67 Ark. 219, 54 S. W. 212. "A denial, though coupled with an allegation showing a lack of knowledge of the matters denied, is sufficient to raise an issue:" Smith *v.* Allen (1901), 63 Neb. 74, 88 N. W. 155.]

action are properly stated, it will frequently happen, especially if the pleadings are verified, that the defendant cannot deny them all. Some of them may be true, so that an issue upon them is impossible. But if one or more are not true, and can therefore be controverted, and if the existence of all is indispensable to the right of action, a denial of that particular allegation, or of those particular allegations, may be as complete a defence as though the entire series was traversed and disproved. The forming such an issue upon some one or more particular averments out of the whole number contained in the complaint or petition is the legitimate and proper office of the "special denial," and by its use in this manner an ample defence may be placed upon the record. A "specific denial" is therefore a denial of some particular averment in the complaint or petition; and whether or not it alone raises a material issue, and constitutes a sufficient defence, depends upon the question, whether the particular allegation thus traversed is in itself essential to the maintenance of the cause of action.[1] There may, of course, be several such specific denials inserted in the same answer, directed to distinct averments of the adverse pleading, and together constituting a defence differing from that raised by the "general denial" in the single circumstance, that by the latter *all* the issuable facts are put in issue, while by the former only a portion of them are controverted. As each specific denial is aimed at a particular averment, it should expressly and unmistakably point out the statement of fact intended to be traversed; it should deny that allegation fully and explicitly, so that the plaintiff may be forced to establish it by proofs; and it should leave no doubt as to the matter at which it is aimed, and as to the issue intended to be made.[2]

[1] [Where the denial in an answer relates solely to an averment which presents no ground for relief, such denial will be treated as surplusage: Chicago, etc. Ry. Co. *v.* Phillips (1900), 111 Ia. 377, 82 N. W. 787.

In Bowman *v.* Bowman (1899), 153 Ind. 498, 55 N. E. 422, the court said: "If an allegation in the opposite pleading be altogether immaterial, it cannot be traversed; otherwise the object of pleading, viz., the bringing the parties to an issue upon a matter or point decisive of the merits, would be defeated. And, upon this ground, it is said, that mere matter of aggravation, not going to the cause of action, or mere inducement or explanatory matter, not in itself essential to, or the substance of, the case, should not be traversed."]

[2] [To deny an averment specifically it must be singled out and denied apart from others in the same paragraph with which it is connected: Woronieki *v.* Pariskiego (1901), 74 Conn. 224, 50 Atl. 562. See also Boyle *v.* McWilliams (1897), 69 Conn. 201, 37 Atl. 501.

Where an answer contains a denial of

§ 507. * 616. **Illustrative Case.** The object of this kind of denial, and the rules which govern its use, were accurately stated in a recent case: "To determine whether an allegation has been properly denied or not, we must examine the answer to the particular allegation which it is designed to controvert. If, taken by itself, an issue is fairly made, and there is no admission inconsistent with the answer, the denial is sufficient. . . . Each denial must be regarded as applying to the specific allegation it purports to answer, and not as forming part of an answer to some other specific and entirely independent allegation."[1] A single case, an abstract of which is placed in the foot-note, will serve to illustrate the object and effect of the specific denial.[2] As the defendant in this action could not controvert his signature to the instrument, the pleader evidently supposed that it was impossible for him to deny the execution in the answer since the pleadings were verified; he therefore traversed but one issuable fact, — the delivery. Success in this issue was as complete a defence as though the execution

any material allegation, a general demurrer to the entire answer cannot be sustained: Hill *v.* Walsh (1894), 6 S. D. 421, 61 N. W. 440; Lee *v.* Mehew (1899), 8 Okla. 136, 56 Pac. 1046; City of Guthrie *v.* Lumber Co. (1897), 5 Okla. 774, 50 Pac. 84.]

[1] Racouillat *v.* Rene, 32 Cal. 450, 453, 455, per Sawyer J.; and see Allis *v.* Leonard, 46 N. Y. 688.

[2] Sawyer *v.* Warner, 15 Barb. 282, 285. The complaint, in an action upon a promissory note, alleged the making of the note by the defendant, the delivery thereof by the defendant to the plaintiff, the present ownership of the plaintiff, nonpayment, and indebtedness of the defendant thereon in the amount specified therein. The answer merely denied that the defendant ever "gave" the said note or any other note to the plaintiff, and denied all indebtedness. On the trial, the plaintiff proved the signature of the note to be in the defendant's handwriting, and his own possession. The body of the instrument was in the plaintiff's handwriting. The defendant then proved facts tending to show that he never executed the instrument *as a note*, and never delivered it to the plaintiff, but that he had some time written and left his name on a blank paper, and the plaintiff had fraudulently added the body of the note over such signature. The jury rendered a verdict for the defendant; and, upon the plaintiff's appeal, the court said: "The allegation in the answer that the defendant never gave the note to the plaintiff is a denial of the allegation in the complaint that the defendant made the note, so far as making includes delivery; and also of the further allegation, that the defendant delivered the note to the plaintiff. The question to be tried on these allegations was, whether or not the note was delivered to the plaintiff as alleged by him. . . . The plaintiff made out this fact *prima facie*. . . . But the defendant was at liberty, in support of his side of the issues, independent of other modes, to prove facts inducing a contrary presumption, and, in that way, overcome the presumption from the plaintiff's proof; and he was entitled to give in evidence any facts calculated to satisfy the jury by fair and direct inference that the note was never delivered by him."

had also been disproved. It is plain, however, that the "general denial" might have been pleaded; for, if the defence was true, there had never been any execution or delivery of the note in the legal sense of these terms.[1]

§ 508. * 617. **Allegations Admitted by Failure to deny.** All the codes provide that material allegations in the complaint or petition, not controverted by a general or specific denial, are admitted to be true for the purposes of the action.[2] It follows

[1] See Higgins *v.* Germaine, 1 Mont. 230; also Van Dyke *v.* Maguire, 57 N. Y. 429 (denial of value alone in action for labor and materials); Dunning *v.* Rumbaugh, 36 Iowa, 566, 568 (denial of execution only in an action on a note). For further illustrations of the text, see Trapnall *v.* Hill, 31 Ark. 346; Babbage *v.* Sec. Bap. Church of Dubuque, 54 Iowa, 172; Roberts *v.* Johannas, 41 Wis. 616; Miller *v.* Brigham, 50 Cal. 615; Lowell *v.* Lowell, 55 id. 316.

[Denials of specific allegations: Jurisdictional facts, Aultman *v.* Mills (1894), 9 Wash. 68, 36 Pac. 1046; consideration, Frank *v.* Jenkins (1895), 11 Wash. 611, 40 Pac. 220; seizin and possession, Raymond *v.* Morrison (1894), 9 Wash. 156, 37 Pac. 318; signification of alleged slanderous words, Barr *v.* Birkner (1895), 44 Neb. 197, 62 N. W. 494; corporate existence, Davis *v.* Nebraska Nat. Bank (1897), 51 Neb. 401, 70 N. W. 963; ownership, Central City Bank *v.* Rice (1895), 44 Neb. 594, 63 N. W. 60; execution of promissory note, Topeka Capital Co. *v.* Remington (1900), 61 Kan. 6, 59 Pac. 1062; same, Kimble *v.* Bunny (1900), 61 Kan. 665, 60 Pac. 746; partnership, Craig *v.* Chipman (1900), Ky., 57 S. W. 244; title, Sprigg *v.* Am. Cent. Ins. Co. (1897), 101 Ky. 185, 40 S. W. 575; execution, Marshall Field Co. *v.* Oren Ruffcorn Co. (1902), 117 Ia. 157, 90 N. W. 618; corporate existence, Law Trust Society *v.* Hogue (1900), 37 Ore. 544, 62 Pac. 380; that money is due, Parsons *v.* Wright (1897), 102 Ia. 473, 71 N. W. 351; that defendants were and still are doing business under the name of the C. agency, Nolan *v.* Hentig (1903), 138 Cal. 281, 71 Pac. 440.

Evidence admissible under specific denials: A denial that a note had been materially altered does not raise the issue that the note was so negligently drawn that the alteration could be made without exciting the suspicions of an ordinarily prudent business man: Bank of Commerce *v.* Haldeman (1900), 109 Ky. 222, 58 S. W. 587. In an action to recover for value of services rendered, the defendant cannot, under a denial of their value, prove that the services were not rendered, but is confined to proof of value: Buddress *v.* Schafer (1895), 12 Wash. 310, 41 Pac. 43. To same effect see Galliers *v.* Chicago, etc. Ry. Co. (1902), 116 Ia. 319, 89 N. W. 1109. Under a denial of title evidence of abandonment may be given: Trevaskis *v.* Peard (1896), 111 Cal. 599, 44 Pac. 246.

In Law Trust Society *v.* Hogue (1900), 37 Ore. 544, 62 Pac. 380, the court said: "A plea of *nul tiel* corporation imposes upon the plaintiff the burden of proving its corporate existence, but whether it should be considered a plea in abatement or in bar has been the subject of much controversy. . . . Such plea does not suggest a better writ, thereby lacking one of the essential elements of a plea in abatement; and as it tends to defeat, and not postpone, the action, we think the better reason supports the theory that a plea of *nul tiel* corporation goes to the merits, and is a plea in bar, and, this being so, Hogue and his wife did not waive such defence by joining it with a plea to the merits."

The execution and delivery of a bond sued on can only be denied by a plea of *non est factum:* English *v.* Grant (1897), 102 Ga. 35, 29 S. E. 157.]

[2] [Stork *v.* Supreme Lodge (1900), 113 Ia. 724, 84 N. W. 721; Kent *v.* Muscatine, etc. Ry. Co. (1902), 115 Ia. 383, 88 N. W. 935; Kellar *v.* Pagan (1899), 54 S. C. 255, 32 S. E. 352; McMillan *v.* Gambill (1894), 115 N. C. 352, 20 S. E. 474; Peterson *v.* Bean (1900), 22 Utah, 43, 61

that the plaintiff need not prove any material allegations so conceded to be true; evidence in contradiction of them cannot be received; and a finding of fact in opposition to such admission will be disregarded or set aside on appeal.[1] The important question is, What facts or allegations are "material"? The answer has already been indicated. The allegations of the "issuable facts" mentioned in the last preceding subdivision, and described at large in Chapter Third, are the material allegations, which are admitted by a neglect to deny them. It follows that the two other classes of averments found in complaints and petitions, viz., those of time, place, quantity, value, amount, and the like, and those of unnecessary evidentiary matter, or of legal conclusions, are not thus admitted. They need not be denied, and are not the subject-matter of proper issues upon the pleadings. The allegations of time, place, amount, value, amount of damages, and the like, are not, except in very special cases, matters of substance so as to require a denial; and they may, in general, be contradicted or modified

Pac. 213; Merguire *v.* O'Donnell (1894), 103 Cal. 50, 36 Pac. 1033; Pitzer *v.* Territory of Oklahoma (1896), 4 Okla. 86, 44 Pac. 216; Boles *v.* Bennington (1896), 136 Mo. 522, 38 S. W. 306; Parke *v.* Boulware (1901), Idaho, 63 Pac. 1045; Capitol Lumbering Co. *v.* Learned (1899), 36 Ore. 544, 59 Pac. 454; Harlan County *v.* Hogsett (1900), 60 Neb. 362, 83 N. W. 171; Davis *v.* First Nat. Bank (1899), 57 Neb. 373, 77 N. W. 775; Baker *v.* Peterson (1899), 57 Neb. 375, 77 N. W. 774; Lonergan *v.* Lonergan (1898), 55 Neb. 641, 76 N. W. 16; Equitable Trust Co. *v.* O'Brien (1898), 55 Neb. 735, 76 N. W. 417; Hartzell *v.* McClurg (1898), 54 Neb. 313, 74 N. W. 625; Stewart *v.* Am. Ex. Bank (1898), 54 Neb. 461, 74 N. W. 865; Rohman *v.* Gaiser (1898), 53 Neb. 474, 73 N. W. 923; Van Etten *v.* Kosters (1896), 48 Neb. 152, 66 N. W. 1106; Scofield *v.* Clark (1896), 48 Neb. 711, 67 N. W. 754; Maxwell *v.* Higgins (1893), 38 Neb. 671, 57 N. W. 388; Smith *v.* Coe (1902), 170 N. Y. 162, 63 N. E. 57; Bouscaren *v.* Brown (1894), 40 Neb. 722, 59 N. W. 385; Douglas County *v.* Bennett (1901), 61 Neb. 660, 85 N. W. 833; White *v.* Costigan (1903), 138 Cal. 564, 72 Pac. 178; Herring-Hall-Marvin Co. *v.* Smith (1903), 43 Ore. 315, 72 Pac. 704. But allegations of value and damages are not admitted by failure to deny them: Baker *v.* Peterson (1899), 57 Neb. 375, 77 N. W. 774; Hartzell *v.* McClurg (1898), 54 Neb. 313, 74 N. W. 625; Grant *v.* Clarke (1899), 58 Neb. 72, 78 N. W. 364.

Admissions in pleadings are conclusive: Nugent *v.* Powell (1893), 4 Wyo. 173, 33 Pac. 23; Gadsden *v.* Thrush (1898), 56 Neb. 565, 76 N. W. 1060. Facts admitted in the pleadings need not be proved: Johnson *v.* Reed (1896), 47 Neb. 322, 66 N. W. 405; Bradfield *v.* Sewall (1899), 58 Neb. 637, 79 N. W. 615; Knight *v.* Finney (1899), 59 Neb. 274, 80 N. W. 912. But a party is not bound by admissions in abandoned pleadings: Mahoney *v.* Hardware Co. (1897), 19 Mont. 377, 48 Pac. 545. But they must be proved as against infant defendants, under Code, § 126: Leslie *v.* Maxey (1902), Ky., 67 S. W. 839.]

[1] Morton *v.* Waring's Heirs, 18 B. Mon. 72, 82; Bradbury *v.* Cronise, 46 Cal. 287; Howard *v.* Throckmorton, 48 Cal. 482, 490.

[Goldwater *v.* Burnside (1900), 22 Wash. 215, 60 Pac. 409.]

without a denial. Thus, in actions of trover, trespass, or replevin, it was not necessary to traverse the averments as to the value of the chattels, and as to the amount of damages; and the same rule prevails in all actions brought for a similar purpose under the new system.[1] "The defendant is not bound to answer all matters of evidence which the plaintiff chooses to allege. The office of the complaint is to aver the material, issuable facts which constitute the cause of action, and not the evidence to prove these facts. It is only material allegations that are admitted when not specifically controverted by the answer."[2] "The scope of the general denial is merely to put in issue such averments of the complaint as the plaintiff is bound to prove in order to maintain his action: it does not controvert redundant allegations."[3]

[1] Jenkins *v.* Steanka, 19 Wis. 126.

[2] Racouillat *v.* Rene, 32 Cal. 450, 455, per Sawyer J.; Siter *v.* Jewett, 33 Cal. 92. [Gattis *v.* Kilgo (1901), 128 N. C. 402, 38 S. E. 931. And only such facts are admitted as are properly pleaded: Doud *v.* Duluth Milling Co. (1893), 55 Minn. 53, 56 N. W. 463.]

[3] Adams Exp. Co. *v.* Darnell, 31 Ind. 20, 22, per Frazer J.; Baker *v.* Kistler, 13 Ind. 63. For an example of immaterial denial, see Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123, 133. Further illustrations of the text, Bonnell *v.* Jacobs, 36 Wis. 59; Katzhausen *v.* Koehler, 42 id. 232; State *v.* Russell, 5 Neb. 211; Cook *v.* Smith, 54 Iowa, 636; Fargo *v.* Ames, 45 id. 494; Stair *v.* Cragin, 24 Hun, 177; Thompson *v.* Thompson, 52 Cal. 154.

[*Miscellaneous Rules Respecting Admissions.*

"Imperfect and defective denials, if acted upon as sufficient at the trial, are in no sense admissions of the allegations of a pleading which are attempted to be denied:" Loftus *v.* Fischer (1895), 106 Cal. 616, 39 Pac. 1064. Where a defendant admits a bond pleaded by plaintiff, his denial of certain of its plain and specific provisions is unavailing: Aikens *v.* Frank (1898), 21 Mont. 192, 53 Pac. 538. In an action of ejectment by a tenant in common against his co-tenant, a denial in the answer of the plaintiff's title and right of entry is equivalent to an ouster, as of the date of the commencement of the action, and the ouster is therefore admitted on the pleadings: Plass *v.* Plass (1898), 121 Cal. 131, 53 Pac. 448. In an action to obtain an accounting of a partnership, where plaintiff alleges that no settlement of the partnership affairs has been had and the defendants specifically deny this allegation, an admission in the answer that an error was made in preparing the balance sheet on which the settlement was founded, is *pro tanto* a limitation upon the denial that there had been no settlement: Rankin *v.* Newman (1895), 107 Cal. 602, 40 Pac. 1024. "Where the answer admits material allegations of the complaint, but accompanies the concession with a statement of affirmative matter in explanation by way of defence, 'the plaintiff may avail himself of the admissions without the qualifications:'" Cook *v.* Guirkin (1896), 119 N. C. 13, 25 S. E. 715. "If during the trial of an action, new matter pleaded in the answer is treated by the parties as denied or placed in issue, it will be so considered in this court, although no, or an imperfect, reply was filed:" Minzer *v.* Willman Mercantile Co. (1899), 59 Neb. 410, 81 N. W. 307. While a party may withdraw his pleadings, he cannot by such withdrawal avoid the effect of the admissions made: Cooley *v.* Abbey (1900), 111 Ga. 439, 36 S. E. 786.

But where allegations, not denied, are

§ 509. * 618. **Negatives Pregnant. How they may arise.** Such a denial is one pregnant with an admission of the substantial fact which is apparently controverted; or, in other words, one which, although in the form of a traverse, really admits the important fact contained in the allegation. As an illustration: If the averment was that the defendant on the first day of January made a note, and the answer should deny that the defendant on the first day of January made the note, this might be construed as an admission that he made the note on some other day: or if the complaint stated that "the defendant wrongfully and forcibly entered the plaintiff's close," and the answer should deny "that the defendant wrongfully and forcibly entered the plaintiff's close," the fact of entering the close might be considered as admitted. Of course, a denial to produce this result must of necessity be specific; for the general denial of "each and every allegation in the complaint" cannot be pregnant with any admission.[1] Denials in the form of a negative pregnant arise (1) when the allegation is of a single fact with some qualifying or modifying circumstance, and the traverse is *in ipsis verbis*, using exactly the same language, and no more; and (2) when the allegation is of several distinct and separate facts or occurrences connected by the copulative conjunction, and the traverse is *in ipsis verbis* of the same facts and occurrences also connected by the same conjunction. In most of the reported decisions, the courts have held such forms of denial to be insufficient, and have declared that they raised no issues, treating the statements of the complaint or petition as actually admitted. This was the universal rule under the old system; and as it was not based upon any merely technical reasons, or doctrine of pleading, the same rule is properly followed under the codes.[2]

treated as in issue on the trial, the omission of a denial will be deemed waived: Albion Milling Co. *v.* First Nat. Bank (1902), 64 Neb. 116, 89 N. W. 638; Crossland *v.* Admire (1899), 149 Mo. 650, 51 S. W. 463; Conant *v.* Jones (1893), Idaho, 32 Pac. 250; Missoula Co. *v.* O'Donnell (1900), 24 Mont. 65, 60 Pac. 594.]

[1] German Am. Bk. of Hastings *v.* White, 38 Minn. 471, overruling earlier Minnesota cases.

[2] See Pottgieser *v.* Dorn, 16 Minn. 204, 209; Lynd *v.* Picket, 7 Minn. 184, 194; Dean *v.* Leonard, 9 Minn. 190. The following cases furnish illustrations of the text: Dole *v.* Burleigh, 1 Dak. 227; Hanning *v.* Bassett, 12 Bush, 361; Morgan *v.* Booth, 13 id. 480; Harden *v.* Atchison, etc. R. Co., 4 Neb. 321; Crane *v.* Morse, 49 Wis. 368; Norris *v.* Glenn, 1 Idaho, 590; Lorney *v.* Cronan, 50 Cal. 610; Prior *v.* Madigan, 51 id. 178; Leroux *v.* Murdock, 51 id. 541; Argard *v.* Parker, 81 Wis. 581; Pullen *v.* Wright, 34 Minn. 314; James *v.* McPhee, 9 Colo. 486.

[Curnow *v.* Phœnix Ins. Co. (1895), 46

§ 510. * 619. **Illustrations.** A few examples will illustrate the nature of these denials, and the decisions of the courts thereon. In an action upon a promissory note against the indorser, the answer, copying the exact language of the complaint, said: "That whether or not, upon the maturity of the said note, the same was duly presented to the makers for payment, and payment thereof demanded and refused, and thereupon said note was duly protested for non-payment and notice of such presentment, refusal, and protest, given to the defendant, the defendant has no knowledge or information sufficient to form a belief." This denial was pronounced bad as a negative pregnant, and was disregarded.[1] In an action upon a fire policy against the insurers, the defendants moved for leave to file an amended answer. In denying this motion, the court said: "The denials are all liable to the objection that they are negatives pregnant. The complaint avers that on a particular day the property was all destroyed by fire. The answer denies this in the very words of the complaint. Such a denial is a negative pregnant with the admission that it may have been destroyed on some other day, or that a part may have been destroyed on the day named. Such denials have always been held insufficient."[2] A complaint alleging that "the proofs of loss were filed with the secretary of the defendant on the 31st of March, 1866," the denial was, that the proofs were filed "*as alleged in the complaint.*" This was declared to be pregnant with the admission that they were filed on another day within the time required.[3]

§ 511. * 620. **Illustrations.** When a verified complaint contained many distinct allegations conjunctively stated, and the

S. C. 79, 24 S. E. 74, quoting the text; Columbia Nat. Bank *v.* Western Iron & Steel Co. (1896), 14 Wash. 162, 44 Pac. 145. But a negative pregnant does not operate to prevent an express denial of the same fact from putting it in issue: Kennedy *v.* Dickie (1902), 27 Mont. 70, 69 Pac. 672.]

[1] Young *v.* Catlett, 6 Duer, 437, 443, per Woodruff J.

[2] Baker *v.* Bailey, 16 Barb. 54; Salinger *v.* Lusk, 7 How. Pr. 430. See Bradbury *v.* Cronise, 46 Cal. 287, where, the complaint alleging that the plaintiff did certain work and labor at the request of the defendant, an answer denying that he performed such work and labor at the request of the defendant admitted the performance of the services by the plaintiff.

[3] Schaetzel *v.* Germantown, etc. Ins. Co., 22 Wis. 412. See also Robbins *v.* Lincoln, 12 Wis. 1. In McMurphy *v.* Walker, 20 Minn. 382, 384, the complaint on a note alleging that it was delivered on the 10th of September, 1868, an answer stating that it "was not delivered until after Sept. 10, 1868," was held to raise no issue.

nswer consisted of denials of these averments *in ipsis verbis* lso conjunctively stated, following in this manner the exact anguage of the entire complaint, the court ordered a judgment or the plaintiff on the pleadings, saying: "This mode of answering is in violation of the principles of common-law pleading, nd not less so of the statute which provides that the defendant's nswer to a verified complaint shall contain a specific denial of ach allegation controverted, or a denial thereof according to he defendant's information and belief."[1] The complaint in n action to recover possession of chattels alleged that "defendant unlawfully and wrongfully seized and took said property into his possession from said plaintiff;" and the answer lenied "that he wrongfully and unlawfully seized and took aid property," etc. This answer, it was held, admitted the aking.[2] It is the settled rule in California that conjunctive lenials, in the very language of conjunctive allegations, raise io issues.[3]

§ 512. * 621. **Illustrations.** In an action to foreclose a mortgage given to secure a bond, the complaint alleged the execution of the bond for $4,000, with a provision in it, that, if default hould be made in the payment of interest for thirty days, the vhole principal sum should become due at the option of the plaintiff; and set out the mortgage, averring that it contained he same provision, that interest had been due more than thirty lays, and that plaintiff made his election to regard the whole principal as due. The defendant in his answer admitted the execution of the bond and mortgage, "but he denies that the said bond and mortgage contained any condition or clause whereby, in case of a default in payment of interest for the space of thirty days, the principal sum was to become due and payable immediately, as alleged in said complaint, *as by reference to said mortgage will more fully appear.*" This defence was

[1] Fish *v.* Redington, 31 Cla. 185, 194.

[2] Woodworth *v.* Knowlton, 22 Cal. 164. See also Feeley *v.* Shirley, 43 Cal. 369; Harris *v.* Shontz, 1 Mont. 212, 216; Toombs *v.* Hornbuckle, 1 Mont. 286. On the other hand, it was held in Jones *v.* Eddy, 90 Cal. 147, that an allegation in the complaint that defendants "assumed and agreed" to pay a debt, amounted merely to an allegation that they "agreed" to pay, the words "assume" and "agree" being synonymous, and a denial that they "assumed and agreed" to pay the debt was sufficient.

[3] Blankman *v.* Vallejo, 15 Cal. 638; Kuhland *v.* Sedgwick, 17 Cal. 123; Caulfield *v.* Sanders, 17 Cal. 569; Landers *v.* Bolton, 26 Cal. 393; Busenius *v.* Coffee, 14 Cal. 91.

struck out as frivolous, the court saying: "This is a denial that both of the instruments contained the clause in question. It is not a denial that one of them contained it. The bond and the mortgage together constituted but one instrument. The latter refers to the former as affording particular evidence of the terms of payment. Such reference incorporates into the mortgage all the terms and conditions of the bond. The only denial was of their joint effect. This was an admission as to the bond." The defence, therefore, did not put in issue the allegation of the complaint, that the whole amount was due.[1]

[1] Kay *v.* Whittaker, 44 N. Y. 565, 571.

[*Examples of Negatives Pregnant Held to raise no Issue.*

A denial "that for a great number of years, previous to the time alleged in the plaintiff's complaint, it had laid out and maintained, and used as a highway, the road described in the plaintiff's complaint:" Grimm *v.* Town of Washburn (1898), 100 Wis. 229, 75 N. W. 964. A denial that defendant directed decedent "to go down and do certain work in an excavation which the defendant had caused to be made:" Stuber *v.* McEntee (1894), 142 N. Y. 200, 36 N. E. 878. A denial that plaintiff "is a corporation duly organized as a national bank under the Act of Congress of June 3, 1864, or any other act:" First Nat. Bank *v.* Gibson (1900), 60 Neb. 767, 84 N. W. 259. A denial that plaintiff's testatrix on a date named "was the owner in fee simple and entitled to the possession" of the land in controversy: Knight *v.* Denman (1902), 64 Neb. 814, 90 N. W. 863. A denial that notes were lost "as alleged in plaintiff's petition:" Storey *v.* Kerr (1902), Neb., 89 N. W. 601. An allegation "that whether said warrant came into the hands of plaintiff as alleged, this defendant has no knowledge, etc.:" Seattle Nat. Bank *v.* Meerwaldt (1894) 8 Wash. 630, 36 Pac. 763. The allegation, "further answering said complaint as to paragraph VIII. thereof, these defendants and neither of them have knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and therefore deny the same and each and every part thereof:" Cole *v.* Noerdlinger (1900), 22 Wash. 51, 60 Pac. 57. An allegation of want of knowledge or information to form a belief as to whether the road was a legally laid out highway, or whether defendant was in duty bound to keep it in repair, and therefore a denial of the same: Carpenter *v.* Town of Rolling (1900), 107 Wis. 559, 83 N. W. 953. A denial that defendant took *and* carried away the goods: Bach *v.* Montana Co. (1894), 15 Mont. 345, 39 Pac. 291. A denial that "the amount of stock" sold by plaintiff to defendant was ever delivered: Edgerton *v.* Power (1896), 18 Mont. 350, 45 Pac. 204. A denial that plaintiff's claim "was assigned to defendant for collection as alleged in the answer:" Mahoney *v.* Hardware Co. (1897), 19 Mont. 377, 48 Pac. 545. A denial of a wrongful or unlawful taking or withholding: Proctor *v.* Irvin (1899), 22 Mont. 547, 57 Pac. 183. A denial of certain allegations "as alleged in the petition:" Board of Education *v.* Prior (1898), 11 S. D. 292, 77 N. W. 105. A denial that such conveyances were executed "as operated to convey perpetual or non-assessable water rights:" Grand Valley Irrigation Co. *v.* Lesher (1901), 28 Col. 273, 65 Pac. 44. A denial that plaintiff is a corporation organized "under or by virtue of the laws of the State of Illinois:" McCormick Mach. Co. *v.* Hovey (1899), 36 Ore. 259, 59 Pac. 189. A denial that the defendants "still continue to hold or occupy said premises, or any portion thereof, as tenants of C. P. Lolor:" Knowles *v.* Murphy (1895), 107 Cal. 107, 40 Pac. 111. A copulative denial of four distinct matters: Wise *v.* Rose (1895), 110 Cal. 159, 42 Cal. 569. An allegation "that said defendant did not execute and

§ 513. * 622. **Conflict of Authority as to whether a Negative Pregnant raises an Issue.** There is not, however, an absolute unanimity among the decided cases. In some instances the courts, avowedly rejecting the common-law rule of strict construction, and applying the requirement of the codes that pleadings must be liberally construed with a view to substantial justice, have held that such denials did raise an issue, although their character as negatives pregnant was fully acknowledged. It will be seen from the decisions to be cited, that no line of distinction can be drawn which separates them from those which precede, and reconciles their conflicting results: different courts have simply pronounced in an opposite manner upon substantially the same facts or circumstances. A petition stated the cause of action in the following manner: "Plaintiff claims of defendant sixty-four dollars, and for a cause of action states that on the 15th day of October, 1867, the defendant set fire to prairie land, and allowed the fire to escape from his control, whereby said fire spread to and consumed sixteen tons of hay, the property of the plaintiff, to his damage," etc. The answer denied "that defendant did on the 15th day of October, 1867, set fire to prairie land by which the hay of the plaintiff was consumed." The Supreme Court of Iowa, in pronouncing judgment, said that defendant's denial "was perfectly consistent with his doing the act on the 14th or the 16th, or on any other day than the 15th." Yet, in view of the rule of liberal construction imposed upon the judges by the code, it held that this answer, though conceded to be a negative pregnant, was not a nullity, but raised an issue.[1] The Supreme Court of Missouri applied a like lenient method in an action upon a bill of exchange executed by the National Insurance Company. The petition alleged that the company, "by its draft in writing signed by its secretary," made the obli-

deliver at Fairfield, Iowa, to the plaintiffs, or either of them, the note, etc.:" Spencer *v.* Turney (1897), 5 Okla. 683, 49 Pac. 1012. A denial that defendant "negligently and carelessly set fire to the depot:" Cincinnati, etc. R. R. Co. *v.* Barker (1893), 94 Ky. 71, 21 S. W. 347. A denial "that the killing was done through the carelessness or negligence of defendant to the damage of the plaintiff:" Rogers *v.* Felton (1895), 98 Ky. 148, 32 S. W. 405. A denial that an execution was duly returned: St. Paul Fire Ins. Co. *v.* Dakota Land Co. (1897), 10 S. D. 191, 72 N. W. 460. An allegation "that Helen V. W. Knight on and prior to the 25th of April, 1898, was the owner in fee simple and entitled to the possession" of the premises in controversy: Knight *v.* Denman (1903), — Neb. —, 94 N. W. 622.]

[1] Doolittle *v.* Greene, 32 Iowa, 123, 124.

gation; and the answer in turn denied, "that the company, by its draft in writing signed by its secretary," made the obligation. This answer, it was held, raised an issue. Construing it freely and favorably to the pleader, it could not be treated as a nullity, although its character as a negative pregnant was undoubted.[1]

§ 514. * 623. **The Better Doctrine.** If the requirements of the codes as to the mode of forming issues by specific denials are not to be a dead letter, the doctrine supported by the series of decisions first above cited is clearly correct, and the practical rule drawn from them is in every respect superior to the slipshod method of treatment adopted by the other class of cases. To say the least, a denial in the form of a negative pregnant is such a glaring violation of logical and legal principles, that it exhibits on the part of the pleader either the ignorance which does not comprehend the nature of an issue, or the astute cunning which is able to conceal the want of a defence under the appearance of a direct answer. In either instance it should be condemned by the courts.

§ 515. * 624. **Denials cannot properly contain New Matter.** It has been shown that all defences are either (1) denials of all, some, or one of the plaintiff's allegations; or (2) affirmative new matter which assumes that the allegations of the complaint or petition cannot be disproved, but at the same time establishes other facts which defeat the right of action. The general denial, we have seen, is a brief and comprehensive formula, denying "each and every allegation of the complaint or petition;" and the special denial is based upon and negatives the single averment against which it is directed. It is utterly impossible, therefore, that a denial, either general or special, if properly framed, should contain any affirmative matter, any allegation of facts in a positive and direct manner as though they constituted new matter and a defence by way of confession and avoidance. A defence consisting in the narrative of facts, stated under

[1] First Nat. Bank *v.* Hogan, 47 Mo. 472. See also Ells *v.* Pacific R. Co., 55 Mo. 278, 286; and Wall *v.* Buffalo Water Co., 18 N. Y. 119, in which it was held that the answer should have been corrected on motion, and that, in the absence of such motion, an issue was raised.

[In Feldmann *v.* Shea (1899), Idaho, 59 Pac. 537, it was held that the words "sold and delivered" as used in a complaint for goods sold and delivered, constitute but one act, and a denial of that act in the conjunctive raises an issue.]

the form of "new matter," which were not, however, new matter, but could all be properly proved under a denial, would be a violation of the true theory of pleading, and of the classification and description of defences contained in all the codes.

§ 516. * 625. **Pleading New Matter Equivalent to a Denial.** It sometimes happens that the pleader, either mistaking the nature of the facts which will be proved by the defendant, and thinking them to be new matter when in truth they are only the evidence which can be offered in support of a denial, or supposing for some reason that his case will be strengthened by spreading all these details upon the record, sets up a defence either alone or joined with others which is in form "new matter." It consists of affirmative allegations, stated as though they confessed and avoided the plaintiff's cause of action: and yet the facts thus averred are not new matter; they are simply the evidence which can be offered in support of a denial. The defence altogether is therefore the same as a denial: if it goes to the whole complaint or petition, it is equivalent to the general denial; if it goes to some particular allegation or allegations, it is equivalent to one or more specific denials. It is plain that the defendant has gained nothing by such a mode of pleading; he has not added anything to his case; he has not stated a fact which he could not have proved under a simple answer of denial. On the contrary, in limiting the scope of his proofs at the trial to the particular matter which he has pleaded, he may have weakened his defence by shutting out the consideration of other facts which he could have given in evidence under a proper denial. At all events, he has unnecessarily disclosed his case to the adverse party.

§ 517. * 626. **Same Subject.** This is clearly an unpractical as well as unscientific mode of pleading. Such a defence is an "argumentative denial." The same fault which I have thus indicated, sometimes existed under the old procedure. A plea in the form of a special plea by way of confession and avoidance, which contained no matter of that character, but only matter which could be proved under a traverse, and which was therefore equivalent to a traverse, — to the general issue perhaps, — was generally bad on demurrer. The objection was, not that the facts thus set up constituted no defence at all, — for the very assumption was that they did constitute a defence by way

of traverse, — but the external forms of the system were considered to be of such importance, and this faulty pleading so completely violated them all, that it was held to be worthless for any purpose.

§ 518. * 627. **Remedy for such a Denial is by Motion under the Codes.** The same rules of order and classification are violated by such defences at the present day; but as the new procedure looks rather to the substance than to the form, and as a demurrer to the answer is only allowed on the ground of insufficiency, — that is, when the facts stated do not constitute *any* defence, — the pleading which I have described as an "argumentative denial" is not considered bad on demurrer.[1] The plaintiff's remedy is by motion to make the defence more certain and definite, and to strike out redundant and superfluous matter.[2] If such motion was more frequently resorted to, and was favored by the courts, it would soon produce the effect of working a marked improvement in pleadings. It is not merely a scientific blemish, but a great practical evil, to have the record incumbered by a mass of unnecessary allegations, and matters purely evidentiary, when a short and comprehensive denial would the better subserve the rights of the parties, and more clearly bring out and exhibit the issues designed to be raised by the answer.[3]

§ 519. * 628. **Illustrations of Argumentative Denials.** An example or two from among the decided cases will be sufficient to illustrate the kind of defence which is equivalent to the denial and the rulings of the courts thereon. An action was brought by the University of Vincennes against one Judah to recover certain bonds alleged to be the property of the institu-

[1] [Oren *v.* Board of Commissioners (1901), 157 Ind. 158, 60 N. E. 1019; Hiatt *v.* Town of Darlington (1898), 152 Ind. 570, 53 N. E. 825; Boos *v.* Morgan (1896), 146 Ind. 111, 43 N. E. 947; State *ex rel. v.* Osborn (1895), 143 Ind. 671, 42 N. E. 921; Childers *v.* First Nat. Bank (1896), 147 Ind. 430, 46 N. E. 825; Nat. Wall Paper Co. *v.* McPherson (1897), 19 Mont. 355, 48 Pac. 550.]

[2] [Oren *v.* Board of Commissioners (1901), 157 Ind. 158, 60 N. E. 1019. But see Lancashire Ins. Co. *v.* Monroe (1897), 101 Ky. 12, 39 S. W. 434, where the allegations were held not to amount even to an argumentative denial. An argumentative denial by defendant is sufficient to give the plaintiff the right to open and close: Sorensen *v.* Sorensen (1903), — Neb. —, 94 N. W. 540.]

[3] It has been held in New York that an affirmative defence inconsistent with the allegations of the complaint, but not coupled with a denial of such allegations, raises no issue, under the provision of the code that material allegations in the complaint not controverted by the answer, must be taken as true. Beard *v.* Tilghman (Supreme, 1892), 20 N. Y. Suppl. 736; Fleischman *v.* Stern, 90 N. Y. 110; [Smith *v.* Coe (1902), 170 N. Y. 162, 63 N. E. 57.]

tion, which the defendant had converted to his own use. His answer set up, that the university was indebted to him in a large amount for professional services, and that the board of trustees had passed a resolution allowing him to retain and have these bonds as compensation for his services and in settlement of his claim. The reply, instead of denying this answer, averred that Judah had been secretary of the board of trustees; that he fraudulently entered this resolution in the books of record of the university; that no such resolution was ever passed; and it set out the resolution which was actually passed, and which was very different from that alleged in the answer. To the paragraph of the reply containing this matter the defendant demurred; the demurrer was overruled, and he appealed. In disposing of the question thus raised, the court said: "Now, this reply is simply a denial of so much of the answer as alleges the adoption of the resolution, or, in other words, the making the contract by the trustees. It is argumentative, and it needlessly explains how a resolution never made by the trustees comes to be found on their records. This is surplusage. But neither argumentativeness nor surplusage justifies a demurrer under our system of pleading. There was, therefore, no error in overruling the appellant's demurrer to the second paragraph of the reply."[1] It is plain that a general denial of this answer would have admitted in evidence all the facts specially pleaded in the reply under the form of new matter; and the reply was, in fact, nothing more than a denial.

§ 520. * 629. **Where Answer contains General Denial and also a Special Defence of New Matter Equivalent to General Denial.** When the answer contains two or more defences, viz., 1st, a general denial, and, 2d, a special defence in the form of new matter, but in fact equivalent to the general denial, and a demurrer to the latter has been sustained, no material error is thus committed, and the judgment will not be reversed; for the same facts which were averred in the special defence could be fully proved under the general denial, and the defendant's whole case would thus be available under the issue which remained upon the record.[2] In an action for goods sold and delivered, the answer in each of

[1] Judah *v.* University of Vincennes, 23 Ind. 272, 277. See also Clink *v.* Thurston, 47 Cal. 21, 29.

[2] Chicago, Cin. & L. R. Co. *v.* West, 37 Ind. 211, 215; Waggoner *v.* Liston, 37 Ind. 357.

three separate defences set up the same facts with immaterial variations: viz., that the goods were sold to the defendant's wife without his knowledge or consent; that she had at the time wrongfully abandoned him, and was living apart from him, and for these reasons he was not liable for the price. A demurrer to these defences having been sustained in the court below, the Supreme Court on appeal held that they were all argumentative general denials: "their effect was simply to aver that the goods were not sold to the defendant, and all the matters relied upon could have been proved under a general denial." It was further said, that a motion was the proper remedy to correct such faulty pleading, and the demurrer was irregular; but the irregularity in this instance was merely technical, and the error committed was immaterial, and had not prejudiced any rights of the defendant; for, as he had pleaded the general denial in addition to the special defence mentioned, his entire case was provable under that part of the answer.[1]

§ 521. * 630. **Combination of General and Argumentative Denials.** This leads me to the second branch of the present subdivision; namely, the combination of the general denial with other defences equivalent thereto in the same answer. The argumentative denial described above is frequently in practice used in connection with the general denial inserted in the same answer. It would seem as though the pleader, after he had written the brief general denial, could not be satisfied with its efficacy, and considered it necessary to add in separate divisions of the answer a further statement of the very facts which he knew would constitute the defence, and which could all be proven under the general denial. This mode of pleading is faulty in the extreme; it has not a single reason in its favor, not an excuse for its existence; it overloads the record with superfluous matter, and produces nothing but confusion and uncertainty. In a few States the courts have struggled to correct this vicious departure from the true theory of pleading, and have enforced the rules and remedies which the codes amply provide. It is unnecessary to argue that this species of answer

[1] Day *v.* Wamsley, 33 Ind. 145.

[In Burris *v.* People's Ditch Co. (1894), 104 Cal. 248, 37 Pac. 922, the court said: "It may be said, generally, that any allegation in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse, and sufficient as a denial." See also Phillips *v.* Hagart (1896), 113 Cal. 552, 45 Pac. 843.]

is in direct conflict with the plainest principles and the most express requirements of the codes. Those statutes permit only "denials" and statements of "new matter," that is, matter which is truly a *confession and avoidance;* they do not authorize averments of matter which is not *new*, but which is simply a detail of evidence going in support of a *denial.* While this reformed system constructed by the codes is perfect in its scientific character, — far surpassing in that respect the loose notions introduced by the common-law courts in relation to the function of the ordinary "general issues" of the old procedure, — it is at the same time in the highest degree practical. If the advantages which ought to be derived from the great reform are to be obtained, it is clearly the duty of all the courts to insist upon a return to the simple methods which the codes so clearly prescribe, concerning which, indeed, they do not leave the slightest doubt or uncertainty.

§ 522. * 631. **Practice in Indiana in Respect to Argumentative Denials.** In Indiana, a practice has become settled, which might well be borrowed by the courts of all the other States. I know of no single rule of procedure, which, if uniformly adopted and rigidly enforced, would work out a happier result in bringing the forms and modes of pleading back to the simple and scientific theory embodied in the codes, than the rule which prevails in Indiana, and which I shall now explain and illustrate. I dwell on it at some length, not because it can now be regarded as part of the universal practice throughout the States in which the new system has been established, but because it ought to become so; and I hope that, by introducing it to the attention of the bench and bar in other commonwealths, its merits may be at once recognized, and its methods followed.

§ 523. * 632. **Same Subject.** When the answer contains the general denial, and, in addition thereto, a separate defence or separate defences equivalent to the general denial, — that is, mere argumentative denials as above described, — such additional defences, it is settled, are irregular, and will be overruled and expunged from the record. The remedy is not by demurrer, for the reasons already given, but by motion to strike out as redundant and superfluous. If, however, a plaintiff, instead of moving to strike out, should demur to the vicious defences, and that demurrer should happen to be sustained by

the lower court, no material error would have been committed, for the same result would have been reached which would be attained by a motion; the record would be cleansed of its redundancy, and the general denial would remain, under which all the facts constituting the defence, and which had been set forth at large in the rejected paragraphs, could be given in evidence at the trial. This practice, I say, is thoroughly settled in Indiana; and the result is a system of pleading in that State which far surpasses, in its brevity and its adherence to the spirit of the codes, that prevailing in any other State. The cases collected in the notes illustrate many forms of pleading to which the rule has been applied, and exhibit its practical workings in a very complete manner.[1] The same doctrine and practice has been occasionally followed in other States.[2] This subject will be again referred to in the subsequent section which deals with the union of defences. It is very plain that the faulty method described and criticised proceeds in a very great measure from an uncertainty in the mind of the pleader as to the matter which may be given in evidence under the "general denial:" whatever, then, will remove that uncertainty, will aid in producing a reform in the manner of stating defences in the answer.

§ 524. *633. **General Denials of all Allegations not otherwise Admitted or Referred to.** A practice has recently grown up of framing an answer in the following manner: To admit such of

[1] Adams Ex. Co. *v.* Darnell, 31 Ind. 20; Indianapolis, etc. R. Co. *v.* Rutherford, 29 Ind. 82; Jeffersonville, etc. R. Co. *v.* Dunlap, 29 id. 426; Rhode *v.* Green, 26 id. 83; Bondurant *v.* Bladen, 19 id. 160; Butler *v.* Edgerton, 15 id. 15; Westcott *v.* Brown, 13 id. 83; Garrison *v.* Clark, 11 id. 369; Cain *v.* Hunt, 41 id. 466, 471; Ferguson *v.* Ramsey, 41 id. 511, 513; Chicago, etc. R. Co. *v.* West, 37 id. 211; Urton *v.* State, 37 id. 339; Port *v.* Russell, 36 id. 60; Day *v.* Wamsley, 33 id. 145; Allen *v.* Randolph, 48 id. 496; Trogden *v.* Deckard, 45 id. 572; Wolf *v.* Schofield, 38 id. 175; Widener *v.* State, 45 id. 244; Sparks *v.* Heritage, 45 Ind. 66; Lewis *v.* Edwards, 44 id. 333; Ohio & Miss. R. Co. *v.* Hemberger, 43 id. 462, 464; Wilson *v.* Root, 43 id. 486, 493. See also Lowry *v.* Megee, 52 id. 107; Watts *v.* Coxen, 52 id. 155; Bannister *v.* Grassy Fork Ditch Ass'n, 52 id. 178, 184; Western Union Tel. Co. *v.* Meek, 49 id. 53; Smith *v.* Denman, 48 id. 65, 70; Milford Sch. T. *v.* Powner, 126 Ind. 528; Wallace *v.* Exch. Bk. of Spencer, 126 Ind. 265; Craig *v.* Frazier, 127 Ind. 286; Wickwire *v.* Angola (Ind. App., 1892), 30 N. E. Rep. 917; Hoosier Stone Co. *v.* McCain (Ind. Supr., 1892), 31 N. E. 956.

[2] Rost *v.* Harris, 12 Abb. Pr. 446, per Bosworth J.; Radde *v.* Ruckgaber, 3 Duer, 684; Simpson *v.* McArthur, 16 Abb. Pr. 302 (n.), per Brady J.; Bruck *v.* Tucker, 42 Cal. 346; Page *v.* Merwin, 54 Conn. 426. It is held in Florida that the court may strike out such a special defence or not as it pleases, and neither ruling will be error. Davis *v.* Shuler, 14 Fla. 438, 445. See also Colorado Cent. R. Co. *v.* Mollanden, 4 Colo. 154. A denial which is a mere inference from facts alleged is not a good denial. Wright *v.* Schmidt, 47 Iowa, 233.

the plaintiff's averments, if any, as the facts of the case require; to deny others wholly or partially; to explain and modify others if thought necessary; in short, to unite in one answer or division thereof a mass of special admissions, denials, explanations, and affirmative statements, and to conclude the whole with a sweeping clause somewhat in this form: "As to each and every other allegation in said complaint not herein expressly admitted or denied or mentioned, the defendant hereby denies the same;" or, "And the defendant denies each and every other allegation in said complaint not hereinbefore expressly admitted or denied or mentioned." Although a somewhat similar mode of putting in issue the averments of a bill in equity was occasionally resorted to by chancery pleaders under the former system, the codes give no countenance to, nor authority for, such a mongrel form of answer. The true spirit and intent of the theory introduced by the reformed procedure plainly demand certainty, precision, and definiteness in the allegations of both parties, and especially in the denials by which the defendant places on the record the exact issues intended to be tried. In this respect the new method was to be a complete departure from the vagueness and uncertainty resulting from the broad effect given to the general issues in "assumpsit," "debt," and "trover" by the common-law courts, and also from the loose and incomplete manner of presenting the issues which necessarily characterized the answer in chancery. This design of the codes would, however, be utterly defeated if the vicious style of defence thus described should become common; and the courts, it is submitted, ought to have pronounced most emphatically against it when it first made its appearance.

§ 525. * 634. **Proper Distinction to be observed between General and Specific Denials.** The codes require either a general denial, or specific denials, or defences in confession and avoidance; and also that each defence must be separately stated, so that the issue raised by it may be perceived at once. The "general denial" is evidently intended to be an answer to the entire complaint or petition, — to negative all its averments. The design of the legislature and the understanding of the bar upon this point were shown by the immediate adoption of the form in use throughout all the States. The code of Iowa expressly enacts that the general denial is interposed to the whole petition; and this provision is plainly a statutory construction of the universally

prevailing doctrine : a specific denial, on the other hand, must be addressed to some single, particular allegation, and must distinctly indicate the portion intended to be controverted by it. I am of opinion that each specific denial ought to be a single and separate defence by itself, so that, if the issue upon it should be decided in favor of the defendant, the cause of action would be defeated. In this respect, I think, the specific denials of the codes were intended to be analogous to the special traverses provided for by the English judges in their new rules of pleading adopted in 1834. Certain it is that the codes do not, by any stretch of their language, contemplate an answer consisting of a general denial directed to a part only of the complaint or petition, and connected with other admissions, partial denials, and explanations.

§ 526. * 635. **Difficulty Arising from this Form of Answer.** Again : this form of answer makes it extremely difficult, and often impossible, to determine what allegations are denied, and what are passed by in silence, and therefore admitted. If the complaint or petition contains numerous averments, and the answer is such a mass of express admissions, partial explanations, and statements of matter which is merely evidentiary, and concludes with the formula above quoted, we have all the evils which can result from the most vicious system or no-system that can possibly be conceived. The object of pleading is to ascertain and present the issues of fact between the litigants, so that they can be readily perceived and decided by the court and jury. The special boast of the common-law methods was, that they brought out these issues singly and clearly. I am confident that the theory of the reformed procedure, when lived up to and accurately followed, will give much better practical results than were ever obtained as a whole from the former system. The kind of answer which I have described violates every principle of this theory, and is a contrivance of ignorance or indolence.

§ 527. * 636. **This Form Sanctioned by some Courts.** Notwithstanding the foregoing considerations, which appear to be such plain and necessary inferences from the language as well as the intent of the codes, the courts of New York and of some other States have given a seeming approval to this most slovenly manner of stating the defence of denial. So far as their decisions have passed upon the subject, they seem either to approve such an-

swers, or at most to hold that, if improper, the only mode of correction is by a motion to make them more definite and certain; in other words, they are sufficient to raise the intended issues. It cannot be said, however, that the question has been settled by authority, or that this species of denial has become an established method of pleading wherever the reformed procedure prevails. The few cases which touch upon the matter will now be cited. In an action upon a policy of life insurance, the answer was of the kind mentioned, and concluded as follows: that "the defendant denied each and every allegation of the complaint not therein expressly admitted or denied." The Court of Appeals said of this answer: "It is clear, both upon principle and authority, that under a general or specific denial of any fact which the plaintiff is required to prove to maintain the action, the defendant may give evidence to disprove it.[1] If an answer containing denials of the allegations of the complaint, except as thereinafter stated, is rendered indefinite, uncertain, or complicated, the remedy is by motion to make the answer more definite, and not by exclusion of evidence on the trial."[2] A similar answer, ending with a denial of "each and every allegation of the complaint except as herein admitted or *stated*," was held by the same court to be good and to raise an issue.[3]

[1] Wheeler *v.* Billings, 38 N. Y. 263.

[2] Greenfield *v.* Mass. Mut. L. Ins. Co., 47 N. Y. 430, 437, per Grover J. An expression in this quotation indicates a certain misconception on the part of the learned judge. A *general denial of a fact* is something unknown in the system of pleading established by the codes. See also Leyde *v.* Martin, 16 Minn. 38; Becker *v.* Sweetzer, 15 Minn. 427, 434; Kingsley *v.* Gilman, 12 Minn. 515, 517, 518, which show that this form of denial is fully approved by the Minnesota court.

[3] Youngs *v.* Kent, 46 N. Y. 672; and see Allis *v.* Leonard, 46 N. Y. 688. That this form of denial is proper, and sufficiently raises issues upon the allegations not admitted, seems to be now settled, at least in several of the States. Walsh *v.* Mehrback, 5 Hun, 448; Calhoun *v.* Hallen, 25 id. 155; Penn. Coal Co. *v.* Blake, 85 N. Y. 226, 235; St. Anthony Falls Co. *v.* King Bridge Co., 23 Minn. 186; Ingle *v.* Jones, 43 Iowa, 286; Burley *v.* German-Am. Bk., 111 U. S. 216; Griffin *v.* L. I. R. Co., 101 N. Y. 348; Crane *v.* Crane, 43 Hun, 309; Owens *v.* R. Hudnot's Pharmacy, 20 Civ. Pro. Rep. 145; see Clark *v.* Dillon, 97 N. Y. 370; Davenport *v.* Ladd, 38 Minn. 545.

[The following forms of general denial have been held sufficient: "Each and every material allegation, statement, matter, fact, and thing in said complaint contained, and not hereinafter admitted:" Althouse *v.* Town of Jamestown (1895), 91 Wis. 46, 64 N. W. 423. "Every allegation in the complaint not admitted in the answer:" Childers *v.* First Nat. Bank (1896), 147 Ind. 430, 46 N. E. 825. "Each and every allegation and averment contained in plaintiff's complaint herein which is not hereinafter specifically admitted or qualified:" Mattoon *v.* Fremont, etc. R. R. Co. (1894), 6 S. D. 301, 60 N. W. 69. "Each and every allegation therein contained, and not hereinafter specifically denied, admitted or explained:" State

§ 528. * 637. **Facts, not Conclusions of Law, should be denied.** The complaint or petition, in addition to the facts from which the right of action arises, sometimes contains the conclusions of law which result from those facts, such as the indebtedness of the defendant, his liability in damages, and the like. It is a fundamental principle of the pleading authorized by the codes, that these averments of fact must be denied, and not merely the legal conclusion therefrom; a traverse of the latter without one of the former is a nullity, and creates no issue.[1] When the issuable facts are denied, a denial of the conclusions of law is unnecessary, but would certainly be harmless. In this respect, the reformed procedure has introduced a new feature into the science of pleading. It is often said, I am aware, by writers of authority even, that, under the common-law methods, the facts were always, and the legal conclusions were never, to be traversed. But this state-

ex rel. v. City of Pierre (1902), 15 S. D. 559, 90 N. W. 1047. "Each and every material allegation:" Nix *v.* Gilmer (1897), 5 Okla. 740, 50 Pac. 131.

In Hardy *v.* Purington (1894), 6 S. D. 382, 61 N. W. 158, the court said: "An answer [in mandamus], which denies 'each and all the allegations in the affidavit contained, except such as are hereinafter admitted or qualified,' though not a form of pleading to be encouraged, has grown into such frequent use that it would be unwise and unfair to litigants and attorneys for this court to hold, without premonition, that such an answer, unassailed by motion or otherwise, constitutes no denial. If such an answer leave the plaintiff in doubt as to what allegations of his complaint are intended to be denied and what admitted, the answer is subject to a motion to make more definite and certain."

A reply denying "each and every allegation of new matter" is good after verdict: Western Mattress Co. *v.* Potter (1903), — Neb. —, 95 N. W. 841.

A reply denying "each and every allegation of new matter set up in defendant's answer" and "each and every other part of same, except such allegations of such answer as may be admissions of plaintiff's petition," unless attacked by motion to strike out or to make more definite and certain, is good: Pecha *v.* Kastl (1902), 64 Neb. 380, 89 N. W. 1047.

"Where a general denial in an answer is qualified by the pleading of special defences in the nature of confession and avoidance, evidence of other defences of a like nature is inadmissible, although, in the absence of such pleading, such evidence would have been admissible under the general denial:" Ball *v.* Beaumont (1901), 63 Neb. 215, 88 N. W. 173.

On the other hand, the following forms have been held insufficient: "Every material allegation of the complaint:" Mead *v.* Pettigrew (1899), 11 S. D. 529, 78 N. W. 945; Burke *v.* Inter-State Savings Ass'n (1901), 25 Mont. 315, 69 Pac. 879; Hamilton *v.* Huson (1898), 21 Mont. 9, 53 Pac. 101. "Each and every allegation and statement therein which is and are in any way inconsistent with the allegations in the petition" and "especially denies all new matter pleaded" in the answer: Young *v.* Schofield (1895), 132 Mo. 650, 34 S. W. 497. "Each and every allegation contained in the answer inconsistent with the statements in plaintiff's petition:" Gross *v.* Scheel (1903), — Neb. —, 93 N. W. 418; Dezell *v.* Fidelity & Casualty Co. (1903), 176 Mo. 253, 75 S. W. 1102: an answer denying "each and every other allegation in said petition not specifically admitted."]

[1] [Heydenfeldt *v.* Jacobs (1895), 107 Cal. 373, 40 Pac. 492.]

ment is clearly inaccurate. In some of the most common forms of declaration in constant use, the leading averment was that "the defendant *is indebted*," a mere inference of law; and the general issue might be, "he is not indebted," or "he was never indebted," which was certainly nothing but the denial of a legal conclusion. All this has been swept away by the codes, and every trace of it left in the modern practice is in direct opposition both to the spirit and to the letter of the statute. A denial of indebtedness or of liability, without denying the allegations of fact from which the indebtedness or liability is claimed to have arisen, is a nullity; it raises no issue, and will be held bad on demurrer, as is shown by the subjoined cases: In an action upon a promissory note, the answer admitted the execution of the note, and denied that the defendant owed the debt to the plaintiff. A demurrer to this answer was sustained, the court saying: "This answer under the former mode of pleading would have amounted to a plea of *nil debet*, and would not have been good, as the suit was brought upon a note in writing *having the dignity of a specialty;* and we are of opinion that the answer was not sufficient under the present practice. It was not sufficient to state that defendant did not owe the debt."[1] All the cases, with hardly an exception, are to the same effect: as in an action on a note, an answer saying that "the defendants do not owe and ought not to pay the note, for they do not admit the regular protest thereof and notice," raised no issue;[2] also where, in an action for goods sold and delivered, the answer "denies that the defendant is indebted to the plaintiff as stated in the petition;"[3] and where, in an action on a note, the answer simply denied indebtedness to the plaintiff as claimed in the petition, or in any other sum or amount whatever.[4]

[1] Haggard *v.* Hay's Adm., 13 B. Mon. 175.

[2] Clark *v.* Finnell, 16 B. Mon. 329, 335.

[3] Francis *v.* Francis, 18 B. Mon. 57; and see Nelson *v.* Murray, 33 Cal. 338; Curtis *v.* Richards, 9 Cal. 33; Wells *v.* McPike, 21 Cal. 215; Higgins *v.* Germain, 1 Mont. 230; Skinner *v.* Clute, 9 Nev. 342,

[4] Morton *v.* Coffin, 29 Iowa, 235, 238. For further illustrations of the rule stated in the text, see Man. Nat. Bank *v.* Russell, 6 Hun, 375; Starr *v.* Cragin, 24 id. 177; Murray *v.* N. Y. L. Ins. Co., 85 N. Y. 236, 239; Kentucky River Nav. Co. *v.* Commonwealth, 13 Bush, 435; Louis *v.* Brown 7 Ore. 326; Indianapolis, B. & W. R. Co. *v.* Risley, 50 Ind. 60; Hunter *v.* Martin, 57 Cal. 365; Hintrager *v.* Richter (Iowa, 1892), 52 N. W. Rep. 188; Carpenter *v.* Ritchie, 2 Wash. 512. Denials of indebtedness: Buller *v.* Siddell, 43 Fed. Rep. 116; Callanan *v.* Williams, 71 Iowa, 363; Watson *v.* Lemen, 9 Colo. 200; Gale *v.* James, 11 Colo. 540; Heath *v.* White, 3 Utah, 474. See McLaughlin *v.* Wheeler (S. Dak. 1891), 47 N. W. 816, 818.

[Spencer *v.* Turney (1897), 5 Okla. 683, 49 Pac. 1012; Aultman & Taylor Co

§ 529. * 638. **Illustrations.** The same is true of any other denials of mere inferences or conclusions of law. Thus, in a suit upon a note given to the plaintiff, a married woman, and made expressly payable to her on its face, a defence that the "note is not her separate property," and a denial that she is the legal owner and holder thereof, were both held nullities, and struck out on motion.[1] The defence, in an action to foreclose a mortgage, "that D. [the mortgagor] was regularly and duly discharged from all his debts, including that to the plaintiff, under proceedings in insolvency," was held not to be new matter requiring a reply, "but only a conclusion of law and not of fact," and not to create an issue.[2] In an action to recover for injuries caused by the negligence of the defendant, the complaint, after stating the necessary facts showing the negligent omissions, and the consequent destruction of the plaintiff's property, concluded, "to his great damage, to wit, in the sum of $800." The answer simply denied "that the plaintiff had suffered damage in the sum of $800." This denial raised no issue.[3]

§ 530. * 639. **Denial of Conclusions of Law is Unnecessary.** The converse of the rule illustrated by the foregoing cases is also true. If the answer denies the material facts averred by the plaintiff, or alleges material facts constituting a defence of new matter, it need not deny the plaintiff's conclusions of law, or state any conclusions of law as the inference from the facts which it has pleaded.[4] Thus, in an action upon a contract, the answer alleged

v. Mead (1901), 109 Ky. 583, 60 S. W. 294; Taylor *v.* Purcell (1894), 60 Ark. 606, 31 S. W. 567.]

[1] Frost *v.* Haford, 40 Cal. 165, 166; Felch *v.* Beaudry, 40 Cal. 439.

[2] Christy *v.* Dana, 42 Cal. 174, 178.

[3] Huston *v.* Twin & C. C. Turnp. Co., 45 Cal. 550; Higgins *v.* Wortel, 18 Cal. 330. In an action to enforce a lien upon defendant's land, an answer which, without controverting any of the facts alleged, simply denied that the plaintiff had any lien, was held to raise no issue. Bradbury *v.* Cronise, 46 Cal. 287. See, however, Simmons *v.* Sisson, 26 N. Y. 264, 270, 273.

[A mere denial of competency to sue raises no issue of fact: Chamberlin Banking House *v.* Noyes (1902), — Neb. —, 92 N. W. 175. In a foreclosure suit an answer denying that the plaintiff is the owner and holder of the note and mortgages creates no issue: Clemens *v.* Luce (1894), 101 Cal. 432, 35 Pac. 1032. A denial by defendant in an action of ejectment that his possession is wrongful raises no issue: Rhoades *v.* Higbee (1895), 21 Colo. 88, 39 Pac. 1099. A valid denial is not vitiated by conclusions of law alleged in connection therewith: Fitzpatrick *v.* Simonson Bros. Co. (1902), 86 Minn. 140, 90 N. W. 378.

A denial that the set-off constituted a defence, raises no issue: Richardson *v.* Doty (1895), 44 Neb. 73, 62 N. W. 254. One who in his pleading has stated a legal conclusion cannot object to a denial thereof in the same terms: Baldwin *v.* Burt (1895), 43 Neb. 245, 61 N. W. 601.]

[4] [Abbott *v.* Gaches (1899), 20 Wash. 517, 56 Pac. 28.]

all the facts necessary to show that the agreement was illegal as being in restraint of trade; but the illegality was not expressly averred, nor relied upon as a defence by means of any clause drawing such a conclusion from the facts which were stated. The defence, however, was held to be sufficient, both in form and substance: the facts constituting it were all pleaded; and that was enough, without adding the legal inferences from them.[1]

§ 531. *640. **Denials of Knowledge or Information. Formula Prescribed by Statute should be followed.** All the denials, either general or specific, to which the rules stated in the foregoing subdivisions apply, may be either positive, or denials of knowledge or information in respect to the matters alleged by the plaintiff. When the latter mode is adopted, the formula prescribed by the statute should be exactly followed, not because there is any value in the form simply as such, but because in no other manner can the defendant satisfy the demands of the code, and raise a substantial issue, — an issue which is not a subterfuge and pretence. When the denial is positive, the defendant is required to negative directly each and every allegation of the complaint or petition, or the particular ones controverted by him if less than all. If this cannot be done by reason of the defendant's ignorance, and he is therefore permitted to choose the other alternative, he must deny that he has any knowledge or information concerning the matters alleged sufficient to enable him to form a belief respecting them.[2] Any other form must of necessity be evasive. And so the cases all hold; but a single illustration will suffice. The complaint in an action to recover the price of gas furnished to a city being verified, the answer was as follows: "And this defendant says that the defendant has no knowledge or information in relation to the allegations of the second count of the said complaint, and *therefore* denies the same." On the trial, the averments of the second count were treated by the court as not denied, and as therefore admitted to be true; and this ruling was sustained on appeal. The answer was held to be a nullity: the only denials permitted, it was said, are those positive in form, and those which deny any knowledge or information sufficient to form a belief; any others raise no issue.[3] The same conclusion was reached in

[1] Prost *v.* More, 40 Cal. 347.

[2] [Colby *v.* Spokane (1895) 12 Wash. 690, 42 Pac. 112.]

[3] San Francisco Gas Co. *v.* San Francisco, 9 Cal. 453.

respect to an answer which stated that "the defendant has not sufficient knowledge or information to form a belief whether [certain allegations] are true, and therefore denies the same." [1]

[1] Curtis *v.* Richards, 9 Cal. 33; Stevenson *v.* Flournoy, 89 Ky. 561; *contra*, Cumins *v.* Lawrence Cy. (S. Dak. 1890), 46 N. W. Rep. 182. As to the proper form of such denials, and their effect in raising issues when thus proper, see also Kentucky, etc. Co. *v.* Commonwealth, 13 Bush, 436; Farmers' & Merch. Bk. of Baltimore *v.* Charlotte Bd. of Ald., 75 N. C. 45; Sherman *v.* Osborn, 8 Ore. 66; Ninde *v.* Oskaloosa, 55 Iowa, 207; Claflin *v.* Reese, 54 id. 544; Neuberger *v.* Webb, 24 Hun, 347; Meehan *v.* Harlem Sav. Bk., 5 id. 439; Grocers' Bank *v.* O'Rorke, 6 id. 18; Wiltman *v.* Watry, 37 Wis. 238; People *v.* Curtis, 1 Idaho, 753. For further examples of such denials improper in form, see Bidwell *v.* Overton, 26 Abb. N. Cas. 402; Sheldon *v.* Sabin, 12 Daly, 84; Lay Gas Machine Co. *v.* Neuse Falls Mfg. Co., 91 N. C. 74; Land, etc. Co. of G. B. *v.* Williams (S. C. 1892), 14 S. E. Rep. 821, 15 id. 453; Greer *v.* Covington, 83 Ky. 410; Haney *v.* People, 12 Colo. 345; Moody *v.* Belden, 60 Hun, 582.

[The following forms have been held sufficient: — "Whether the matters and things set forth [in said paragraph] are true or false, defendant has no knowledge or information sufficient whereof to form a belief and he therefore denies the same:" Seattle Nat. Bank *v.* Meerwaldt (1894), 8 Wash. 630, 36 Pac. 763. A denial of any knowledge or information sufficient "to enable it to form a belief," although the statute uses the words, "sufficient to form a belief:" Wilson *v.* Commercial Union Ins. Co. (1902), 15 S. D. 322, 89 N. W. 649. Plaintiff "denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in said answer," held good, as against the objection that it was a negative pregnant, when objection was first made after trial and verdict: Trustees *v.* Nesbitt (1896), 65 Minn. 17, 67 N. W. 652. A denial that plaintiff "has knowledge or information sufficient, etc.," is sufficient without the word "any" before knowledge, as the statute reads: Gilreath *v.* Furman (1900), 57 S. C. 289, 35 S. E. 516.

The following forms have been held insufficient: — "Defendant says that he has not information sufficient to form a belief:" Sigmund *v.* Bank of Minot (1894), 4 N. D. 164, 59 N. W. 966. An *averment* that defendant has no knowledge or information sufficient to form a belief, since there must be a direct denial and not merely an affirmation of a negative: Law Trust Society *v.* Hogue (1900), 37 Ore. 544, 63 Pac. 690. A denial that defendant has "any knowledge or information sufficient to form a belief," since under the statute he must deny also that he could *obtain* sufficient knowledge: Jones *v.* Perot (1893), 19 Colo. 141, 34 Pac. 728. "This defendant has not and cannot obtain information sufficient upon which to base a belief," defective in not stating the same as to both knowledge and information: Grand Valley Irr. Co. *v.* Lesher (1901), 28 Colo. 273, 65 Pac. 44. An allegation that defendant "has no knowledge of the facts" alleged in one paragraph of the complaint, and "has no information" respecting the truth of the allegations in another paragraph: Woodcock *v.* Bostic (1901), 128 N. C. 243, 38 S. E. 881. An allegation "that defendant has not sufficient knowledge or information as to the claim of the plaintiff, and therefore demands and calls for strict legal proof thereof:" National Life Ins. Co. *v.* Martin (1899), 57 Neb. 350, 77 N. W. 769. An allegation that defendant has no knowledge or information concerning the matter alleged in the petition: Wilson *v.* Neu (1901), — Neb. —, 95 N. W. 502.

"To authorize the denial of an allegation in a petition, a want of belief is sufficient; and it is not improper to accompany the denial with a statement that the party making it has no knowledge or information on which to form a belief:" McIntosh *v.* City of Omaha (1902), Neb., 91 N. W. 527. A denial of knowledge or information sufficient to form a belief as to the existence of an alleged fact must be specific as to such fact: Ward *v.* Edge (1897), 100 Ky. 757, 39 S. W. 440. Other cases dealing with the subject: Banks *v.* Moshier

§ 532. * 641. **When a Denial of Knowledge or Information is not allowed.** Although the denial of knowledge or information may be used in respect to every *form* of traverse, whether general or specific, yet it cannot be resorted to under all circumstances. There are occasions in which the defendant will not be permitted to say that he has no knowledge or information of the matter sufficient to form a belief, because such a statement would be a palpable falsehood, a plain impossibility. When the allegation in the complaint or petition is of a fact which must of necessity be within the personal knowledge of the defendant; when it avers an act done or an omission suffered by him personally; when, for example, it states a contract entered into, or a deliberate wrong perpetrated, by himself, — he *must* know whether the averment is true or false.[1] He will not be suffered to assert a

(1900), 73 Conn. 448, 47 Atl. 656; Sayles *v.* FitzGerald (1899), 72 Conn. 391, 44 Atl. 733; Smith *v.* Allen (1901), 63 Neb. 74, 88 N. W. 155; Jacobs *v.* Hogan (1900), 73 Conn. 740, 49 Atl. 202. The Georgia statute is somewhat different from that found in most of the code States: Code, § 4961 (1895), "Any averment distinctly and plainly made therein [in the petition], which is not denied by the defendant's answer, shall be taken as *prima facie* true, unless the defendant states in his answer that he can neither admit nor deny such averment because of the want of sufficient information." For cases construing it see Lester *v.* McIntosh (1897), 161 Ga. 675, 29 S. E. 7; English *v.* Grant (1897), 102 Ga. 35, 29 S. E. 157; Smith *v.* Champion (1897), 102 Ga. 92, 29 S. E. 160; Angier *v.* Equitable Bldg. Ass'n (1899), 109 Ga. 625, 35 S. E. 64.

Denials upon Information and Belief: — "The better rule is that a denial made upon 'information and belief' is sufficient when made in a certain class of cases. In strictness, it is the only proper form of denial in a case where, with reference to the fact sought to be denied, defendant has certain information which induces him to believe that such facts are untrue, and yet has not absolute knowledge that such facts are untrue. Having information inducing a belief which falls short of knowledge, defendant cannot truthfully deny that he has neither knowledge nor information sufficient to form a belief as to the fact." Russell *v.* Amundson (1894), 4 N. D. 112, 59 N. W. 477. See also Warburton *v.* Ralph (1894), 9 Wash. 537, 38 Pac. 140; Seattle Nat. Bank *v.* Meerwaldt (1894), 8 Wash. 630, 36 Pac. 763.]

[1] [Raymond *v.* Johnson (1897), 17 Wash. 232, 49 Pac. 492; Sweet *v.* Davis (1895), 90 Wis. 409, 63 N. W. 1047; Bartow *v.* Northern Assurance Co. (1897), 10 S. D. 132, 72 N. W. 1135; Nashville, etc. R. R. Co. *v.* Carrico (1894), 95 Ky. 489, 26 S. W. 177; Sloane *v.* Southern Cal. Ry. Co. (1896), 111 Cal. 668, 44 Pac. 320; Gribble *v.* Columbus Brewing Co. (1893), 100 Cal. 67, 34 Pac. 527; Wickersham *v.* Comerford (1894), 104 Cal. 494, 38 Pac. 101; Mills' Estate (1902), 40 Ore. 424, 67 Pac. 107.

Matters of public record are presumptively within the knowledge of the parties, and denials of information and belief are insufficient: Thompson *v.* Skeen (1896), 14 Utah, 209, 46 Pac. 1103; Mullally *v.* Townsend (1897), 119 Cal. 47, 50 Pac. 1066; First Nat. Bank *v.* Martin (1898), Idaho, 55 Pac. 302; Simpson *v.* Remington (1899), Idaho, 59 Pac. 360; First Nat. Bank *v.* Watt (1901), Idaho, 64 Pac. 223; Van Dyke *v.* Doherty (1896), 6 N. D. 263, 69 N. W. 200; Oakes *v.* Ziemer (1901), 62 Neb. 603, 87 N. W. 350; s. c. (1900), 61 Neb. 6, 84 N. W. 409.

A denial of knowledge or information that plaintiff is a corporation, is not suffi-

defective memory, for such a forgetfulness is contrary to the general experience of mankind. If his recollection is at fault, the law affords him ample opportunity and means of refreshing it during the interval between the service of the adverse pleading and the time for answering. A denial, therefore, of the form described, pleaded in answer to allegations of a nature purely personal to the defendant, will be treated as sham and evasive, and will be struck out on motion. A demurrer would not be the proper remedy; because the objection is not to the sufficiency *as a defence*, but to the bad faith of the party in interposing a pleading of such a character. The rule was accurately stated by Mr. Justice Field of the California Supreme Court substantially as follows: "If the facts alleged are presumptively within the knowledge of the defendant, he must deny positively, and a denial of information or belief will be treated as an evasion. Thus, for example, in reference to instruments in writing alleged to have been executed by the defendant, a positive answer will alone satisfy the requirements of the statute. If the defendant has forgotten the execution of the instruments, or doubts the correctness of their description, or of the copies in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the originals. If the facts alleged are not such as must be within the personal knowledge of the defendant, he may answer according to his information and belief." [1]

cient to put in issue the question of the plaintiff's corporate existence: Stoddard Mfg. Co. *v.* Mattice (1897), 10 S. D. 253, 72 N. W. 891; Board of Education *v.* Prior (1898), 11 S. D. 292, 77 N. W. 106; Iowa Savings, etc. Ass'n *v.* Selby (1900), 111 Ia. 402, 82 N. W. 968. Nor will such a denial put in issue the execution of a written instrument: Winterfield *v.* Cream City Brewing Co. (1897), 96 Wis. 239, 71 N. W. 101; Garland *v.* Gaines (1900), 73 Conn. 662, 49 Atl. 19; Moore *v.* Holmes (1897), 68 Minn. 108, 70 N. W. 872.]

[1] Curtis *v.* Richards, 9 Cal. 33, 38. See also, to the same effect, Wing *v.* Dugan, 8 Bush, 583, 586; Jackson Sharp Co. *v.* Holland, 14 Fla. 384, 386. The rule stated in the text is also sustained by the following cases: Huffaker *v.* Nat. Bk. of Monticello, 12 Bush, 287; Gridler *v.* Farmers' & D. Bank, 12 id. 333; Barret *v.* Godshaw, 12 id. 592; Goodell *v.* Bloomer, 41 Wis. 436; Union Lumb. Co. *v.* Chippewa Cy. Sup., 47 id. 245; Collart *v.* Fisk, 38 id. 238; Hathaway *v.* Baldwin, 17 id. 616; see Brotherton *v.* Downey, 21 Hun, 436. Further instances of such denials disallowed, as concerning matters presumptively within the knowledge of the defendant: Buller *v.* Sidell, 43 Fed. Rep. 116; Sherman *v.* Boehm, 13 Daly, 42; Wheaton *v.* Briggs, 35 Minn. 470; Loveland *v.* Garner, 74 Cal. 298. Instances of such denials which did not come within the operation of the rule, and were therefore allowed: Martin *v.* Erie Preserving Co., 48 Hun, 81; Harvey *v.* Walker, 59 Hun, 114; Hall *v.* Woodward, 30 S. C. 564; Hagman *v.* Williams, 88 Cal. 146.

§ 533. * 642. **Outline of Proposed Treatment of Issues Raised by Denials.** In discussing the topics embraced within this subdivision, the same doctrines apply both to general and to specific denials. The only difference is in respect to the extent of their effect and operation.[1] The general denial raises an issue with the entire complaint or petition, and admits evidence in contradiction to all the plaintiff's material allegations; while the specific denial raises an issue with the particular allegation alone to which it is directed, and only admits evidence in contradiction thereto. The same rules as to the effect of the general denial upon the issue raised with the whole complaint, and the proofs admissible under it, apply with equal force to the specific denial in respect to the narrower issue which it creates and the evidence which it admits. It will only be necessary, therefore, to discuss the objects and functions of the general denial, since the results of this discussion will be true of specific denials within their limited operation. In pursuing this discussion, I shall inquire into the nature and effect of the general denial and the issues formed by it; the general nature of the evidence which may be admitted, and the defences which may be set up under it; and I shall state and classify a number of particular defences, and matters of defence, which have been held admissible or not admissible, or, in other words, a number of particular defences which have been determined to be defences by way of denial, or to be new matter.

§ 534. * 643. **Importance of Questions Suggested.** No topic connected with the whole subject of pleading is, I think, more important than the questions thus suggested. Undoubtedly, much of the confusion, redundancy, and unscientific character of pleadings under the codes is the result of ignorance or uncertainty as to the power of the general denial to admit defences upon which the defendant relies. In very many instances the answer is made a long and rambling mass of purely evidentiary details, when the simple general denial, not exceeding two or three lines in length, would be fully as efficacious, and would present the issue in a sharper and clearer manner. The general denial is in some respects broader in its scope, and in some respects narrower, than the general issues as a whole at the common law. But little aid can be obtained from the rules which

[1] See Coles *v.* Soulsby, 21 Cal. 47, 50, per Field C. J.

governed the use of the latter traverses, except by way of contrast.

§ 535. * 657. **The General Denial. McKyring v. Bull.** In pursuing this inquiry, I shall rely upon the judicial opinions found in decisions which are universally regarded as authoritative, even using their language instead of my own wherever practicable. The case of McKyring *v.* Bull[1] is conceded to be the leading one. The opinion of Mr. Justice S. L. Selden is so full, accurate, and able an exposition of the subject, that other judges have done little more than repeat his conclusions. The action was brought to recover compensation for work and labor. The complaint alleged that the plaintiff entered into the employment of the defendant at a certain date, and continued in such employment at defendant's request, doing work and labor until another specified date, and that the services so rendered were worth the sum of $650; and concluded as follows: "That there is now due to this plaintiff, over and above all payments and offsets on account of said work, the sum of $134; which said sum defendant refuses to pay: wherefore the plaintiff demands judgment for the last-mentioned sum, and interest from the 4th day of May, 1854." The answer was only a general denial. On the trial, the defendant offered to prove payment as a defence to the action; but the evidence was excluded, on the ground that the defence should have been pleaded. He then offered to prove part payment in mitigation of damages; but this was also rejected for the same reason. The case thus presented two questions to the Appellate Court for decision: (1) Whether payment could have been proved as a defence under the general denial; (2) whether it could have been proved in mitigation of damages. If the action had been assumpsit or debt, the evidence would have been admissible in either aspect.[2]

[§§ * 658, * 659. These sections of the author's text, consisting of quotations from McKyring *v.* Bull, will be found in the note.[3]]

[1] McKyring *v.* Bull, 16 N. Y. 297, decided in 1857.

[2] McKyring *v.* Bull, 16 N. Y. 297, 299. The opinion concludes as follows: "My conclusion, therefore, is, that neither payment nor any other defence which confesses and avoids the cause of action can in any case be given in evidence as a defence under an answer containing simply a general denial of the allegations of the complaint."

[3] § 658. The discussion of the second question presented in this case is so complete and instructive, that I adopt it as

§ 536. * 660. **Further Illustrations.** The Supreme Court of New York, in an early case, described the office of the general denial

a portion of the text. "The next question is, whether evidence of payment, either in whole or in part, is admissible in mitigation of damages. As the code contains no express rule on the subject of mitigation, except in regard to a single class of actions, this question cannot be properly determined without a recurrence to the principles of the common law. By these principles, defendants in actions sounding in damages were permitted to give in evidence, in mitigation, not only matters having a tendency to reduce the amount of the plaintiff's claim, but, in many cases, facts showing that the plaintiff had in truth no claim whatever. It was not necessarily an objection to matter offered in mitigation, that, if properly pleaded, it would have constituted a complete defence. Thus, in Smithies *v.* Harrison, 1 Ld. Raym. 727, the truth of the charge was received in mitigation in an action of slander, although not pleaded. Again: in the case of Abbott *v.* Chapman, 2 Lev. 81, which was an action of assumpsit, the defendant having given in evidence a release, Lord Holt said that 'he should have pleaded *exoneravit*, but that the evidence was admissible in mitigation of damages.' So too, in the modern case of Nicholl *v.* Williams, 2 M. & W. 758, which was assumpsit for use and occupation, the defendant, having pleaded payment to a part of the demand, and *non-assumpsit* to the residue, was permitted, upon the trial, to prove payment in full; but it was held that the evidence could only go in mitigation, and that the plaintiff was entitled to judgment for nominal damages. It is obvious that this practice was open to serious objections. It enabled defendants to avail themselves of their defences for all substantial purposes without giving any notice to the plaintiff. . . . But in regard to payment, release, etc., so long as they were received in evidence under the general issue in bar, no objection could be made to allowing them in mitigation. As soon, however, as this practice was abrogated by the rules of Hilary Term, 4th William IV., the question as to the admissibility of payment in mitigation at once arose." The learned judge here traces the course of English decisions upon this question, citing and reviewing a number of cases, and referring to certain additional legislation (Lediard *v.* Boucher, 7 C. & P. 1, per Lord Denman; Shirley *v.* Jacobs, 7 C. & P. 3, per Tindal C. J.; Henry *v.* Earl, 8 M. & W. 228; Rule of Trinity Term, 1st Vict. 4 M. & W. 4), and concludes this discussion as follows: "The matter is now placed, therefore, in the English courts, upon a footing of perfect justice. If the demand for which an action is brought has once existed, and the defendant relies upon its having been reduced by payment, he must appear and plead.

§ 659. "It is to be determined in this case whether we have kept up with these courts in our measures of reform. The rules of Hilary Term (4 William IV.) and the system of pleading prescribed by the code have, in one respect, a common object; viz., to prevent parties from surprising each other by proof of what their pleadings give no notice. These rules, according to the construction put upon them by the courts, were found inadequate, so far as proving payment in mitigation is concerned, to accomplish the end in view; and it became necessary to adopt the rule of Trinity Term (1st Vict.) to remedy the defect. If the provisions of the code are to receive in this respect a construction similar to that given to the rules of Hilary Term, then an additional provision will be required to place our practice upon the same basis of justice and convenience with that in England. But is such a construction necessary? Section 149 of the code provides that the answer of the defendant must contain, 1. A general or specific denial of the material allegations of the complaint; and, 2. A statement of any new matter constituting a defence or counter-claim. The language here used is imperative, — '*must* contain.' It is not left optional with the defendant whether he will plead new matter or not; but all such matter, if it constitutes 'a defence or counter-claim,' must be pleaded; and this is in entire accordance with the general principles of plead-

in the following brief but very accurate manner: "Under a denial of the allegations of the complaint, the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish in order to sustain his action." [1] "Under the general denial of the code, evidence of a distinct affirmative defence is not admissible. The only evidence which the defendant is entitled to give is limited to a contradiction of the plaintiff's proofs, and to the disproval of the case made by him." [2]

ing. The word 'defence,' as here used, must include partial as well as complete defences; otherwise it would be no longer possible to plead payment in part of the plaintiff's demand, except in connection with a denial of the residue; since section 153 provides that 'the plaintiff may in all cases demur to an answer containing new matter, when, upon its face, it does not constitute a counter-claim or *defence*.' Such a restriction would be not only contrary to the general spirit of the code in regard to pleading, but would obviously conflict with § 244, subdivision 5, which provides that 'where the answer expressly, or by not denying, admits part of the plaintiff's claim to be just, the court may, on motion, order such defendant to satisfy that part of the claim,' etc. The question to be determined, then, is, whether these provisions are limited in their operation to cases where the defendant seeks to avail himself of new matter strictly as a defence either in full or *pro tanto*, or whether they extend to the use of such matter in mitigation. Were there nothing in the code to indicate the intention of the legislature on this subject, we might feel constrained to follow the construction put by the English courts upon the rules of Hilary Term. But § 246 provides that in all actions founded upon contract brought for the recovery of money only, in which the complaint is sworn to, if the defendant fails to answer, the plaintiff is entitled absolutely to judgment for the amount mentioned in the summons without any assessment of damages. It is plain, that, in this class of actions, defendants who have paid part only of the plaintiff's demand must appear and plead such part payment, or they will lose the benefit of it altogether. The provisions of § 385 afford no adequate remedy in such cases, because the offer to allow judgment for a part does not relieve the defendant from the necessity of controverting the residue by answer. Section 246 could never have been adopted, therefore, without an intention on the part of the legislature that § 149 should be so construed as to require defendants, at least in this class of cases, to set up part payment by answer; and it is difficult to suppose that they intended the section to receive one construction in one class of actions, and a different one in another. My conclusion, therefore, is, that § 149 should be so construed as to require defendants in all cases to plead any new matter constituting either an entire or partial defence, and to prohibit them from giving such matter in evidence upon the assessment of damages when not set up in the answer. Not only payment, therefore, in whole or in part, but release, arbitrament, accord and satisfaction, must here be pleaded. In this respect, our new system of pleading under the code is more symmetrical than that prescribed by the rules adopted by the English judges."

[1] Andrews *v.* Bond, 16 Barb. 633, 641, per T. A. Johnson J.

[In Milbank *v.* Jones (1894), 141 N. Y. 340, 36 N. E. 388, it was held that the defendant might introduce evidence to controvert anything that plaintiff is bound to prove or is permitted to prove. See also Whitney *v.* Whitney (1902), 171 N. Y. 176, 63 N. E. 834, reaffirming the rule quoted in the text.]

[2] Beaty *v.* Swarthout, 32 Barb. 293–294, per E. Darwin Smith J.; and see Wheeler *v.* Billings, 38 N. Y. 263, 264, per Grover J.

§ 537. * 661. **Necessity of Reply depends upon Nature of Defence.** Whenever a reply is made necessary to all new matter contained in the answer, the question as to the nature of a defence has often arisen upon the plaintiff's failure to reply to allegations which the defendant insisted were new matter, and therefore admitted to be true by means of the omission, but which the plaintiff claimed to be mere argumentative denials, or, in other words, unnecessary averments of evidentiary facts which could be proved under a denial. In passing upon such a question, the Supreme Court of Minnesota fully approved and adopted the general doctrine which has been stated in the text.[1] In another case before the same court, the question was examined with great care and marked ability. The action was upon a contract of sale: the answer consisted of specific denials of each allegation in the complaint; and the defendant offered to prove that the contract was entered into on Sunday, and was therefore illegal and void. [The conclusion of the court is given in the note.] [2]

§ 538. * 662. **Anything Tending directly to controvert Allegations in Complaint Admissible under General Denial.** In an action to recover possession of chattels where the complaint alleged property in the plaintiff, and the answer was a general denial, evidence tending to show that the plaintiff was not the owner was excluded on the trial. This ruling was disapproved on appeal, the court saying: "The answer is a denial of each and every allegation of the complaint. The allegation of ownership is therefore denied. In Bond *v.* Corbett,[3] it was held that anything which tends to *directly* controvert the allegations in the complaint may be shown under the general denial. The defendant might, therefore, introduce evidence to show that plaintiff was not the owner, nor entitled to possession." [4]

[1] Nash *v.* St. Paul, 11 Minn. 174, 178; Finley *v.* Quirk, 9 Minn. 194.

[2] Finley *v.* Quirk, 9 Minn. 194, 200, per Wilson C. J.: "We hold, therefore, (1) that an answer merely by way of denial raises an issue only on the *facts* alleged in the complaint; (2) that the denial of the sale in this case only raised an issue on the sale in point of fact, and not on the question of the legality of such sale; (3) that all matters in confession and avoidance showing the contract sued upon to be either void or voidable must be affirmatively pleaded."

[3] Bond *v.* Corbett, 2 Minn. 248.

[4] Caldwell *v.* Bruggerman, 4 Minn. 270, 276, per Atwater J.

[The Supreme Court of Minnesota, in Dodge *v.* McMahan (1895), 61 Minn. 175, 63 N. W. 487, stated the rule as follows: "Authorities may be found, even in some of the code States, to the effect that, under a mere denial, evidence of any fact may be given in evidence that would go to the

The same doctrine is maintained by the Supreme Court of Indiana.[1]

§ 539. * 663. **Same Subject.** The doctrine thus stated has also been approved by the Supreme Court of Missouri.[2] "It is clear, both upon principle and authority, that, under a general or specific denial of any fact which the plaintiff is required to prove to maintain the action, the defendant may give evidence to disprove it."[3] The true scope of and limitations upon this form of traverse were well illustrated in a very recent case decided by the New York Court of Appeals. The complaint alleged that the plaintiff was owner of certain shares of stock in a corporation; that the stock had been transferred to one W. to hold for the plaintiff; that W., without the plaintiff's knowledge, had transferred the same to the defendant, in payment, as defendant claimed, of a debt due from him to defendant; and prayed that defendant might be compelled to re-transfer and deliver the same to the plaintiff. The answer was a general denial. The nature and extent of the issues thus presented were discussed, and the

original validity of the contract sued on, — that is, which, although admitting the making of the contract, would show that, when made, it was, for some reason invalid; as, for example, that it was made on Sunday, or that it was a gambling or wagering contract. But this rule is not in accordance with either the spirit of the reformed procedure or the decisions of this court. The correct rule is that, under a denial, the defendant is at liberty to give only such evidence as tends to disprove the existence of facts, as facts, alleged by the plaintiff, but not of any matter aliunde, which, although admitting such facts, would tend to avoid their legal effect and operation." See also Iselin *v.* Simon (1895), 62 Minn. 128, 64 N. W. 143; Fort Dearborn Bank *v.* Security Bank (1902), 87 Minn. 81, 91 N. W. 257.]

[1] Wood *v.* Ostram, 29 Ind. 177, 186.

[2] Northrup *v.* Miss. Vall. Ins. Co., 47 Mo. 435, 443.

[Jones *v.* Rush (1900), 156 Mo. 364, 57 S. W. 118: "Under a general denial any legal evidence is admissible which tends to show that the statements in the petition constituting the plaintiff's cause of action are not true, and to that end he may affirmatively show facts inconsistent with the plaintiff's statements tending to prove them to be false." In Cunningham *v.* Roush (1900), 157 Mo. 336, 57 S. W. 769, the rule was stated as follows: — "Where a cause of action which once existed has been determined by some matter which subsequently transpired, such new matter must, to comply with the statute, be specially pleaded; but where the cause of action never existed, the appropriate defence under the law is a denial of the material allegations of the petition; and such facts as tend to disprove the controverted allegations are pertinent to the issue." See also Patton *v.* Fox (1902), 169 Mo. 97, 69 S. W. 287, containing a list of special defences which have been held admissible under the general denial in Missouri. And in Bolton *v.* Mo. Pac. Ry. Co. (1903), 172 Mo. 92, 72 S. W. 53, the court said: "Any fact the effect of which is to show that an essential statement in the plaintiff's cause of action is untrue may be proven under the general denial, and, therefore, should not be specially pleaded and if so pleaded should be stricken out as redundant."]

[3] Greenfield *v.* Mass. Mut. L. Ins. Co., 47 N. Y. 430, 437, per Grover J.; Wheeler *v.* Billings, 38 N. Y. 263.

principle which controlled them was stated by Mr. Justice Grover, who pronounced the defence inadmissible.[1]

§ 540. * 664. **Same Subject.** A general denial being pleaded in an action on a non-negotiable note brought against the maker thereof, evidence designed to show a want of consideration was rejected at the trial. The New York Supreme Court, in reviewing this ruling, very properly held that this defence may be proved under an answer of denial in actions upon all contracts which do not import a consideration.[2] While the very point decided, that evidence of a want of consideration could be admitted, is undoubtedly correct, the opinion as a whole is very careless and inaccurate, and the general criterion which it lays down is clearly erroneous. There are many classes of defences which show that a cause of action never existed, and which cannot be proved under the general denial, but must be pleaded; as, for example, illegality, fraud, duress, and the like. The learned judge was entirely misled by the analogies drawn from the ancient practice. The general denial puts in issue the facts, which, if true, constitute a *prima facie* cause of action. A consideration is, in general, one of these facts in actions upon contract. When these facts are admitted, but by reason of some extraneous features or elements affecting them they do not produce the otherwise necessary result, that element which constitutes the defence, and which destroys the *prima facie* legal aspect of the facts, is certainly not put in issue by the general denial: it is new matter, and must be specially pleaded.

[1] Weaver *v.* Barden, 49 N. Y. 286, 297: "To establish a cause of action, the plaintiff was bound to prove that he was the legal owner of the stock, or was equitably entitled to it as against the defendant. Under this answer the defendant had a right to give evidence controverting any fact necessary to be established by the plaintiff to authorize a reconveyance, but not to prove a defence founded upon new matter." Recapitulating the facts actually proved by the plaintiff, — namely, those alleged in the complaint as above stated, and that W. held the stock as a trustee for the plaintiff, — he continued: "This established the plaintiff's right to the stock as against the defendant, unless he was a *bona fide* purchaser from W. To meet this case, the defendant offered to prove in substance that he *was* a *bona fide* purchaser from W. The special term held, against plaintiff's objection, that this was admissible under the answer. This was error. Under the general denial, the defendant could not introduce evidence tending to show a defence founded upon new matter, but such only as tended to disprove any fact that the plaintiff must prove to sustain his case." The court, however, did not pass upon the question thus discussed by Grover J.: the decision was placed upon a different ground; viz., that defendant was *not* a *bona fide* purchaser.

[2] Evans *v.* Williams, 60 Barb. 346

§ 541. * 665. **Construction Adopted in California.** The courts of one State alone dissent from this course of judicial decision, and give to the general denial of the code something of the comprehensive operation which belonged to the general issues of *non-assumpsit* and *nil debet* at the common law. The construction adopted in California seems to regard the general denial — certainly in actions upon contract — as admitting any defences which show that there is no subsisting cause of action at the time of the commencement of the suit. At least the defence of payment is thus held admissible; and, if it be so, other similar defences, such as release, accord and satisfaction, and the like, cannot with consistency be rejected. This doctrine of the California courts is stated and illustrated in the following cases: In an action upon contract the complaint contained three counts, each in the form of the common-law *indebitatus assumpsit*. The answer was a general denial. Upon these issues the court said: "In each count of the complaint there is an averment that on, etc., the defendant was indebted to the plaintiff in a specified sum, and promised to pay it, but therein has made default. The answer contained a general denial, which made it incumbent on the plaintiff to prove a subsisting indebtedness from the defendant to the plaintiff at the time of the institution of the suit. Under this denial, it would have been competent for the defendant to prove payment.[1] For the same reason, it is competent to show that the plaintiff had transferred the demand, and that the defendant, therefore, was not indebted to him."[2] In another case upon a promissory note the complaint was in the usual form, setting out the note, and alleging that it had not been paid, and that there was due upon it a specified sum, for which judgment was demanded. The answer was the general denial. "The question is," said the court, "whether the general denial presents any issue of fact. In Frisch *v.* Caler, this question was fully considered. The statute then in force required a replication to new matter in the answer. The answer averred that the note in suit had been paid by the defendant; and it was contended that that averment was admitted because of the failure on the part of the plaintiff to file

[1] Frisch *v.* Caler, 21 Cal. 71; Brown *v.* Orr, 29 Cal. 120; Davanay *v.* Eggenhoff, 43 Cal. 395.

[2] Wetmore *v.* San Francisco, 44 Cal. 294, 299, 300, per Crockett J.; and see especially Fairchild *v.* Amsbaugh, 22 Cal. 572, 574; Brooks *v.* Chilton, 6 Cal. 640.

a replication denying it. But the court held that it was not new matter; that the failure to pay the note constituted the breach, and must be alleged; and that the allegation in the answer — that it had been paid — was only a traverse of the allegation in the complaint that it had not been paid. (See also Brown *v.* Orr.)[1] The doctrine then laid down has not since been departed from, so far as we are aware, except in the case of Hook *v.* White;[2] and that case, so far as it holds that the allegation in the complaint that the note remains unpaid is immaterial, and that a denial of the allegation does not put any fact in issue, ought, in our opinion, to be overruled. The general denial in this case puts in issue the averment of the complaint, that the promissory note remained due and unpaid."[3] This decision falls far short of sustaining the sweeping doctrine of Mr. Justice Crockett, in the preceding case of Wetmore *v.* San Francisco, as to the effect of the general denial. When the opinion of Mr. Justice Rhodes is analyzed, it does not in fact lay down any principle different from that maintained by the cases cited from the courts of other States. It simply asserts that the general denial puts in issue the allegations of the complaint, and that the negative averment of non-payment, when traversed in this manner, produces a complete issue, under which evidence of payment may be offered. This is very far from holding, with Crockett J., that the defence of payment is admissible under the general denial in all cases.

§ 542. * 666. Twofold Office of General Denial. No Exact Statement Possible of Particular Defences Admissible under it. The foregoing extracts from the judgments of so many courts leave little room and little need for any addition by way of comments. The unanimity of opinion in respect to the fundamental principles of pleading embodied in the codes is almost absolute; and this principle has been so clearly formulated by several of the judges, that no difficulty ought to arise in its practical application. The office of the general denial, like that of the old traverses, is twofold: it forces the plaintiff to prove all the material allegations of fact contained in his complaint or petition, and constituting his cause of action, by sufficient evidence at least to make out a *prima facie* case; it also permits the de-

[1] Brown *v.* Orr, 29 Cal. 120.
[2] Hook *v.* White, 36 Cal. 299.
[3] Davanay *v.* Eggenhoff, 43 Cal. 395, 397, per Rhodes J.

fendant to offer any and all legal evidence which controverts those averments, and contradicts the plaintiff's proofs.[1] It is clear that no exact statement can be made defining with universal precision what particular issues the general denial raises in all possible cases, and what particular defences it admits; and in this respect it differs from the general issue. As a result of the common-law methods of pleading, and the uniformity of averment necessarily used in all actions of the same class, the operation of the general issue in every suit was exactly defined; and this was especially so after the rules made in 4th William IV. (1834). Certain averments, and none others, of the declaration, were put in issue by it; certain defences, and none others, were admissible under it. This precise rule cannot be laid down in respect of the general denial, because there is no *necessary* uniformity in the averments of complaints or petitions in actions of the same kind brought on the same substantial facts, and seeking the same relief. As the general denial puts in issue *all* the material allegations made by the plaintiff, and admits all evidence contradicting them, what issues it *actually* raises, and what defences it *actually* admits, in a given case, must depend upon the frame of the complaint or petition, and upon the number and nature of the allegations which the plaintiff has inserted therein. It could be said of the general issue in all actions upon contract, — assumpsit, debt, covenant, — after the rules of Hilary Term, 1834, that the defence of payment was never admissible under it. If we would speak with perfect accuracy, such language cannot be adopted as the expression of a universal rule in respect of the general denial; for the plaintiff may so shape his pleading, and introduce into it such a negative averment of non-payment, that the proof of payment would be simply supporting the general denials of the answer. Several cases already cited sufficiently sustain the correctness of this position; and others, to be hereafter more particularly referred to in a subsequent portion of this section, and in the next section under the head of Payment, will furnish various examples of this feature of dis-

[1] [Graves *v.* Norfolk Nat. Bank (1896), 49 Neb. 437, 68 N. W. 612; Am. Bldg. & Loan Ass'n *v.* Rainbolt (1896), 48 Neb. 434, 67 N. W. 493; Wiedeman *v.* Hedges (1901), 63 Neb. 103, 88 N. W. 170; Peterson *v.* Seattle Traction Co. (1900), 23 Wash. 615, 63 Pac. 539. "A superfluous plea does not render irrelevant to a general denial matter which would have been relevant in the absence of a special plea:" Horkey *v.* Kendall (1898), 53 Neb. 522, 73 N. W. 953.]

tinction between the general denial and the general issue.[1] Additional cases, bearing upon the nature and effect of the general denial, are collected in the foot-note.[2]

§ 543. * 667. **Only Material Averments Put in Issue by General Denial.** As the general denial forms an issue upon the entire cause of action set up by the plaintiff, and forces him to prove the same substantially as alleged, the question becomes one of great practical importance: What are the averments in the complaint or petition which are thus negatived, and which must be established by sufficient proof on the trial? The full answer to this question belongs rather to a discussion of the requisites of the plaintiff's than of the defendant's pleading, and will be found in Chapter Third. The universally accepted rule is, that only those averments of the complaint or petition which are material and proper are put in issue by a denial either general or specific in its form. Neither "material" nor "proper" is, however, synonymous with "necessary." A plaintiff may insert in his pleading allegations which are unnecessary in that position, and which are not in conformity with the perfect logic of the system, but which, when once introduced, become "material," so that an issue is formed upon them by a general or a specific denial.[3] The instance just mentioned, of an allegation of non-payment in the complaint met by a denial

[1] See Quin *v.* Lloyd, 41 N. Y. 349; Marley *v.* Smith, 4 Kan. 183; Frisch *v.* Caler, 21 Cal. 71; White *v.* Smith, 46 N. Y. 418; Van Gieson *v.* Van Gieson, 10 N. Y. 316.

[2] Button *v.* McCauley, 38 Barb. 413; Schular *v.* Hudson Riv. R. Co., 38 Barb. 653; Schermerhorn *v.* Van Allen, 18 Barb. 29; Hendricks *v.* Decker, 35 Barb. 298; Perkins *v.* Ermel, 2 Kan. 325; Adams Exp. Co. *v.* Darnell, 31 Ind. 20; Lafayette & I. R. Co. *v.* Ehman, 30 id. 83; Watkins *v.* Jones, 28 id. 12; Frybarger *v.* Cokefair, 17 id. 404; Bingham *v.* Kimball, 17 id. 396; Norris *v.* Amos, 15 id. 365; Hawkins *v.* Borland, 14 Cal. 413; Goddard *v.* Fulton, 21 Cal. 430; Evansville *v.* Evans, 37 id. 229, 236; Hier *v.* Grant, 47 N. Y. 278; Schaus *v.* Manhattan Gasl. Co., 14 Abb. Pr. N. S. 371; Hunter *v.* Mathis, 40 Ind. 356; Ammerman *v.* Crosby, 26 id. 451; Johnson *v.* Cuddington, 35 id. 43; Brett *v.* First Univ. Soc. of Brooklyn, 63 Barb. 610, 616; Catlin *v.* Gunter, 1 Duer, 253, 265; Robinson *v.* Frost, 14 Barb. 536, 541; Texier *v.* Gouin, 5 Duer, 389, 391; Dyson *v.* Ream, 9 Iowa, 51; Scheer *v.* Keown, 34 Wis. 349, 356. The conclusions of the text as to what allegations in the plaintiff's pleading the general denial puts in issue and compels him to prove, and what evidence it admits on the part of the defendant, are further illustrated by Paris *v.* Strong, 51 Ind. 339; Stafford *v.* Nutt, 51 id. 535; Bate *v.* Sheets, 50 id. 329; Morgan *v.* Wattles, 69 id. 260; McWilliams *v.* Bannister, 40 Wis. 489; Moulton *v.* Thompson, 26 Minn. 120; School Dist. *v.* Shoemaker, 5 Neb. 36; Jones *v.* Seward Cy. Com'rs, 10 id. 154; Scott *v.* Morse, 54 Iowa, 732; Amador Cy. *v.* Butterfield, 51 Cal. 526; Elder *v.* Spinks, 53 id. 293.

[3] [Dillon *v.* Lee (1899), 110 Ia. 156, 81 N. W. 245.]

in the answer, is a familiar example of such averments, material, although not necessary.[1]

§ 544. * 668. **Only Issuable Facts are Material. Test to distinguish them from Evidentiary Facts.** It is an elementary doctrine of pleading under the new system, that only the *issuable* facts — that is, the conclusions of fact which are essential to the existence of the cause of action, or upon which the right to relief wholly or partially depends in equitable suits — are material, and are therefore put in issue by the denial; and the converse of the proposition is true, that the averments of mere evidentiary facts, if inserted in the pleading, are not thus controverted. Although this doctrine is elementary, and appears so simple in the statement, it is nevertheless sometimes exceedingly difficult of application in practice; and the difficulty is enhanced by the frequent inconsistencies of courts in dealing with it. While the general principle, as just stated, is constantly affirmed, yet there are numerous instances of particular causes of action in which the plaintiffs are required to set out in detail matter which is plainly evidentiary, and which is only of value as leading the mind to a conviction that the final or issuable fact, which is one necessary element of the right of action, exists. In other words, the courts have often, while dealing with particular cases, violated the elementary principle which applies, or should apply, to all cases; and the result is confusion and uncertainty. It is possible, however, to distinguish between issuable, material facts, and evidentiary facts, by an unfailing criterion. In all particular instances of the same cause of action based upon the same circumstances, — that is, arising from the same primary right in the plaintiff, broken by the same delict or wrong on the part of the defendant, — the material or issuable facts which are the essential elements of the right of action must be the same: immaterial circumstances, the time, place, amounts, values, extent of damages, parties, and the like, will be different; but the substantial elements of the cause of action, the facts which constitute it, must in every instance of the same species be the same. On the other hand, the evidentiary matter, the mass of subordinate facts and circumstances which must be actually proved, and from

[1] [Riner *v.* New Hampshire Fire Ins. Co. (1899), 9 Wyo. 81, 60 Pac. 262; Robertson *v.* Robertson (1900), 37 Ore. 339, 62 Pac. 377; Ball *v.* Putnam (1898), 123 Cal. 134, 55 Pac. 773.]

which the above-described essential elements result as inferences more or less direct, may vary with each particular instance of the same species of cause of action. The former class of facts are material, issuable, and, when the theory of pleading in legal actions is strictly observed, they alone should be averred, and they alone should be treated as put in issue by the denials, general or specific: the second class of facts — the proper evidentiary matter — should not be pleaded, and, if improperly averred, should not be regarded as put in issue by the denials of the defendant. This is the true theory, and is again and again commended by the courts; but, at the same time, it is constantly violated by the same courts in their requirements in respect to the pleading in certain species of causes of action. Another source of difficulty in applying the elementary doctrine is found in the circumstance, that not infrequently the material, issuable fact which must be averred, and which is put in issue, is identical with the fact which must be actually given in evidence. In respect of such matters there are no steps and grades, and processes of combination and deduction, by which the issuable fact alleged is inferred from the evidentiary fact proved. The two are one and the same; and thus matter which is truly evidence must in such case be alleged, and matter which is the proper subject of allegation must be directly given in evidence.

§ 545. * 669. **Allegations of Legal Conclusions not Controverted by General Denial.** Another and the final element which should belong to the averments in the complaint, in order that an issue may be raised thereon by the denial, is, that they must be of fact, and not of law. This particular topic has already been treated of in a former subdivision of the present section. The reformed system of pleading, unlike that of the common law, authorizes no issues to be raised by allegations of legal conclusions, and denials of the same. Although there are traces to be found in some of the cases of the ancient forms of averment in *indebitatus assumpsit* and in *debt*, and of answers resembling the plea of *nil debet*, yet all the decisions of present authority unite in theoretically condemning such a mode of pleading. I need not, however, dwell upon this particular rule, nor again refer to cases which have been so recently cited. An allegation of law in the plaintiff's pleading is not controverted by the defendant's denial:

no issue is formed thereby under which evidence can be admitted from either party.

§ 546. * 670. **General Nature of Evidence Admissible under Denials.** The judicial opinions quoted under the preceding head sufficiently establish the principle which controls all the questions embraced under the present, and the cases to be cited in the following one will illustrate the application of that principle. In fact, it is so intimately bound up with the subject last discussed, that it has already been stated and explained. I shall, however, recapitulate and restate this fundamental doctrine. The material allegations of the complaint or petition, when denied either generally or specifically, determine in each case what evidence and what defences may be given and established by the defendant. It is impossible to say of any class of cases, that such or such evidence can or cannot be offered as a matter of certain rule, or that such or such a defence can or cannot be set up. As the plaintiff is bound by no inflexible rule as to the form of his pleading, and as to the averments he may choose to introduce into it, so he can widen or contract within distant extremes the extent and nature of the evidence and defences which may be interposed by the defendant under a denial.[1] As the denial puts in issue all the material allegations of fact made by the plaintiff, whether originally necessary or not, he is at liberty to introduce all and any legal evidence which tends to sustain those allegations. On the other hand, under the same issue, the defendant is entitled to offer any evidence which tends to contradict that of the plaintiff, and to deny, disprove, and overthrow his material averments of fact.[2] This is the fundamental and most comprehensive doctrine of pleading embraced in the new procedure, and it of course determines the nature of the defences which may be set up under a general denial. It is to be observed — although the remark is perhaps unnecessary — that the defendant may in this manner attack any material allegation of fact, and thus, if possible, defeat the recovery, while the others are left unanswered or unassailed.[3]

[1] See Chicago, Cin. & L. R. Co. *v.* West, 37 Ind. 211, 215.

[2] [Bay View Brewing Co. *v.* Grubb (1901), 24 Wash. 163, 63 Pac. 1091.]

[3] As further illustrations of the text, see Jones *v.* Seward Cy. Com'rs, 10 Neb. 154; Scott *v.* Morse, 54 Iowa, 732; Roe *v.* Angevine, 7 Hun, 679; Manning *v.* Winter, 7 id. 482; Boomer *v.* Koon, 6 id. 645; Andrews *v.* Bond, 16 Barb. 633; Beaty *v.* Swarthout, 32 id. 293; Schermerhorn *v.* Van Allen, 18 id. 29; Scharz

§ 547. * 671. **Evidence Proper under Denials may be Affirmative or Negative.** As the allegations of the complaint or petition controverted by the denials of the answer determine the nature and extent of the evidence admissible under such denials, it follows that this evidence may be sometimes negative and sometimes affirmative. Herein lies the source of much confusion and uncertainty as to the character of the defendant's proofs and defences, and as to their admissibility under the general denial. Evidence in its nature affirmative is often confounded with defences which are essentially affirmative and in avoidance of the plaintiff's cause of action, and is therefore mistakenly regarded as new matter requiring to be specially pleaded, although its effect upon the issues is strictly negative, and it is entirely admissible under an answer of denial. In other words, in order that evidence may be proved under a denial, it need not be in its own nature negative: affirmative evidence may often be used to contradict an allegation of the complaint, and may therefore be proved to maintain the negative issue raised by the defendant's denials.[1] One or two familiar examples will sufficiently illustrate this proposition. In certain actions, property in the plaintiff, in respect of the goods which are the subject-matter of the controversy, is an essential element of his claim. His complaint, therefore, avers property in himself: the allegation is material, and is, of course, put in issue by the general or specific denial. To maintain this issue on his part, the plaintiff may give evidence tending to show that he is the absolute owner, or has the requisite qualified property. The defendant may controvert this fact in two modes. He may simply contradict and destroy the effect

v. Oppold, 74 N. Y. 307, 309; Hier *v.* Grant, 47 id. 278; Dunham *v.* Bower, 77 id. 76; Brown *v.* College Cor. Gt. Co., 56 Ind. 110.

[1] [In Jeffersonville, etc. Co. *v.* Riter (1896), 146 Ind. 521, 45 N. E. 697, the court said: "A defendant, under the general denial, is not confined to negative proof in denial of the facts stated in the complaint as a cause of action, but may, upon the trial, introduce proof of facts independent of those alleged in the complaint, but which are inconsistent therewith, and tend to meet and break down or defeat the plaintiff's cause of action." See also Hess *v.* Union State Bank (1900), 156 Ind. 523, 60 N. E. 305; Jones *v.* Rush (1900), 156 Mo. 364, 57 S. W. 118; Alpert *v.* Bright (1902), 74 Conn. 614, 51 Atl. 521; Van Skike *v.* Potter (1897), 53 Neb. 28, 73 N. W. 295; Phelps *v.* Skinner (1901), 63 Kan. 364, 65 Pac. 667.

This rule was approved by the Supreme Court of South Carolina in Wilson *v.* Railway Co. (1897), 51 S. C. 79, 28 S. E. 91, where it was held that the defence that an injury was caused by a fellow servant was admissible under the general denial, quoting the text at length.]

of the plaintiff's proofs, and in this purely negative manner procure, if possible, a decision in his own favor upon this issue. The result would be a defeat of the plaintiff's recovery by his failure to maintain the averment of his pleading: but the jury or court would not be called upon to find that the property was in any other person; the decision would simply be, that the plaintiff had not shown it to be in himself. On the other hand, the defendant, not attempting *directly* to deny the testimony of the plaintiff's witnesses, and to overpower its effect by *directly* contradictory proofs, may introduce evidence tending to show that the property in the goods is, in fact, in a third person. This evidence, if convincing, would defeat the plaintiff's recovery. It would be affirmative in its *direct* nature; but its ultimate effect, in the trial of the issue raised by the answer, would be to deny the truth of the plaintiff's averment. Such evidence, although immediately affirmative, would still, for the purpose of determining the issue presented by the pleadings, be negative. Again: in an action on a promissory note against the maker or indorser, the complaint might allege title in the plaintiff, and the fact that he was the owner and holder thereof. The answer of denial would put this averment in issue, as it would be material, and its truth essential to the recovery. Proof by the defendant, that, prior to the commencement of the action, the plaintiff had assigned the note to a third person, would be affirmative in its immediate nature, but negative in its effect upon the issue; for it would controvert the truth of the plaintiff's allegation. Cases cited under the next subdivision hold that the evidence which I have thus described in both of these examples is admissible under the general denial.

§ 548. * 672. **Distinction between General Issue and Plea of Confession and Avoidance at Common Law not the same as that between General Denial and New Matter under the Code.** The theory of the general denial is completed by considering what evidence cannot be given, and what defences cannot be set up, under it. This subject will be discussed at large in the following section: but some reference to it is appropriate in the present connection. The codes divide defences into denials and new matter. New matter must be specially pleaded. Defences at the common law were separated into traverses general and special, and pleas by way of confession and avoidance. The

general traverses were the general issues, and special traverses were denials of some particular allegation. The common-law distinction between these classes of defences was generally stated by the text-writers as follows: The general issue, when used in accordance with the original theory in those actions which admitted its full efficacy, put in issue the entire cause of action, and under it the defendant was permitted to offer any evidence and set up any defence which showed that the right of action *never, in fact, existed.* The plea by way of confession and avoidance, on the other hand, did not deny the facts from which the cause of action arose. It admitted or "confessed" that a cause of action once existed as averred, and set up other and subsequently occurring facts which showed that the right *after* it had occurred had been in some manner discharged, satisfied, or defeated. Is it possible to draw the same distinction between the general denial and the new matter of the code? I answer, It is not. Such a distinction, although correct in many instances, is not true absolutely. One reason for this is, that the plaintiff may so frame his complaint or petition, may insert in it allegations of such a sort, that a general denial will admit proof of facts which would be strictly matter by way of confession and avoidance under the former procedure. Certain passages in judicial opinions which have identified the "new matter" of the codes with the pleas by way of confession and avoidance of the common law, are, therefore, inaccurate: they were written by their authors in forgetfulness of the inherent difference between the fixed forms of the common-law declarations, and the varying forms of the complaints and petitions which may properly, though not perhaps scientifically, be used under the new system. To illustrate: Payment after breach of a contract, and therefore after a cause of action arose, is certainly matter by way of confession and avoidance; and yet a complaint may be so drawn that payment will not be new matter, but will be provable under a general denial. Other examples might be given; but this single one suffices.

§ 549. * 673. **Same Subject.** The result is, that the new matter of the code does not, like the matter in confession and avoidance of the common law, depend upon *the essential nature of the cause of action and of the defence*, but, like the effect of the general denial, it depends primarily upon *the nature of the material allegations which are embraced in the complaint.* Any facts

which tend to disprove some one of these allegations may be given in evidence under the denial; any fact which does not thus directly tend to disprove some one or more of these allegations cannot be given in evidence under the denial. It follows, that if such fact is in itself a defence, or, in combination with others, aids in establishing a defence, this defence must be based upon the assumption, that, so far as it is concerned, all the material allegations made by the plaintiff are either admitted or proven to be true. The facts which constitute or aid in constituting such a defence are "new matter." In this respect the new matter of the codes is analogous to the pleas by way of confession and avoidance of the common law, since it does, in truth, confess and avoid. The two definitions may now be given, and their contrast will be plain. A plea by way of confession and avoidance *admitted that the cause of action alleged did once exist*, and averred subsequent facts which operated to discharge or satisfy it. The new matter of the codes *admits that all the material allegations of the complaint or petition are true, and consists of facts not alleged therein which destroy the right of action, and defeat a recovery*. To sum up these conclusions, the classification of and distinction between defences at the common law depended upon the intrinsic, essential nature of the causes of action and of the defences. The analogous classification and distinction between defences admissible under a denial, and those which are new matter, in the new procedure, depend primarily upon the structure of the complaint or petition, and the material averments of fact which it contains. All facts which directly tend to disprove any one or more of these averments may be offered under the general denial: all facts which do not thus directly tend to disprove some one or more of these averments, but tend to establish a defence independently of them, cannot be offered under the denial; they are new matter, and must be specially pleaded.[1] I shall now apply these general principles to some particular instances.

§ 550. * 674. **Particular Defences Admissible under the General Denial. In Actions for Compensation for Services.** I shall in this subdivision classify and discuss only those cases in which defences have been held *admissible:* those which have been pronounced inadmissible, for the reason that they fell within the denomina-

[1] [Keens *v.* Robertson (1896), 46 Neb. 837, 65 N. W. 897.]

tion of "new matter," will be given in the next succeeding section.[1] In an action by an attorney and counsellor to recover compensation for professional services, the complaint stating the retainer, the services and their value, and the answer being a general denial, the plaintiff proved the services, and gave evidence showing their reasonable value. It was held that the defendant might, under his denial, show that the services were rendered upon a special agreement to the effect that the plaintiff would look to the recovery of costs from the adverse party as his sole mode of compensation, and would make no personal claim against the defendant.[2] And in a similar action under the same answer the defendant may prove the plaintiff's negligence and want of skill, by which the value of the services was diminished or destroyed.[3] In general, in actions to recover compensation for work and labor upon a *quantum meruit* the defendants may, under the general denial, prove that the work was negligently or unskilfully done, and thus contest its value;[4] and may prove that the plaintiff had assigned and transferred the demand before suit brought, for this controverts the defendant's indebtedness to him.[5]

§ 551. * 675. **In Actions for Negligent Injuries.** In actions for injuries to person or property alleged to have resulted from the

[1] For a summary of recent decisions, see the additions to the last note under § * 682.

[2] Schermerhorn *v.* Van Allen, 18 Barb. 29, per Parker J.: "The evidence was improperly excluded. Under a general allegation of indebtedness, the plaintiff had proved certain services rendered and their value. It was surely competent for the defendant, under a denial of such indebtedness, to prove that he never incurred or owed the debt. He had a right to prove that the services were rendered as a gratuity, or that the plaintiff himself had fixed a less price for their value than he claimed to recover. The services being proved, the defendant might show that they were rendered, not for him, but on the credit of some other person, or that the plaintiff himself undertook to run the risk of the litigation. It was not an attempt to show an extinguishment of the indebtedness by payment, release, or otherwise; but it was an offer to show that such indebtedness never existed. The defendant was at liberty to prove any circumstances tending to show that he was never indebted at all, or that he owed less than was claimed."

[3] Bridges *v.* Paige, 13 Cal. 640, 641.

[4] Raymond *v.* Richardson, 4 E. D. Smith, 171. But under a mere denial of the value, the defendant cannot show that the services were not rendered. Van Dyke *v.* Maguire, 57 N. Y. 429.

[5] Wetmore *v.* San Francisco, 44 Cal. 294, 299. And in an action for goods sold and delivered, the defendant may show that the plaintiff acted as agent for another person, whose name was disclosed, and who was the actual vendor. Merritt *v.* Briggs, 57 N. Y. 651.

[But evidence showing a contract for a smaller sum than that alleged by plaintiff is not admissible: Scholey *v.* Demattos (1898), 18 Wash. 504, 52 Pac. 242. Nor can it be shown that the appropriation for the purpose is exhausted: McNulty *v.* City of New York (1901), 168 N. Y. 117, 61 N. E. 111.]

defendant's negligence, he may prove under a general denial that the wrong was caused by the negligence of third persons not agents of the defendant, and for whom he was not responsible;[1] or may prove contributory negligence of the plaintiff.[2] In accordance with the principle of these decisions, the defence of *non superior* is always admissible under a general denial of complaints which allege the commission of injuries by means of defendant's servants, employees, or agents.[3]

§ 552. * 676. **Assignment, Want of Consideration, etc.** In an action upon a promissory note or other security, the defendant may under the general denial show an assignment of the thing in action to a third person before the suit was commenced, since this directly controverts the averment of title in the plaintiff;[4]

[1] Schular *v.* Hudson River R. Co., 38 Barb. 653; Schaus *v.* Manhattan Gasl. Co., 14 Abb. Pr. N. S. 371; Jackson *v.* Feather Riv. & G. W. Co., 14 Cal. 18; Adams Exp. Co. *v.* Darnell, 31 Ind. 20. In this case, proof that the goods were stolen was admitted in an action against a common carrier. [Roemer *v.* Striker (1894), 142 N. Y. 134, 36 N. E. 808.]

[2] Schaus *v.* Manhattan Gasl. Co., 14 Abb. Pr. N. S. 371; New Haven & N. Co. *v.* Quintard, 6 Abb. Pr. N. S. 128; Indianapolis, etc. R. Co. *v.* Rutherford, 29 Ind. 82; Jeffersonville, M. & I. R. Co. *v.* Dunlap, 29 Ind. 426; Hathaway *v.* Toledo, etc. Ry. Co., 46 Ind. 25, 27. This decision is placed upon the ground that in Indiana the plaintiff must allege and prove the absence of negligence on his part. See also McDonell *v.* Buffum, 31 How. Pr. 154; Evansville & C. R. Co. *v.* Hiatt, 17 Ind. 102; Jonesboro' & F. Turnp. Co. *v.* Baldwin, 57 Ind. 86; Jones *v.* Sheboygan, etc. R. Co., 42 Wis. 306; McQuade *v.* Chicago & N. W. Ry. Co., 68 Wis. 616. *Contra*, Watkins *v.* So. Pac. Ry. Co., 38 Fed. Rep. 711; Kentucky Cent. R. Co. *v.* Thomas, 79 Ky. 164; Stone *v.* Hunt, 94 Mo. 475; Donovan *v.* Hannibal & St. J. Ry. Co., 89 Mo. 147; Hudson *v.* Wabash W. Ry. Co., 101 Mo. 13; Keitel *v.* St. Louis Cable & W. Ry. Co., 28 Mo. App. 657; St. Clair *v.* Mo. Pac. Ry. Co., 29 Mo. App. 76; South Omaha *v.* Cunningham, 31 Neb. 316; Grant *v.* Baker, 12 Ore. 329.

[Indiana Natural Gas Co. *v.* O'Brien (1903), — Ind. —, 66 N. E. 742. It was held in Kennedy *v.* Railway Co. (1901), 59 S. C. 535, 38 S. E. 169, that under a general denial defendant may show that the injury was caused *solely* by plaintiff's negligence, since this goes to controvert the allegations of defendant's negligence contained in the complaint. Otherwise in case of contributory negligence, since that admits plaintiff's allegations of negligence and avoids the effect of the same. Quoting § * 671 of the text.]

[3] [The defence that the injury was caused by a fellow servant is admissible under a general denial: Wilson *v.* Railway Co. (1897), 51 S. C. 79, 28 S. E. 91; Kaminski *v.* Tudor Iron Works (1902), 167 Mo. 462, 67 S. W. 221. But see note 2, p. 817. And under this issue the defendant may show that it exercised due care: Hunter *v.* Grande Ronde Lumber Co. (1901), 39 Ore. 448, 65 Pac. 598.]

[4] Andrews *v.* Bond, 16 Barb. 633. And see Wetmore *v.* San Francisco, 44 Cal. 294, 299. The exact contrary is held in Brett *v.* First Univ. Soc., 63 Barb. 610, 618, per Leonard J. The opinion in this case is, however, manifestly incorrect. Under the denial of "execution" in an action on a note or other written contract, the defendant may prove that his signature was obtained by fraud: Corby *v.* Weddle, 57 Mo. 452, 459; or that the instrument was not delivered: Fisher *v.* Hamilton, 48 Ind. 239. But see Dunning *v.* Rumbaugh, 36 Iowa, 566, 568. In an action upon an account stated for services, the defendant cannot, under the general denial, attack any of the

and where the note is non-negotiable, a want of consideration may be shown.[1] The general denial to a complaint in the ordinary form, for goods alleged to have been sold and delivered by the plaintiff, admits the defence that a third person who actually made the sale was himself the owner of the goods, and was not acting in the transaction as agent for the plaintiff; for this proof contradicts the allegation of a sale by the plaintiff;[2] and that the person who actually bought the goods in the name of the defendant was not the latter's agent, but that his prior authority had been revoked, and the plaintiff had been notified thereof; for this proof contradicts the allegation of a sale to the defendant.[3]

§ 553. * 677. **In Actions for Conversion.** In an action for the conversion of chattels, the complaint of course averring property in the plaintiff, the general denial permits the defendant to show that the property is not in the plaintiff;[4] as, for example, by proving that a third person is owner of the goods either by an absolute or qualified title.[5] This latter proposition is, however, denied by some of the cases, which hold that the defence of property in a third person, or in the defendant, must be specially

items in the account: Warner *v.* Myrick, 16 Minn. 91. The defence of alteration can be shown under the general denial in an action upon a written contract: Boomer *v.* Koon, 6 Hun, 645; National Bk. of Paris *v.* Nickell, 34 Mo. App. 295; Walton Plow Co. *v.* Campbell (Neb. 1892), 52 N. W. Rep. 883.

[The defence of no assignment can also be set up: Brown *v.* Curtis (1900), 128 Cal. 193, 60 Pac. 773.]

[1] Evans *v.* Williams, 60 Barb. 346; Bondurant *v.* Bladen, 19 Ind. 160; Butler *v.* Edgerton, 15 Ind. 15. But not when the consideration is presumed, as in a sealed instrument or negotiable paper: Dubois *v.* Hermance, 56 N. Y. 673, 674; Eldridge *v.* Mather, 2 N. Y. 157; Weaver *v.* Barden, 49 N. Y. 286.

[But an illegal consideration for a promissory note cannot be shown under this issue: Dillon *v.* Darst (1896), 48 Neb. 803, 67 N. W. 783.]

[2] Hawkins *v.* Borland, 14 Cal. 413; and see Ferguson *v.* Ramsey, 41 Ind. 511, 513.

[3] Hier *v.* Grant, 47 N. Y. 278; and see Day *v.* Wamsley, 33 Ind. 145, in which the defence was admitted that the goods were sold to defendant's wife, who had left him without cause, against his consent, and without his knowledge.

[4] Robinson *v.* Frost, 14 Barb. 536.

[Kerwood *v.* Ayers (1898), 59 Kan. 343, 53 Pac. 134; Hopkins *v.* Dipert, (1901), 11 Okla. 630, 69 Pac. 883. So in an action for money had and received, it may be shown under a general denial that the claim was for money lost by plaintiff at the game of poker: Frank *v.* Pennie (1897), 117 Cal. 254, 49 Pac. 208.]

[5] Davis *v.* Hoppock, 6 Duer, 254. He may show title in himself or in a third person, Sparks *v.* Heritage, 45 Ind. 66; Kennedy *v.* Shaw, 38 Ind. 474; Farmer *v.* Calvert, 44 Ind. 209, 212; Thompson *v.* Sweetser, 43 Ind. 312; Davis *v.* Warfield, 38 Ind. 461. See also Jones *v.* Rahilly, 16 Minn. 320, 325; Schoenrock *v.* Farley, 49 N. Y. Super. Ct. 302; Johnson *v.* Oswald, 38 Minn. 550 (the plaintiff claiming through a sale by the defendant, the latter may, under a denial, show fraud to avoid the sale, and a rescission of it).

pleaded.[1] Under a general denial in the same action, or a specific denial of the conversion, any facts may be proved in defence which go to show that there was no conversion;[2] as, for example, that the goods were lost without fault of the defendant,[3] or were taken under an execution against the plaintiff.[4]

§ 554. * 678. **In Actions to recover Possession of Goods.** When the action is brought to recover possession of goods, the complaint alleging title or right of possession in the plaintiff, the defendant may, under the general denial, introduce evidence to show that the plaintiff is not the owner nor entitled to possession of the chattels,[5] but cannot show that the plaintiff's title is fraudulent and void as against his creditors.[6] Nor can the de-

[1] Dyson *v.* Ream, 9 Iowa, 51; Patterson *v.* Clark, 20 Iowa, 429. The doctrine of these cases is clearly opposed to the true theory of the general denial.

[2] [Nichols & Shepard Co. *v.* Minnesota Thresher Co. (1897), 70 Minn. 528, 73 N. W. 415.]

[3] Willard *v.* Giles, 24 Wis. 319, 324.

[4] McGrew *v.* Armstrong, 5 Kan. 284; or that the goods were taken with the plaintiff's consent, Wallace *v.* Robb, 37 Iowa, 192, 195; and see Phœnix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669; and the defendant in such action may prove any facts in reduction of damages; as, for instance, that the maker was insolvent in an action for the conversion of a note made by a third person, and owned by the plaintiff, Booth *v.* Powers, 56 N. Y. 22, 27, 31, 33; Quin *v.* Lloyd, 41 N. Y. 349.

[5] Caldwell *v.* Bruggerman, 4 Minn. 270; Woodworth *v.* Knowlton, 22 Cal. 164. In this case, defendant proved that the goods were the property of a third person. See also Sparks *v.* Heritage, 45 Ind. 66; Kennedy *v.* Shaw, 38 Ind. 474; Farmer *v.* Calvert, 44 Ind. 209, 212; Thompson *v.* Sweetser, 43 Ind. 312; Siedenboch *v.* Riley, 111 N. Y. 560; Griffin *v.* L. I. R. Co., 101 N. Y. 348; Lane *v.* Sparks, 75 Ind. 278; Pulliam *v.* Burlingame, 81 Mo. 111; Oester *v.* Sitlington (Mo. 1893), 21 N. W. Rep. 820; Deford *v.* Hutchinson, 45 Kan. 318, 332; Gandy *v.* Pool, 14 Neb. 98; Aultman *v.* Stichler, 21 Neb. 72; Towne *v.* Sparks, 23 Neb. 142; Merrill *v.* Wedgwood, 25 Neb. 283; Staley *v.* Housel (Neb. 1892), 52 N. W. Rep. 888; Chamberlin *v.* Winn, 1 Wash. 501. Under a general denial of plaintiff's title, the defendant may show that the chattel mortgage, upon which the plaintiff relies to establish his title, is void for usury: Adamson *v.* Wiggins, 45 Minn. 448.

[Webster *v.* Long (1901), 63 Kan. 876, 66 Pac. 1032; Street *v.* Morgan (1902), 64 Kan. 85, 67 Pac. 448; Payne *v.* McCormick Co. (1901), 11 Okla. 318, 66 Pac. 287; Gila Valley, etc. Ry. Co. *v.* Gila County (1903), Ariz., 71 Pac. 913; Cumbey *v.* Lovett (1899), 76 Minn. 227, 79 N. W. 99; Pitts Agricultural Works *v.* Young (1895), 6 S. D. 557, 62 N. W. 432; Plano Mfg. Co. *v.* Daley (1897), 6 N. D. 330, 70 N. W. 277; Iowa Sav. Bank *v.* Frink (1902), Neb., 92 N. W. 916; Jenkins *v.* Mitchell (1894), 40 Neb. 664, 59 N. W. 90.]

[6] Frisbee *v.* Langworthy, 11 Wis. 375. *Contra*, see Young *v.* Glascock, 79 Mo. 574; Stern Auction, etc. Co. *v.* Mason, 16 Mo. App. 473; Sopris *v.* Truax, 1 Col. 89.

[Seeleman *v.* Hoagland (1893), 19 Col. 231, 34 Pac. 995. *Contra*, Nat. Bank *v.* Barkalow (1894), 53 Kan. 68, 35 Pac. 796; Jones *v.* McQueen (1896), 13 Utah, 178, 45 Pac. 202; Munns *v.* Loveland (1897), 15 Utah, 250, 49 Pac. 743; Gallick *v.* Bordeaux (1899), 22 Mont. 470, 56 Pac. 961. Usury may be shown under the general denial: Davis *v.* Culver (1899), 58 Neb. 265, 78 N. W. 504. Waiver of conditions of sale may be shown: Oester *v.* Sitlington (1893), 115 Mo. 247, 21 S. W. 820.]

fendant in such action, when the record presents the same issue, justify as sheriff under process against A., and assert that the goods in controversy were the property of A. fraudulently transferred to the plaintiff: this defence is new matter, and must be pleaded.[1]

§ 555. *679. **In Actions to recover Possession of Land.** In an action to recover possession of land, if the complaint is in the usual form, merely averring that the plaintiff is owner in fee of the premises described and entitled to their possession, and that the defendant unlawfully withholds the same, the general denial admits proofs of anything that tends to defeat the title which the plaintiff attempts to establish on the trial.[2] In some States the defence of the Statute of Limitations may even be relied upon in this action under a general denial;[3] but cannot be in the other

[1] Glazer *v.* Clift, 10 Cal. 303. *Contra*, Bailey *v.* Swain, 45 Ohio St. 657; Holmberg *v.* Dean, 21 Kan. 73; Merrill *v.* Wedgwood, 25 Neb. 283.

[See in this connection Dobson *v.* Owens (1895), 5 Wyo. 325, 40 Pac. 442; Connor *v.* Knott (1896), 8 S. D. 304, 66 N. W. 461. The rules respecting replevin in Connecticut are different from those in most of the code States. See McNamara *v.* Lyon (1897), 69 Conn. 447, 37 Atl. 981; Smith *v.* Brockett (1897), 69 Conn. 492, 38 Atl. 57.

"A defendant in replevin may, under a general denial, prove and recover any items of damage properly allowable to him in such action:" Schrandt *v.* Young (1901), 62 Neb. 254, 86 N. W. 1085; Ulrich *v.* McConaughey (1901), 63 Neb. 10, 88 N. W. 150.]

[2] Lain *v.* Shepardson, 23 Wis. 224, 228, per Paine J.: "Under such a complaint, the plaintiff is allowed to show any title he can; and, from the necessities of the case, the defendant, under a mere denial, must be allowed to prove anything tending to defeat the title which the plaintiff attempts to establish. He cannot be bound to allege specific objections to a title which the complaint does not disclose, and which he may have no knowledge of until it is revealed by the evidence at the trial." Mather *v.* Hutchinson, 25 Wis. 27; Miles *v.* Lingerman, 24 Ind. 385; Marshall *v.* Shafter, 32 Cal. 176; the defendant may prove title in himself, and an allegation to that effect in the answer is not new matter; Bruck *v.* Tucker, 42 Cal. 346, 351; Bledsoe *v.* Simms, 53 Mo. 305, 307; Northern Pac. R. Co. *v.* McCormick, 55 Fed. Rep. 601. In several States, by virtue of the statute, every defence, legal or equitable, may be proved under the general denial, Vanduyn *v.* Hepner, 45 Ind. 589, 591; Franklin *v.* Kelley, 2 Neb. 79, 113–115 (fraud); Hickman *v.* Link, 97 Mo. 482.

[Iba *v.* Central Ass'n of Wyoming (1895), 5 Wyo. 355, 40 Pac. 527; Macey *v.* Stark (1893), 116 Mo. 481, 21 S. W. 1088; Carkeek *v.* Boston Nat. Bank (1897), 16 Wash. 399, 47 Pac. 884; Commonwealth Title Ins. Co. *v.* Dokko (1898), 72 Minn. 229, 75 N. W. 106, quoting the text; Cheatham *v.* Young (1893), 113 N. C. 161, 18 S. E. 92; Shelton *v.* Wilson (1902), 131 N. C. 499, 42 S. E. 937; Hedges *v.* Pollard (1899), 149 Mo. 216, 50 S. W. 889. But in Kentucky, under Civ. Code, § 125, a defendant cannot assert his title to land under a general denial: Brent *v.* Long (1896), 99 Ky. 245, 35 S. W. 640.]

[3] Nelson *v.* Brodhack, 44 Mo. 596; Bledsoe *v.* Simms, 53 Mo. 305, 307; Fulkerson *v.* Mitchell, 82 Mo. 13; Fairbanks *v.* Long, 91 Mo. 628; Stocker *v.* Green, 94 Mo. 280; Holmes *v.* Kring, 93 Mo. 452. See also *post*, § *714, and notes. [Coleman *v.* Drane (1893), 116 Mo. 387, 22 S. W. 801.]

States, whose codes expressly require the statute to be pleaded.[1] An equitable defence to the action must, however, as it seems, be specially pleaded;[2] and the defence that a deed to the plaintiff absolute on its face, under which he claims title, is only a mortgage.[3]

§ 556. * 680. **In Actions in which Malice is an Essential Ingredient.** In an action to recover damages for a malicious prosecution, the complaint alleging malice and the want of a probable cause, the general denial puts these averments in issue, and admits any evidence going to show a want of malice and the existence of a probable cause; as, for example, when the complaint charged that the defendant wrongfully procured the plaintiff to be indicted, proof on the part of the defendant that he was a grand juror, and that all the acts complained of were done by

[1] Orton *v.* Noonan, 25 Wis. 672. A defence arising after the commencement of the action cannot be proved, but must be set up by a supplemental answer. McLane *v.* Bovee, 35 Wis. 27, 34.

[2] Stewart *v.* Hoag, 12 Ohio St. 623; Lombard *v.* Cowham, 34 Wis. 486, 491. The court, in the last case, held that, when the deed under which the plaintiff claims is fraudulent and void, that defence may be proved under the general denial, because it controverts the plaintiff's *legal* title. To this effect is Brown *v.* Freed, 43 Ind. 253, 254-257, and cases cited. Under a general denial, defendant may show that his deed to the plaintiff, under which the latter claims, was upon an illegal consideration, and therefore void, Sparrow *v.* Rhoades, 76 Cal. 208, 245; that an execution sale which was the source of plaintiff's title was void, by reason of the land having been a homestead, Kipp *v.* Bullard, 30 Minn. 84; and see the similar case of Motley *v.* Griffin, 104 N. C. 112; and where the defendant is not advised by the complaint as to the source of the plaintiff's title, he may introduce evidence of an equitable estoppel against the plaintiff: Parker *v.* Dacres, 1 Wash. 190.

[Anderson *v.* Rasmussen (1894), 5 Wyo. 44, 36 Pac. 820. But see Travellers' Ins. Co. *v.* Walker (1899), 77 Minn. 438, 80 N. W. 618, where the court said: "Where the complaint in an action of ejectment merely alleges the plaintiff's title generally, without disclosing the source of his title or right of possession, if the defendant has an equity which, as it exists and without any affirmative relief, defeats plaintiff's claim to the possession, it may be proved under a general denial, being strictly defensive in its nature. But, if the equity is such that it does not give the defendant the right of possession as against the legal title without affirmative relief enforcing the equity, then the defendant must plead the facts entitling him to such relief, the matter being in the nature of a counter-claim." See also, to the same effect, Pinkham *v.* Pinkham (1901), 61 Neb. 336, 85 N. W. 285.]

[3] Davenport *v.* Turpin, 43 Cal. 597; Hughes *v.* Davis, 40 Cal. 117; *contra*, see remarks in Healy *v.* O'Brien, 66 Cal. 517; Smith *v.* Smith, 80 Cal. 323, 329; Hyde *v.* Mangan, 88 Cal. 319; in none of which cases, however, does it appear to have been necessary to pass upon the point in question. [*Contra*, Locke *v.* Moulton (1895), 108 Cal. 49, 41 Pac. 28. Under this issue it may be shown that a deed introduced as evidence of title was executed by a grantor wanting in capacity; Cawfield *v.* Owens (1902), 130 N. C. 641, 41 S. E. 891. And it may be shown that the deed was champertous: O'Banion *v.* Goodrich (1901), Ky., 62 S. W. 1015.]

him in that capacity, was held proper.[1] The same principle must apply to all cases in which malice is an essential ingredient in the right of action, and is alleged in the complaint or petition: all facts tending to disprove the malice are clearly admissible under the denial.

§ 557. * 681. **In Actions for Specific Performance.** When the general denial is pleaded in an action to compel the specific performance of a contract to convey land, it is held in some cases that the defence of the Statute of Frauds may be relied upon, for the answer puts the existence of the contract in issue;[2] other cases, however, hold the contrary, and require the statute to be pleaded.[3] And the Statute of Limitations may be set up under a general denial in the same action, whenever it is not expressly required by the codes, as in certain States, to be pleaded.[4]

[1] Ammerman *v.* Crosby, 26 Ind. 451; Hunter *v.* Mathis, 40 Ind. 356; Rost *v.* Harris, 12 Abb. Pr. 446; Radde *v.* Ruckgaber, 3 Duer, 684; Simpson *v.* McArthur, 16 Abb. Pr. 302 (n.); Levy *v.* Brannan, 39 Cal. 485; Trogden *v.* Deckard, 45 Ind. 572; but see Scheer *v.* Keown, 34 Wis. 349, an action for false arrest and imprisonment. In an action for malicious prosecution, under a general denial the plaintiff's guilt may be shown, Bruley *v.* Rose, 57 Iowa, 651; and that the defendant acted in good faith, upon the advice of competent counsel, Sparling *v.* Conway, 75 Mo. 510. [Maynard *v.* Sigman (1902), — Neb. —, 91 N. W. 576; Kellogg *v.* Scheuerman (1897), 18 Wash. 293, 51 Pac. 344; Bowman *v.* Fur Mfg. Co. (1895), 96 Ia. 188, 64 N. W. 775; McAllister *v.* Johnson (1899), 108 Ia. 42, 78 N. W. 790. In actions for libel, privilege is provable under a general denial: Schomberg *v.* Walker (1901), 132 Cal. 224, 64 Pac. 290; also the truth of the alleged libellous statement: Locke *v.* Chicago Chronicle Co. (1899), 107 Ia. 390, 78 N. W. 49; Moffitt *v.* Chicago Chronicle Co. (1899), 107 Ia. 407, 78 N. W. 45.]

[2] Hook *v.* Turner, 22 Mo. 333; Wildbahn *v.* Robidoux, 11 Mo. 659; Springer *v.* Kleinsorge, 83 Mo. 152, 156; Bernhardt *v.* Walls, 29 Mo. App. 206; Popp *v.* Swanke, 68 Wis. 364; Smith *v.* Theobald, 86 Ky. 141.

[Hillhouse *v.* Jennings (1901), 60 S. C. 373, 38 S. E. 599; Bean *v.* Lamprey (1901), 82 Minn. 320, 84 N. W. 1016; Williams-Hayward Shoe Co. *v.* Brooks (1900), 9 Wyo. 424, 64 Pac. 342; Hackett *v.* Watts (1896), 138 Mo. 502, 40 S. W. 113; Hillman *v.* Allen (1898), 145 Mo. 638, 47 S. W. 509; Boyd *v.* Paul (1894), 125 Mo. 9, 28 S. W. 171; Bless *v.* Jenkins (1895), 129 Mo. 647, 31 S. W. 938; Devore *v.* Devore (1896), 138 Mo. 181, 39 S. W. 68; Klein *v.* Liverpool & London Ins. Co. (1900), Ky., 57 S. W. 250; Haun *v.* Burrell (1896), 119 N. C. 544, 26 S. E. 111; Thompson *v.* Frakes (1900), 112 Ia. 585, 84 N. W. 703; Indiana Trust Co. *v.* Finitzer (1903), — Ind. —, 67 N. E. 520; Riif *v.* Riibe (1903), — Neb. —, 94 N. W. 517.]

[3] Livesey *v.* Livesey, 30 Ind. 398; Osborne *v.* Endicott, 6 Cal. 149; Maybee *v.* Moore, 90 Mo. 340. [See cases cited in note 2, p. 718.]

[4] Wiswell *v.* Tefft, 5 Kan. 263; Springer *v.* Kleinsorge, 83 Mo. 152.

[Coleman *v.* Drane (1893), 116 Mo. 387, 22 S. W. 801 (ejectment). In Bond *v.* Bond (1903), 175 Mo. 112, 74 S. W. 975, in an action for specific performance, defendant, under a general denial, was allowed to introduce a bond for title executed by him to plaintiff's deceased husband, conditioned on payment of certain notes, and introduce the notes, unpaid, to show a forfeiture.]

§ 558. * 682. **In Actions on Covenants and Judgments.** When the complaint in an action upon a covenant of warranty, contained in a deed of land to the plaintiff, alleged the conveyance, the covenant, and a breach thereof by means of an outstanding paramount title and a recovery on the same, the general denial put all these averments in issue, and enabled the defendant to prove any facts going to show that there was no such paramount title.[1] In an action upon a judgment recovered in another State, the complaint set out the recovery of the judgment, and all the other allegations necessary to constitute the cause of action. The defendant pleaded (1) the general denial; (2) that there was no such record; (3) that the judgment was obtained without any notice given to the defendant, without service of process on him or appearance by him, he being all the time a non-resident of the State in which the judgment was recovered. All the matters alleged in these two special defences were, it was held, embraced within the general denial, and could be proved under it: the defences themselves, according to the well-settled practice in Indiana, were struck out on motion, because they were equivalent to the general denial and redundant.[2]

[1] Rhode *v.* Green, 26 Ind. 83. In a creditor's suit to set aside the debtor's fraudulent transfer of land, the grantee may prove, under the general denial, that the land was a homestead, for this rebuts the alleged fraud charged by the plaintiff, Hibben *v.* Soyer, 33 Wis. 319, 322; also any facts showing absence of fraud, Summers *v.* Hoover, 42 Ind. 153, 156.

[2] Westcott *v.* Brown, 13 Ind. 83. The following recent cases show what defences have or have not been admitted under the general denial in various actions. Some of these decisions can hardly be reconciled with the well-settled doctrine concerning the office of the general denial, especially some cases dealing with the actions for the recovery of land, and of chattels, ejectment, and replevin. In actions for *conversion*, Ontario Bk. *v.* N. J. Steamboat Co., 59 N. Y. 510; McClelland *v.* Nichols, 24 Minn. 176; Moulton *v.* Thompson, 26 id. 120; Smith *v.* Hall, 67 N. Y. 48; in *actions of ejectment*, Tracy *v.* Kelly, 52 Ind. 535; Freeman *v.* Sprague, 82 N. C. 346; Powers *v.* Armstrong, 35 Ohio St. 357; Phillippi *v.* Thompson, 8 Ore. 428; Freser *v.* Charleston, 11 S. C. 486; Weeks *v.* Smith, 18 Kan. 508; Clayton *v.* School Dist., 20 id. 206; Emily *v.* Harding, 53 Ind. 102; Steeple *v.* Downing, 60 id. 368; Webster *v.* Bebinger, 70 id. 9; Over *v.* Shannon, 75 id. 352; in *actions of replevin*, Branch *v.* Wiseman, 51 Ind. 1; Willer *v.* Manby, 51 id. 169; Stowell *v.* Otis, 71 N. Y. 36; Staubach *v.* Rexford, 2 Mont. Ty. 565; Creighton *v.* Newton, 5 Neb. 100; Richardson *v.* Steele, 9 id. 483; Bailey *v.* Bayne, 20 Kan. 657; in *actions on promissory notes*, Casad *v.* Holdridge, 50 Ind. 529 (illegality of consideration cannot be shown); Schwarz *v.* Oppold, 74 N. Y. 307 (alteration may be shown); in *contract for materials, etc.*, Read *v.* Decker, 5 Hun, 646; *contract for services*, Blizzard *v.* Applegate, 61 Ind. 368; *for rent on a lease*, Mack *v.* Burt, 5 Hun, 28; on *an oral contract*, Bush *v.* Brown, 49 Ind. 573; to *rescind a contract for fraud*, Dalrymple *v.* Hunt, 5 Hun, 111; to *recover a deficiency on a mortgage foreclosure*, Scofield *v.* Doscher, 72 N. Y. 491, 495, 496; for *damages*, Wandell *v.* Edwards, 25 Hun, 498; in

§ 559. * 683. **Special Statutory Provisions as to Denying Existence of Corporation and Partnership.** This discussion will be ended by a brief reference to some special statutory rules, prescribing the effect and operation of denials in certain cases, which have been adopted in various States. These rules do not belong to the general theory of pleading embodied in the new system; they rather break the symmetry of that theory; but as they are practically important, they cannot be passed by without notice. [In New York, a statute, general in its terms, provides that the corporate existence alleged in the complaint need not be proved "unless the answer is verified, and contains an affirmative allegation that the plaintiff, or defendant, as the case may be, is not a corporation,"] and the fact is not put in issue by the general denial.[1] In Indiana a sworn answer is made necessary to put in issue the legal existence of alleged corporations in actions brought by them; but a general denial verified complies with this statutory requirement, and compels the plaintiff to prove its corporate character.[2] In Wisconsin, an answer denying the partnership of the plaintiffs in an action by a firm must be verified, or it forms no issue. An unverified denial, therefore, either general or specific, admits the partnership as averred.[3]

action for negligence, Jones *v.* Sheboygan, etc. R. Co., 42 Wis. 307; *defence of accord and satisfaction*, Looby *v.* West Troy, 24 Hun, 78; in *action for a divorce*, defences in abatement, and the statute of limitations, Dutcher *v.* Dutcher, 39 Wis. 651, and numerous cases cited.

[A general denial raises the issue of the right of a foreign executor to maintain an action: Stoddard *v.* Aiken (1899), 57 S. C. 134, 35 S. E. 501. But this form of answer does not put in issue the due appointment of a domestic administrator and his right to sue: Hankinson *v.* Charlotte, etc. R. R. Co. (1893), 41 S. C. 1, 19 S. E. 206. Nor does it raise the issue of an infant's disability to sue: Hicks *v.* Beam (1893), 112 N. C. 642, 17 S. E. 490. *Condonation* need not be pleaded: Hill *v.* Hill (1893), 24 Ore. 416, 33 Pac. 809.]

[1] [Code Civ. Pro., § 1776. See also Standard Sewing Mach. Co. *v.* Henry (1894), 43 S. C. 17, 20 S. E. 790; Chamberlin Banking House *v.* Kemper, etc. Co. (1902), Neb., 92 N. W. 175; Fletcher *v.* Co-operative Pub. Co. (1899), 58 Neb. 511, 78 N. W. 1070; Kelley *v.* Nebraska Exp. Ass'n (1897), 52 Neb. 355, 72 N. W. 356. *Contra*, Town of Denver *v.* Spokane Falls (1893), 7 Wash. 226, 34 Pac. 926.] Waterville Man. Co. *v.* Bryan, 14 Barb. 182.

[2] Chance *v.* Indianapolis & W. G. Road Co., 32 Ind. 472, disapproving a contrary doctrine in Cicero Hyg. Dr. Co. *v.* Craighead, 28 Ind. 274, and approving Wert *v.* Crawfordsville & A. Turnp. Co., 19 Ind. 242; Williams *v.* Franklin Tp. Acad. Assoc., 26 Ind. 310; Adams Exp. Co. *v.* Hill, 43 Ind. 157; Indianapolis F. & M. Co. *v.* Herkimer 46 Ind. 142, 144. A statute in Wisconsin [requiring a specific denial], it is held, applies to both foreign and domestic corporations, St., 1898, § 4199; Williams Mower, etc. Co. *v.* Smith, 33 Wis. 530; Central Bk. of Wis. *v.* Knowlton, 12 Wis. 624.

[3] [St., 1898, § 4197.] Fisk *v.* Tank, 12 Wis. 276, 301; Martin *v.* Am. Exp. Co., 19 Wis. 336.

[Lago *v.* Walsh (1898), 98 Wis. 348, 74 N. W. 212. *Contra*, McKasy *v.* Huber (1896), 65 Minn. 9, 67 N. W. 650.]

§ 560. * 684. **Special Statutory Provisions as to Denials in Actions on Written Instruments.** In Indiana, in actions upon written instruments against the original parties, makers, indorsers, acceptors, obligors, and the like, an unsworn general denial puts in issue only the *existence* of the writing, and requires its production; but does not put in issue its *execution*, and therefore admits no evidence tending to dispute the signature of the defendant or any other facts included within the execution. If verified, the denial puts in issue both the execution and the existence.[1] The rule is different, however, in actions against the executors or administrators of deceased parties to written instruments: the unverified general denial pleaded by them raises a complete issue.[2] An unverified general denial also admits the plaintiff's legal capacity to sue in Indiana.[3] A statute of Iowa enacts that, in actions or defences on written instruments, "the signature or indorsement thereto shall be deemed *genuine* and admitted, unless the party whose signature it purports to be shall deny the same under oath in the pleading." In an action upon a promissory note against the maker, the defendant pleaded an unverified general denial, and under it insisted as a defence that he did not sign the writing *as a note*, but executed it with the supposition that it was a simple receipt. This defence being objected to as inadmissible, the court held that the statute referred only to the *genuineness* of the signature, and did not prohibit the defendant from showing that he did not execute such a contract as the one in suit, but executed an entirely different instrument, for example, a receipt, and that the same had been altered into a note.[4] In another case upon a note the petition set it out *in hæc verba*, averring that it was executed by the defendant. The answer was verified, but simply denied knowledge or information sufficient to form a belief whether the allegations of the petition were true. This form of verified denial, it was held, did not comply with the requirements of the statute in question, and raised no issue in respect of the signature.[5]

[1] [Burns' St., 1901, § 367.] Stebbins *v.* Goldthwaite, 31 Ind. 159; Evans *v.* Southern Turnp. Co., 18 Ind. 101; Price *v.* Grand Rapids & Ind. R. Co., 18 Ind. 137; Hicks *v* Reigle, 32 Ind. 360.

[2] Cawood's Adm. *v.* Lee, 32 Ind. 44; Riser *v.* Snoddy, 7 Ind. 442; Mahon's Adm. *v.* Sawyer, 18 Ind. 73.

[3] Downs *v.* McCombs, 16 Ind. 211; Jones *v.* Cin. Type Foundry, 14 Ind. 89; Heaston *v.* Cincinnati & Ft. W. R. Co., 16 Ind. 275; Harrison *v.* Martinsville & F. R. Co., 16 Ind. 505.

[4] Lake *v.* Cruikshank, 31 Iowa, 395.

[5] Hall *v.* Ætna Man. Co., 30 Iowa, 215, 217, 218. See Lyon *v.* Bunn, 6 Iowa, 48.

§ 561. *685. **General Denial cannot be struck out as Sham.** The general denial, at least when verified, cannot be struck out as sham on motion.[1] In accordance with the settled rule of the former procedure, the general issue could not be struck out for such cause; and in this respect the general denial is its equivalent. "It gives the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea [the general issue]."[2]

[1] [See Patterson *v.* Railway Co. (1896), 12 Ohio C. C. 274, and Packet Co. *v.* Fogarty (1895), 9 Ohio C. C. 418, condemning the use of a verified general denial when the defendant knows that some of the averments denied are true.] State *v.* Chamberlin, 54 Mo. 338. See also Ewen *v.* Chicago & N. W. Ry. Co., 38 Wis. 613; Sanford *v.* McCreedy, 28 id. 103; Wittman *v.* Watry, 37 id. 238; Preston *v.* Roberts, 12 Bush, 570; Ranson *v.* Anderson, 9 S. C. 438; Sully *v.* Goldsmith, 49 Iowa, 690.

[Where the statute requires the denial of the genuineness of the indorsement or assignment of a written instrument to be verified, an unverified plea of denial is an admission of such matters: Daggs *v.* Phœnix Nat. Bank (1898), Ariz., 53 Pac. 201. See also, to same effect, Hardwick *v.* Atkinson (1899), 8 Okla. 608, 58 Pac. 747; Lux *v.* McLeod (1893), 19 Colo. 465, 36 Pac. 246. But where the petition alleges ownership of a note, but not the execution of an indorsement, the ownership is put in issue by an unverified general denial: Southern Kan. Farm, etc. Co. *v.* Barnes (1901), 63 Kan. 548, 66 Pac. 638.]

[2] Wayland *v.* Tysen, 45 N. Y. 281, 282. See also Grocers' Bank *v.* O'Rorke, 6 Hun, 18; Reynolds *v.* Craus (Supreme, 1891), 16 N. Y. Suppl. 792; Upton *v.* Kennedy (Neb., 1893), 53 N. W. Rep. 1042.

[Loranger *v.* Big Missouri Mining Co. (1895), 6 S. D. 478, 61 N. W. 686; Green *v.* Hughitt School Tp. (1894), 5 S. D. 452, 59 N. W. 224. The same rule applies to any verified denial: King *v.* Waite (1897), 10 S. D. 1, 70 N. W. 1056; Pfister *v.* Wells (1896), 92 Wis. 171, 65 N. W. 1041; Pearson *v.* Neeves (1896), 92 Wis. 319, 66 N. W. 357.

In general an answer may be stricken out as sham when its falsity and insufficiency are clearly apparent: Dobson *v.* Hallowell (1893), 53 Minn. 98, 54 N. W. 939; Randall *v.* Simmons (1902), 40 Ore. 554, 67 Pac. 513; Pfaender *v.* Winona, etc. R. R. Co. (1901), 84 Minn. 224, 87 N. W. 618; Fargo *v.* Vincent (1894), 6 S. D. 209, 60 N. W. 858; Sweetman *v.* Ramsey (1899), 22 Mont. 323, 56 Pac. 361; Sweeney *v.* Schlessinger (1896), 18 Mont. 326, 45 Pac. 213; McDonald *v.* Pincus (1893), 13 Mont. 83, 32 Pac. 283; Sifton *v.* Sifton (1895), 5 N. D. 187, 65 N. W. 670; Kidder County *v.* Foye (1901), 10 N. D. 424, 87 N. W. 984; Wilson *v.* Burhans (1897), 96 Wis. 550, 71 N. W. 879; Miser *v.* O'Shea (1900), 37 Ore. 231, 62 Pac. 491. Under the statute providing that "sham, frivolous and irrelevant replies may be stricken out" on motion, the entire reply must be proceeded against: Brown *v.* Baker (1901), 39 Ore. 66, 65 Pac. 799. Under the express provision of R. S. 1898, § 2682, matter cannot be stricken from a verified pleading on the ground that it is sham: Moore *v.* May (1903), 117 Wis. 192, 94 N. W. 45.

For other cases touching sham and frivolous answers, see Western Carolina Bank *v.* Atkinson (1893), 113 N. C. 478, 18 S. E. 703; Campbell *v.* Patton (1893), 113 N. C. 481, 18 S. E. 687; Vass *v.* Brewer (1898), 122 N. C. 226, 29 S. E. 352; Bardwell-Robinson Co. *v.* Brown (1894), 57 Minn. 140, 58 N. W. 872; Northwestern Cordage Co. *v.* Galbraith (1897), 9 S. D. 634, 70 N. W. 1048; Bank of Commerce *v.* Humphrey (1894), 6 S. D. 415, 61 N. W. 444; Pittsburg, etc. Ry. Co. *v.* Fraze (1898), 150 Ind. 576, 50 N. E. 576; Brown *v.* Porter (1893), 7 Wash. 327, 34 Pac. 1105; Oakes *v.* Ziemer (1900), 61 Neb. 6, 84 N. W. 409; First Nat. Bank *v.* Stoll (1899), 57 Neb. 758, 78 N. W. 254; Upton *v.* Kennedy (1893), 36 Neb. 66, 53 N. W. 1042.]

The same rule applies to a denial, general in form, of certain specified allegations constituting a part of the complaint,[1] and is applicable as well to equitable as to legal actions,[2] and to all partial denials,[3] and is not restricted to those which are verified.[4]

SECTION FOURTH.

THE DEFENCE OF NEW MATTER.

§ 562. * 686. **Introductory.** Much of what might properly be included in this section has already been necessarily dwelt upon in discussing the defence of denials. The two subjects so correlate and support each other, that the one cannot be explained in full without, to some extent, explaining the other also. I shall not repeat the propositions and definitions given in the last section, but shall content myself with adding examples and illustrations drawn from decided cases. The subject-matter of this section will be distributed into three subdivisions: I. How defences of new matter should be pleaded; II. What is new matter in general, with a particular reference to defences in mitigation and those in abatement; and, III. Some particular examples of new matter classified and arranged.

I. *How Defences of New Matter should be pleaded.*

§ 563. * 687. **Statement of New Matter in Answer Governed by same Rule as Statement of Cause of Action in Petition.** A denial when properly pleaded does not *state* any facts; it simply *denies* facts.[5] A defence of new matter, on the other hand, does not deny any facts; it assumes the averments of the complaint or petition to be true; and under the ancient system a plea of confession and avoidance must *give color* to these averments, or it would be fatally defective. The "giving color" was simply the absence of any denials, and the express or silent admission that

[1] [Standard Sewing Mach. Co. *v.* Henry (1894), 43 S. C. 17, 20 S. E. 790; State *ex rel. v.* King (1894), 6 S. D. 297, 60 N. W. 75; Gjerstadengen *v.* Hartzell (1899), 8 N. D. 424, 79 N. W. 872; Larson *v.* Winder (1896), 14 Wash. 647, 45 Pac. 315. But see Upton *v.* Kennedy (1893), 36 Neb 66, 53 N. W. 1042.]

[2] Thompson *v.* Erie R. Co., 45 N. Y. 468, 472.

[3] Claflin *v.* Jaroslauski, 64 Barb. 463.

[4] Brooks *v.* Chilton, 6. Cal. 640.

[5] See Venice *v.* Breed, 65 Barb. 597, 603, per Mullin J., for a statement of the comparative effects of denials and of new matter in raising issues.

the declaration, as far as it went, told the truth.[1] The defence of new matter consists, therefore, of facts, — positive facts; and these should be averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint. The defence of new matter depends upon the existence of facts from which it results as truly as the cause of action results from other facts.[2] The rule for setting forth the facts which constitute the defence is, therefore, the same as that for setting forth the facts which constitute the cause of action.[3] In each case, all the material, issuable facts which make up the cause of action or the defence must be averred, while the detail of mere evidentiary matter should properly be left to be used as proofs at the trial. I need not further enlarge upon this proposition, but will illustrate it by a few judicial decisions. Thus it is a settled rule that, when fraud is relied upon as a defence, a general allegation charging fraud or a fraudulent intent will not suffice: all the facts which the law requires as the elements of fraud, and all which are claimed to be the constituents of the fraud in the particular case, must be averred; and their absence may destroy the intended effect of the pleading, and shut out all evidence in its support at the trial.[4]

[1] Under the new procedure, in every defence of new matter there should be, either expressly or by implication, a confession that, but for such new matter, the action could be maintained; the defence must contain no denial; such denial should be pleaded in a separate defence, if at all. Morgan *v.* Hawkeye Ins. Co., 37 Iowa, 359; Anson *v.* Dwight, 18 Iowa, 241. This is nothing more than the simple rule that two distinct defences should not be mingled together.

[2] [Where an answer by way of new matter alleges conclusions only, it is subject to general demurrer: Van Dyke *v.* Doherty (1896), 6 N. D. 263, 69 N. W. 200.]

[3] [In an action for conversion, an answer which refers to the "property mentioned and described in the second paragraph in plaintiff's second cause of action," is sufficiently definite and not demurrable for want of certainty: Spalding *v.* Allred (1901), 23 Utah, 354, 64 Pac. 1100.

New matter in the answer may be alleged on information and belief where not in effect a denial of allegations in the complaint presumptively within defendant's knowledge: Risdon *v.* Davenport (1894), 4 S. D. 555, 57 N. W. 482. See note 1, p. 757.]

[4] Jenkins *v.* Long, 19 Ind. 28, 29, per Frazer J.: "At the common law, fraud could be given in evidence under the general issue, or under a general plea of fraud. But, under the code, fraud must be specially pleaded; and the answer of fraud must contain all the elements necessary to be proved to make out the fraud: and these are, that the representation must go to a material fact; must be made under such circumstances that the party had a right to rely on it; and it must be false to a material extent." Keller *v.* Johnson, 11 Ind. 337. In an action on notes, a defence, "that he was induced to execute the notes mentioned by the fraud, covin, and deceit of the," etc., was held bad on demurrer. Capuro *v.* Builders' Ins. Co., 39 Cal. 123; Oroville & Va. R. Co. *v.* Plumas Cy. Sup., 37 Cal. 354; Kent *v.* Snyder, 30 Cal. 666; Fankboner *v.* Fank-

§ 564. * 688. **Further Illustrations.** Akin to the defence of fraud is that of duress: the facts constituting the duress must be stated, and a mere general averment will not suffice; as, for example, in a suit to foreclose a mortgage given by a married woman upon her own land, a defence that "she was induced by the coercion of her said husband to execute the said mortgage."[1]

boner, 20 Ind. 62; Ham *v.* Greve, 34 Ind. 18, 21, a defence "that his signature was obtained by the fraud of the plaintiff," without stating any circumstances, was held a nullity. Hale *v.* Walker, 31 Iowa, 344, 355, a defence which simply stated that the contract in suit "was either false or fraudulently so written or so done by mistake," admitted no proof of fraud. "In order to admit evidence of fraud, there should, under our system of pleading, be at least a general statement of the facts constituting the fraud." Lefler *v.* Field, 52 N. Y. 621, action for the price of barley bargained and sold; answer, that the barley was bargained for by defendants' agent; that he contracted to buy plaintiff's barley, provided it was merchantable; that plaintiff represented it good, first quality, and merchantable; that the agent relied on such representations; that the barley was not merchantable, which fact was known to the plaintiff. Although the plaintiff went to trial on this answer without prior objection, the Court of Appeals held it was worthless, since it omitted two essential elements of the fraud, — (1) the plaintiff's intent to deceive, and (2) that defendants were in fact deceived. See also Cummings *v.* Thompson, 18 Minn. 246, 256, in which the rule is given as follows: "A general statement of the matters of fact constituting the fraud is all that is required: it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge." Dubois *v.* Hermance, 56 N. Y. 673, 674; Joest *v.* Williams, 42 Ind. 565, 568; Curry *v.* Keyser, 30 Ind. 214; Leighton *v.* Grant, 20 Minn. 345, 354. See also Mills *v.* Collins, 67 Iowa, 164; Specht *v.* Allen, 12 Ore. 117. In Prall *v.* Peters, 32 Neb. 832, an action for false representations in the sale of a horse, it was held that the defences that the plaintiffs sustained no damage, and that they had full knowledge of the condition of the horse when they purchased the same, constituted new matter.

[Nichols *v.* Stevens (1894), 123 Mo. 96, 25 S. W. 578; Fire Extinguisher Co. *v.* City of Perry (1899), 8 Okla. 429, 58 Pac. 635; Greiss *v.* State Inv. Co. (1893), 98 Cal. 241, 33 Pac. 195; Muldoon *v.* Brown (1899), 21 Utah, 121, 59 Pac. 720; Wilson *v.* Sullivan (1898), 17 Utah, 341, 53 Pac. 994; H. B. Claflin Co. *v.* Simon (1898), 18 Utah, 153, 55 Pac. 376; Voorhees *v.* Fisher (1893), 9 Utah, 303, 34 Pac. 64; Smith *v.* Estey Organ Co. (1897), 100 Ga. 628, 28 S. E. 392; Paving Co. *v.* Botsford (1896), 56 Kan. 532, 44 Pac. 3; Guild *v.* Railroad Co. (1896), 57 Kan. 70, 45 Pac. 82; Winchester *v.* Joslyn (1903), — Col. —, 72 Pac. 1079; Parker *v.* Jewett (1893), 52 Minn. 514, 55 N. W. 56; Caplis *v.* Am. Fire Ins. Co. (1894), 60 Minn. 376, 62 N. W. 440; Ætna Ins. Co. *v.* Simmons (1896), 49 Neb. 811, 69 N. W. 125; Kettenbach *v.* Omaha Life Ass'n (1896), 49 Neb. 842, 69 N. W. 135. See also Parker *v.* Des Moines Life Ass'n (1899), 108 Ia. 117, 78 N. W. 826, holding that, under the statute, fraud in the application cannot be set up as a defence unless the application was attached to the policy.

But see Clough *v.* Holden (1893), 115 Mo. 336, 21 S. W. 1071, where it was held that while a general allegation of fraud is sufficient in an answer (Edgell *v.* Sigerson, 20 Mo. 494; Smalley *v.* Hale, 37 Mo. 102; Fox *v.* Webster, 46 Mo. 181), it is not sufficient in a petition, a reason for which distinction the writer, Gantt J., said would be hard to give. To the same effect as to the answer see Ryan *v.* Middlesborough Co. (1899), 106 Ky. 181, 50 S. W. 13.]

[1] Richardson *v.* Hittle, 31 Ind. 119; Conn. L. Ins. Co. *v.* McCormick, 45 Cal. 580.

A defence of justification in an action for trespasses and other torts must by appropriate averments identify the wrongs complained of with the acts described in the answer and justified, or else it will fail of its purpose and be worthless.[1] In Indiana, the defence of a former recovery for the same cause of action between the same parties must set out the record of such former suit, or it will be insufficient and bad on demurrer.[2] The following are some further illustrations of the general rule. A defence of jettison by a common carrier on the water should allege all the facts showing the jettison to have been necessary;[3] a defence of usury must narrate all the particulars of the agreement and transaction;[4] a defence of long-continued user or prescription should aver that the possession or user by the defendant was adverse:[5] and the defence that the plaintiff is not the real party in interest must state all the facts which show that legal conclusion.[6]

§ 565. *689. **Averments of New Matter as Basis for Affirmative Relief.** When the defendant sets out new matter which he relies upon, not as defensive merely, but as the basis of affirmative relief, either in the form of a strictly legal counter-claim or of an equitable cross-demand, he becomes in truth an *actor pro tanto:* his answer is to that extent equivalent to a cause of action

[1] Gallimore *v.* Ammerman, 39 Ind. 323; Isley *v.* Huber, 45 Ind. 421; Boaz *v.* Tate, 43 Ind. 60, 71.

[2] Norris *v.* Amos, 15 Ind. 365; 2 R. S., p. 44, § 78.

[3] Bentley *v.* Bustard, 16 B. Mon. 643.

[4] Manning *v.* Tyler, 21 N. Y. 567, 568, and cases cited; Gaston *v.* McLeran, 3 Ore. 389.

[5] White *v.* Spencer, 14 N. Y. 247.

[6] Raymond *v.* Pritchard, 24 Ind. 318, and cases cited; Hereth *v.* Smith, 33 Ind. 514, and cases cited; Shafer *v.* Bronenberg, 42 Ind. 89, 90; Harte *v.* Houchin, 50 Ind. 327. The following recent cases give additional illustrations of the text, and of various defences held to have been properly or improperly pleaded: Becker *v.* Boon, 61 N. Y. 317 (tender); Manufac. Nat. Bank *v.* Russell, 6 Hun, 375 (mistake); Bush *v.* Brown, 49 Ind. 573 (want of consideration and duress); Zeidler *v.* Johnson, 35 Wis. 335 (statute of limitations, hypothetical); Van Trott *v.* Wiesse, 36 id. 439 (fraud); Freeman *v.* Engelmann Transp. Co., 36 id. 571 (contributory negligence); Klais *v.* Pulford, 36 id. 587 (justification by public officers); Staley *v.* Ivory, 65 Mo. 74 (failure of consideration); Foy *v.* Haughton, 83 N. C. 467 (fraud); Hendrix *v.* Gore, 8 Ore. 406 (payment); Wallace *v.* Lark, 12 S. C. 576 (illegality); Kendig *v.* Marble, 55 Iowa, 386 (fraud); Clayes *v.* Hooker, 4 Hun, 231 (usury); Lord *v.* Lindsay, 18 Hun, 489 (duress); Jones *v.* Frost, 51 Ind. 69 (fraud); Young *v.* Pickens, 49 id. 23 (title); Mahoney *v.* Robins, 49 id. 146 (fraud and failure of title); Van Wy *v.* Clark, 50 id. 259 (fraud); Jones *v.* Shaw, 67 Mo. 667; Keim, etc. Co. *v.* Avery, 7 Neb. 54; Sargent *v.* Steubenville, etc. R. Co., 32 Ohio St. 449; Stowell *v.* Otis, 71 N. Y. 36; McKissen *v.* Sherman, 51 Wis. 303. When the defendant must or need not negative the exceptions in a statute on which his defence is based, see Harris *v.* White, 81 N. Y. 532, 546; Clark *v.* Clark, 5 Hun, 340; Fleming *v.* People, 27 N. Y. 329.

asserted in a complaint or petition, and is to be governed by the same rules. It must aver all the material, issuable facts constituting the right of action in his favor, and must demand the relief legal or equitable which is sought to be obtained from the plaintiff.[1] The foregoing cases are given as illustrations and examples of the general doctrine, and not as exhaustive of its scope and application. The rule applies to all defences of new matter. The material, issuable facts which constitute the defence must be averred, so that its sufficiency in law may fully appear on the record: the facts themselves, and not the legal conclusions from assumed facts, are to be stated.[2]

II. *The General Nature of New Matter; Defences in Mitigation of Damages, and in Abatement.*

§ 566. * 690. **Introductory.** The cases quoted from in the preceding section to show the judicial definition of the general denial exhibit also the interpretation put by the courts upon the term "new matter;" and the decisions which will be cited in the next subdivision of this section will show how that interpretation has been applied in a great variety of particular instances. It would be a needless labor to repeat the extracts referred to, or the general discussion of the nature and properties of new matter. It is elementary that a defence of new matter should be pleaded; and as new matter must of necessity be a distinct defence from a denial, it follows that it cannot properly be associated or mingled up with denials general or specific in one paragraph or plea. For the same reason, each defence of new matter must necessarily be complete and single, as much so as each cause of action, and should be separately stated in a plea by itself. This subject will be treated of at large in a subsequent section.

§ 567. * 691. **Denials and New Matter Distinguished.** The overwhelming weight of judicial opinion has with almost complete unanimity agreed upon the principle which distinguishes denials

[1] Rose *v.* Treadway, 4 Nev. 455; Hook *v.* Craighead, 32 Mo. 405; White *v.* Allen, 3 Ore. 103.

[2] Northrup *v.* Miss. Vall. Ins. Co., 47 Mo. 435, 443, per Wagner J.; State *v.* Cent. Pac. R. Co., 9 Nev. 79, 87 (payment); Pease *v.* Hannah, 30 Ore. 301 (defence in action to recover land); Heaston *v.* Cincinnati & Ft. W. R. Co., 16 Ind. 275. But it was held in Hunter *v.* McLaughlin, 43 Ind. 38, 45, that the following was a sufficient averment of a want of consideration; that the notes "were given without any consideration whatever."

from new matter, and determines the office and function of each.[1] The general denial puts in issue all the material averments of the complaint or petition, and permits the defendant to prove any and all facts which tend to negative those averments or some one or more of them. Whatever fact, if proved, would not thus tend to contradict some allegation of the plaintiff's first pleading, but would tend to establish some circumstance, transaction, or conclusion of fact, not inconsistent with the truth of all those allegations, is new matter.[2] It is said to be "new," because it is not embraced within the statements of fact made by the plaintiff; it exists outside of the narrative which he has given; and proving it to be true *does not disprove a single averment of fact* in the complaint or petition, but merely prevents or destroys the legal conclusion as to the plaintiff's rights and the defendant's duties which would otherwise have resulted from all those averments admitted or proved to be true. Such is the nature of the new matter which cannot be presented by means of a denial, but must be specially pleaded, so that the plaintiff may be informed of its existence and of the use to be made of it by the defendant.[3] Whether it is "new" in the sense described must of necessity depend, and depend alone, upon the nature, extent, and variety of the material allegations which the plaintiff inserts in his pleading. I shall not repeat the observations upon this point contained in the preceding section, and simply remark that the plaintiff may, by making unnecessary although material averments in his complaint or petition, greatly enlarge the scope of the general denial, and prevent those defensive facts from being in *his* case new matter, which in another case, and from the operation of a more scientific and correct mode of pleading, would clearly be

[1] [Matter specially pleaded, if admissible under the general denial, should be stricken out as redundant: Bolton *v.* Missouri Pac. Ry. Co. (1902), 172 Mo. 92, 72 S. W. 530; Kirton *v.* Bull (1902), 168 Mo. 622, 68 S. W. 927. But it does not render the pleading demurrable: Staten Island, etc. Ry. Co. *v.* Hinchliffe (1902), 170 N. Y. 473, 63 N. E. 545.]

[2] The following recent decisions illustrate the text: Roe *v.* Angevine, 7 Hun, 679; Read *v.* Decker, 5 id. 646; Douglas *v.* Haberstro, 25 id. 262; Saunders *v.* Chamberlain, 13 id. 568; Allen *v.* Saunders, 6 Neb. 436; Burlington & Mo. Riv. R. Co. *v.* Lancaster Cy. Com'rs, 7 id. 33; Swenson *v.* Cresop, 28 Ohio St. 668.

[See Kingsbury *v.* Chicago, etc. Ry. Co. (1897), 104 Ia. 63, 73 N. W. 477, for an interesting application of this distinction.]

[3] [Cady *v.* South Omaha Nat. Bank (1896), 46 Neb. 756, 65 N. W. 906; Gran *v.* Houston (1895), 45 Neb. 813, 64 N. W. 245; Home Fire Ins. Co. *v.* Berg (1896), 46 Neb. 600, 65 N. W. 780; Medland *v.* Connell (1898), 57 Neb. 10, 77 N. W. 437; Denney *v.* Stout (1900), 59 Neb. 731, 82 N. W. 18.]

new matter. The criterion under the code system is not, therefore, in *every* case, the intrinsic, essential nature of the defence itself proposed by the defendant: it is to be found rather in the frame of the complaint or petition, in the material statements of fact made by the plaintiff therein. It cannot then be said, for example, that "payment" is always new matter; for the plaintiff may so construct his complaint that facts showing payment will be directly contradictory of a material averment embraced within it, and therefore plainly admissible under the general denial. It is impossible for this reason to collect, arrange, and classify a mass of different defences, and say of them, as could be said under the old system, that they are all necessarily by way of confession and avoidance, and therefore all of necessity "new matter."

§ 568. *692. **New Matter as Confession and Avoidance.** It follows from the foregoing discussion, that considering the office and function of the general denial, and the distinction between it and new matter, the latter *confesses and avoids all the material allegations of the complaint or petition;* that is, it admits all the material facts averred therein, and avoids their legal result by means of the additional facts which are relied upon as constituting the defence.[1] A particular defence may therefore, when set up in answer to *one* complaint, be new matter, and require to be pleaded: the same kind of defence, when set up in answer to *another* complaint, may not be new matter, but may be proved under the general denial without being specially pleaded. Undoubtedly the defence of payment in its various phases is the one which most frequently assumes this double aspect; but the principle plainly applies to other defences, and is general. This description of new matter and the discussion of its nature will be so fully illustrated by the cases to be cited in the following subdivision of the present section, that none need now be quoted in support of the foregoing positions. There are, however, two special classes of defences, which, though embraced under the denomination of new matter, are so peculiar, and so radically different from all others of that name, that they require a separate mention, — defences in mitigation of damages, and defences in abatement.

[1] [Johnson *v.* Hesser (1901), 61 Neb. 631, 85 N. W. 894; Home Fire Ins. Co. *v.* Johansen (1899), 59 Neb. 349, 80 N. W. 1047; Lowe *v.* Prospect Hill Cemetery Ass'n (1899), 58 Neb. 94, 78 N. W. 488; North Neb. Fair, etc. Ass'n *v.* Box (1899), 57 Neb. 302, 77 N. W. 770; Jackson *v.* School Dist. (1900), 110 Ia. 313, 81 N. W. 596.]

§ 569. * 693. **Defences in Mitigation of Damages. Common-Law Theory.** The theory of the common law in respect of full and partial defences has already been stated.[1] Each defence in bar by way of confession and avoidance must have been a complete answer to the whole cause of action. Facts which fell short of that result, but which constituted a partial answer, were not regarded as true "defences." As they did not defeat a recovery, but always allowed a judgment for at least nominal damages, the severe logic of the system did not suffer them to be pleaded separately in the form of a bar. This logic demanded a perfect issue upon the record, — an assertion on the one side, and a complete denial thereof on the other, — or else the record admitted the plaintiff's right to recover. If the defendant should plead facts which constituted a partial defence merely, there would be no issue, and the common-law devotion to logical *forms* could not admit such a violation of its theory. As the partial defences, if pleaded, would raise no issue, the rule was adopted that they should not be pleaded, but that the general issue should be interposed, and the facts constituting them should be given in evidence under that answer. Matters in mitigation are partial defences, and it became the settled doctrine of the former procedure that they were to be proved under the general issue. Mitigating circumstances were not confined to actions for torts, to "trespass," "case," or "trover:" they were possible and proper as well in actions upon contract, in "covenant" and "assumpsit." Part payment was of course such a circumstance; and even full payment might be proved in mitigation, reducing the plaintiff's recovery to nominal damages.

§ 570. * 694. **Theory of the Codes as to Pleading Matter in Mitigation.** The common-law logic does not control the forms of pleading and of the issues under the present system. The notion of a partial defence on the record of an answer which does not go to the whole cause of action, is neither opposed to the spirit nor to the letter of the codes; on the contrary, it is in full harmony with the spirit, and seems to be demanded by the letter. The obvious intent of the system — the central conception — is not an observance of logical forms, but that the facts which constitute the plaintiff's cause of action, and the defendant's resistance thereto, shall be stated in a plain and concise manner, in

[1] See *supra*, §§ * 607, * 608.

ordinary language, without reference to any technical requirements of form or theory. The very primary design of the procedure is that the truth as it is between the parties must be first alleged, and then proved. The letter carries out this spirit, because it requires that the answer *must* contain (1) the denials, and (2) a statement of *any* new matter constituting a defence and that the defendant may set forth as many defences as he shall have. No other clauses of the statute limit this general language, or restrict it to entire defences. From the nature of the case, when a complaint or petition is in an ordinary form, containing only the averments necessary to state the cause of action, facts in mitigation of damages must be new matter rather than denials. It follows that the fair and obvious interpretation of the codes not only permits but requires that this class of defences, when they are new matter, should be pleaded.[1] It is clearly contrary to the entire theory of the system that *any* new matter, however incomplete may be its effect upon the plaintiff's recovery, should be proved under a denial: there is not the slightest warrant for such a use to be made of the general denial, whatever may have been the function of the general issue in this respect. In interpreting the language of the codes, all the common-law notions as to the impossibility of pleading partial defences should be wholly rejected; for they were based upon reasons purely technical and arbitrary, — mere formulas of verbal logic without any *real* meaning. The statute should be construed in its own spirit as an independent creation, and not in the light of ancient dogmas which it was designed to supersede. I need not collate and compare the various provisions of the code bearing upon the question in order to establish the textual interpretation. Nothing can be added to the demonstration which Mr. Justice Selden has worked out in the opinion already mentioned and quoted at length in the preceding section, and that opinion has not been and cannot be answered.[2]

[1] [This rule is supported by the following cases: Reed *v.* Union Central Life Ins. Co. (1900), 21 Utah, 295, 61 Pac. 21; Vierling *v.* Binder (1901), 113 Ia. 337, 85 N. W. 621, citing the text; Smith *v.* Bowers (1902), Neb., 89 N. W. 596; Latimer *v.* York Cotton Mills (1903), 66 S. C. 135, 44 S. E. 559.

Matter pleaded in mitigation is not objectionable because it would not justify: Conley *v.* Arnold (1894), 93 Ga. 823, 20 S. E. 762. And matter in justification cannot be available in mitigation unless so pleaded: Jenks *v.* Lansing Lumber Co. (1896), 97 Ia. 342, 66 N. W. 231.]

[2] McKyring *v.* Bull, 16 N. Y. 304.

§ 571. * 695. **New York Doctrine as to Pleading Matter in Mitigation.** On principle, then, all defences in mitigation of damages, when they consist of new matter, should be pleaded, and cannot be proved, under the general denial. How does the question stand upon authority? It is, of course, put at rest in New York by the decision of the tribunal of last resort in McKyring *v.* Bull.[1] The *ratio decidendi* of that case is universal in its application: it is not confined to the defence of payment; the argument embraces all instances of mitigation, for it is not based upon the particular nature of any defence, but upon an interpretation of the language used by the legislature. This decision has been followed by other courts and in other States, but the cases are not unanimous: in some, the ancient common-law dogmas have been appealed to and accepted as controlling. I will collect the more important of these adjudications. A defence in mitigation having been pleaded to an action for false arrest and imprisonment, the Supreme Court of New York, in denying a motion to strike out the answer, said: "It has been held in several cases that mitigating circumstances in actions of this nature may be proved without being set up, if admissible in evidence at all. Whatever weight may be given to these authorities, I am inclined to think that the case of Foland *v.* Johnson,[2] which was decided by the general term of this district, settles the question in favor of the doctrine that mitigating circumstances may be set up by way of answer in a case like the present one."[3] In Foland *v.* Johnson,[4] which was an action for assault and battery and false imprisonment, it was held that a separate defence in mitigation was proper. McKyring *v.* Bull was distinctly recognized as overruling previous cases, and as laying down the universal rule of interpretation for all causes of action and defences. It had been said in several early New York cases that matter in mitigation cannot be pleaded, but must be proved under a general denial: these decisions were all pronounced before that made in McKyring *v.* Bull, and must

[1] McKyring *v.* Bull, 16 N. Y. 304. See *supra*, §§ *658, *659. See also Wilbour *v.* Hill, 72 N. Y. 36, 38; Spooner *v.* Keeler, 51 id. 527; Wachter *v.* Quenzer, 29 id. 547. Compare Wandell *v.* Edwards, 25 Hun, 498; Jauch *v.* Jauch, 50 Ind. 135.

[2] Foland *v.* Johnson, 16 Abb. Pr. 235, 239.

[3] Beckett *v.* Lawrence, 7 Abb. Pr. N. S. 403, 405.

[4] Foland *v.* Johnson, 16 Abb. Pr. 235, 239.

therefore be considered as overruled.[1] There is a dictum in Travis *v.* Barger,[2] to the effect that circumstances in mitigation may be proved under the general denial; but the facts did not call for any decision. The proposition was stated by the judge *arguendo*, and the opinion itself was prior to the announcement of the contrary doctrine by the Court of Appeals.

§ 572. * 696. **Doctrine in Indiana and Kentucky.** In Indiana the common-law dogma is still adhered to. The rule as stated by the Supreme Court of that State is, that "matter in mitigation only cannot be specially pleaded or set up by way of answer, but may be given in evidence under the general denial. We know of no authority, either at common law or by statute, allowing matters in mitigation only, except in actions for libel and slander, to be specially pleaded or set up in the answer."[3] In

[1] Saltus *v.* Kip, 5 Duer, 646 (Sp. Term); Kneedler *v.* Sternbergh, 10 How. Pr. 67 (Sp. Term); Dunlap *v.* Snyder, 17 Barb. 561; Anonymous, 8 How. Pr. 434 (Sp. Term); Gilbert *v.* Rounds, 14 How. Pr. 46; Lane *v.* Gilbert, 9 How. Pr. 150.

[2] Travis *v.* Barger, 24 Barb. 614, 623, per Birdseye J. There are New York cases, however, subsequent to McKyring *v* Bull, which utterly disregard it, and might be considered as overruling it, were it possible for a lower court, and a single judge quoting himself as authority, to overrule the decisions of a higher tribunal. In Harter *v.* Crill, 33 Barb. 283, per Morgan J., which was an action for criminal conversation, it was held that facts in mitigation could be proved under the general denial. McKyring *v.* Bull was mentioned, and its authority was denied because the mitigating circumstances did not constitute a defence. It was said that the section requiring new matter to be pleaded (§ 149 of the New York Code) includes only those cases in which the facts to be alleged amount to a complete defence. In short, the entire argument, the whole course of reasoning approved by the court of last resort, was disregarded. No analysis or comparison of other sections and passages bearing upon the question was made: the results reached by the Court of Appeals, after a most careful examination of the text of the statute aided by the light of experience, were overturned by a bare assertion. Finally, in Tompkins *v.* Wadley, 3 N. Y. S. C. 424, 430, per Morgan J., which was an action for the breach of a promise to marry, evidence in mitigation was held admissible under the general denial. The same judge again delivered the opinion, and cited Harter *v.* Crill, Travis *v.* Barger, 24 Barb. 614, 623, and Kniffen *v.* McConnell, 30 N. Y. 290, in support of his position, McKyring *v.* Bull not being mentioned. The two former cases have already been commented upon. In the head-note of Kniffen *v.* McConnell, the reporter states that "*it seems* matter in mitigation may be proved under the general denial;" but there is nothing in the opinion of the court which furnishes the slightest warrant for even that guarded statement. The doctrine of the text is therefore fully sustained by judicial authority in New York. The two opinions of Mr. Justice Morgan can hardly be regarded as overturning the judgment pronounced by the tribunal of final resort; and the argument of Mr. Justice Selden is certainly unanswered and unanswerable on principle. See, however, O'Brien *v.* McCann, 58 N. Y. 373, 376.

[3] Smith *v.* Lisher, 23 Ind. 500, 502, per Elliott J.; and see Allis *v.* Nanson, 41 Ind. 154, 157, 158, per Worden J.; Smith *v.* Rodecap (Ind. App. 1892), 31 N. E. Rep. 479.

[See also, in this connection, Hicks *v.*

Kentucky it would seem that a partial defence in mitigation should be pleaded.[1] The codes expressly authorize mitigating circumstances to be pleaded in actions for libel or slander.[2]

§ 573. * 697. **Defences in Abatement. Common-Law Doctrine.** At the common law, all pleas were divided into two general classes, — those "in bar" and those "in abatement." "Whenever the subject-matter of the defence is, that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded *in bar;* but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded *in abatement.*"[3] The most common defences in the present system analogous to the ancient pleas in abatement are those which set up want of jurisdiction in the court, or a *present* want of legal capacity in the plaintiff to sue, or a defect of parties, or the pendency of another action. There was a marked difference between these two classes of pleas at the common law, and certain special rules regulating the use of those in abatement. Among these rules, the following were important. A plea in abatement could not be joined with one in bar in answer to the same subject-matter; but the former must be pleaded by way of introduction, and must be disposed of before a plea in bar could be interposed. As a consequence, the pleading a defence in bar waived all defences in abatement to the same matter. The judgments rendered upon the two classes of pleas were different: for the one simply dismissed *that* suit, and did not prevent the plaintiff from commencing another; while the other ended the judicial controversy in respect to the subject-matter involved.

§ 574. * 698. **Formal Distinctions between Pleas in Abatement and in Bar Removed by the Codes.** There are in the new pro-

Drew (1897), 117 Cal. 305, 49 Pac. 189, holding that where, by the same act which causes damage to the plaintiff, some benefit also results, such incidental benefit need not be pleaded by the defendant.]

[1] Hackett *v.* Schad, 3 Bush, 353, 355, per Robertson J. Mitigating facts and circumstances must be pleaded in actions for libel or slander, and cannot be proved under a general denial. Langton *v.* Hagerty, 35 Wis. 150, 161, 162; Wilson *v.* Noonan, 35 Wis. 321, 348, 349. See Desmond *v.* Brown, 33 Iowa, 13.

[2] [See Haynes *v.* Spokane Chronicle Pub. Co. (1895), 11 Wash. 503, 39 Pac. 969; Craver *v.* Norton (1901), 114 Ia. 46, 86 N. W. 54; Fenstermaker *v.* Tribune Pub. Co. (1895), 12 Utah, 439, 43 Pac. 112; s. c. (1896) 13 Utah, 532, 45 Pac. 1097.]

[3] 1 Ch. Pl. 446.

cedure no such divisions and classes.[1] Defences still exist of the same essential nature as those which were formerly set up by means of a plea in abatement, and a judgment thereon in favor of the defendant does not forever bar the plaintiff from the further prosecution of his demand. They are governed, however, by the same rules of procedure that regulate all the other defences which may be relied upon by a defendant. There is no difference in the methods of pleading them, of trying them, or of adjudicating upon them:[2] the only difference is in respect to the conclusive effects of the judgments rendered upon them.[3] In other words, so far as concerns the manner of alleging and of trial, all distinctions between these two classes of defences have been abolished, and both have been placed in the same category.[4] All defences which are analogous to the ancient pleas

[1] [It has been held, however, in the following cases that an answer to the merits waives a plea in abatement: Chamberlain *v.* Hibbard (1894), 26 Ore. 428, 38 Pac. 437; Fort *v.* Penny (1898), 122 N. C. 230, 29 S. E. 362; Earle *v.* Sayre (1896), 99 Ga. 617, 25 S. E. 943; Moore *v.* Harmon (1895), 142 Ind. 555, 41 N. E. 599; Smith *v.* Pedigo (1896), 145 Ind. 361, 33 N. E. 777. *Contra*, La Plant *v.* Firemen's Ins. Co. (1897), 68 Minn. 82, 70 N. W. 856.]

[2] [Needham *v.* Wright (1894), 140 Ind. 190, 39 N. E. 510, it was held that a plea in abatement must be certain to a certain intent in every particular, and it requires the utmost fulness and particularity of statement, as well as the highest attainable accuracy and precision, leaving nothing to be supplied by intendment or construction. The pleader must not only answer fully what is necessary to be *answered*, but must also anticipate and exclude all such supposable matter, as would, if alleged on the opposite side, *defeat* his plea, citing Chitty, Stephen, and Gould, and declaring the doctrine of those text writers to be the rule in Indiana. See also Moore *v.* Morris (1895), 142 Ind. 354, 41 N. E. 796; Miller *v.* Cross (1900), 73 Conn. 538, 48 Atl. 213; Budd *v.* Meriden Elec. R. R. Co. (1897), 69 Conn. 272, 37 Atl. 683.

It was held in Coombs Commission Co. *v.* Block (1895), 130 Mo. 668, 32 S. W. 1139, that a plea in abatement may be pleaded without waiving the right to plead to the merits also, and this is true whether the action is one in attachment or an ordinary civil action. Overruling Fordyce *v.* Hathorn (1874), 57 Mo. 120.

When the same matter is pleaded both in abatement and in bar, the latter overrides the former: Crowns *v.* Forest Land Co. (1898), 99 Wis. 103, 74 N. W. 546.

A plea treated by the parties as one in abatement is properly so considered: Saylor *v.* Commonwealth Banking Co. (1900), 38 Ore. 204, 62 Pac. 652.

Combs *v.* Union Trust Co. (1896), 146 Ind. 688, 46 N. E. 16: "An answer in abatement is not required to state facts sufficient to constitute a defence to the action, but it is sufficient if it states facts sufficient to abate the action."

Matter in abatement of the action should be determined by proof on the trial, and not upon the pleadings and affidavits on a preliminary hearing: Ricketson *v.* City of Milwaukee (1900), 105 Wis. 591, 81 N. W. 864.]

[3] [Rosser *v.* Georgia Home Ins. Co. (1897), 101 Ga. 716, 29 S. E. 286.]

[4] Stone's Adm. *v.* Powell, 13 B. Mon. 342; Sweet *v.* Tuttle, 14 N. Y. 465, 468, per Comstock J. (defect of parties); Gardner *v.* Clark, 21 N. Y. 399 (pending of another action); Mayhew *v.* Robinson, 10 How. Pr. 162 (defect of parties); Bridge *v.* Payson, 5 Sandf. 210 (defect of parties); Freeman *v.* Carpenter, 17 Wis. 126 (pen-

in abatement — that is, all which are based upon the same facts — are evidently new matter: they cannot be proved under the general denial, but must be specially pleaded.

III. *Some Particular Defences of New Matter Classified and Arranged.*

§ 575. * 699. **Introductory.** In all the following examples in which it has been held that the defences are new matter, it must be understood that the complaints or petitions were in the proper form, containing the allegations necessary to constitute the causes of action, and no more. When the plaintiff's pleadings deviated from this usual type, and were so framed that the defences could be admitted under the general denial, this fact will be particularly mentioned.

§ 576. * 700. **Payment.** It is the settled rule, except perhaps in California, that when the complaint or petition is in the customary form, not averring the fact of non-payment in so distinct a manner that an issue would be raised upon it by a denial, the defence of payment is new matter, and must be pleaded as such.[1]

dency of another action); Thompson *v.* Greenwood, 28 Ind. 327; Bond *v.* Wagner, 28 Ind. 462. The rule stated in the text, that defences in abatement are new matter and must be pleaded, is further illustrated by the following cases: Allison *v.* Chicago & N. W. R. Co., 42 Iowa, 274; Plath *v.* Braunsdorff, 40 Wis. 107; White *v.* Miller, 7 Hun, 427; Dawley *v.* Brown, 9 id. 461; Levi *v.* Haversteck, 51 Ind. 236; Stafford *v.* Nutt, 51 id. 535; Smith *v.* Peckham, 39 Wis. 414; Newhall-House Stock Co *v.* Flint & F. M. Ry. Co., 47 id. 516; Dutcher *v.* Dutcher, 39 id. 651, and numerous cases cited.

[1] McKyring *v.* Bull, 16 N. Y. 297; Morrell *v.* Irving Fire Ins. Co., 33 N. Y. 429, 443, per Davies J.; Texier *v.* Gouin, 5 Duer, 389, 391, per Oakley C. J.; Martin *v.* Pugh, 23 Wis. 184; Phillips *v.* Jarvis, 19 Wis. 204; Stevens *v.* Thompson, 5 Kan. 305, distinguishing Marley *v.* Smith, 4 Kan. 183, on the ground that in the latter case the allegations were unusual; Baker *v.* Kistler, 13 Ind. 63; Hubler *v.* Pullen, 9 Ind. 273; Bassett *v.* Lederer, 1 Hun, 274, an action for goods sold and delivered. The complaint stated that defendant "had not paid the price, nor any part thereof:" the answer was a general denial. Held, that proof of payment under the issue was error. This case certainly goes further than any other, and is inconsistent with those cited in the next following note. Hall *v.* Olney, 65 Barb. 27, an instance of payment after suit brought. Held, that defendant should have set up the defence in a supplemental answer. See also Everett *v.* Lockwood, 8 Hun, 356; Knapp *v.* Runnells, 37 Wis. 135; Hegler *v.* Eddy, 53 Cal. 597 (tender); Johnson *v.* Tyler, 1 Ind. App. 387; Hyde *v.* Hazel, 43 Mo. App. 668; St. Louis, Ft. S. & W. R. Co. *v.* Grove, 39 Kan. 731; Ellison *v.* Rix, 85 N. C. 77; and see Lent *v.* N. Y. & Mass. Ry. Co., 130 N. Y. 504.

[*Payment:* Ferguson *v.* Dalton (1900), 158 Mo. 323, 59 S. W. 88; State *ex rel. v.* Peterson (1897), 142 Mo. 526, 39 S. W. 453; Farmers' Nat. Bank *v.* Hunter (1899) 35 Ore. 188, 57 Pac. 424; Hopper *v.* Hopper (1901), 61 S. C. 124, 39 S. E. 366; Marshall & Ilsley Bank *v.* Child (1899), 76 Minn. 173, 78 N. W. 1048; Mullen *v.*

When, however, the complaint or petition contains negative averments of non-payment, so that a traverse of them is in fact equivalent to an allegation of payment, an issue is made by the mere denial general or specific, which admits the defence of payment to be proved under it.[1] This is not an exception to the foregoing rule; for an issue upon the very fact of payment is actually formed by such assertions and denials. The decided cases present some differences in respect to the form of the averment in the complaint or petition, which, by being traversed, permits the defence to be interposed; but the principle upon which they were decided is the same in all. In an action to recover for work and labor, the complaint stated the agreement, the performance of services at a stipulated price, and that on a certain day named the defendant "was indebted to the plaintiff in the sum of $333, being the balance remaining due after sundry payments made by defendant to the plaintiff." The answer was a general denial. Evidence offered by the defendant to prove payments made by him on account, the New York Court of Appeals held, ought to have been admitted under this issue, distinguishing the case from McKyring *v.* Bull by reason of the peculiar averments in the complaint.[2] Where a complaint set

Morris (1895), 43 Neb. 596, 62 N. W. 74; Cady *v.* South Omaha Nat. Bank (1896), 46 Neb. 756, 65 N. W. 906; Ashland Land, etc. Co. *v.* May (1897), 51 Neb. 474, 71 N. W. 67; Hudelson *v.* First Nat. Bank (1897), 51 Neb. 557, 71 N. W. 304; Morehouse *v.* Throckmorton (1899), 72 Conn. 449, 44 Atl. 747; Culbertson Irrig., etc. Co. *v.* Cox (1897), 52 Neb. 684, 73 N. W. 9; Hortzell *v.* McClurg (1898), 54 Neb. 313, 74 N. W. 625; Barker *v.* Wheeler (1900), 60 Neb. 470, 83 N. W. 678; s. c. (1901), 62 Neb. 150, 87 N. W. 20; Union Stockyards Nat. Bank *v.* Haskell (1902), Neb., 90 N. W. 233; Richards *v.* Jefferson, (1898), 20 Wash. 166, 54 Pac. 1123; Meating *v.* Tigerton Co. (1902), 113 Wis. 379, 89 N. W. 152; Clark *v.* Wick (1894), 25 Ore. 446, 36 Pac. 165; Nat. Bank *v.* Quinton (1897), 57 Kan. 750, 48 Pac. 20.

A plea of payment confesses the cause of action: Lokken *v.* Miller (1900), 9 N. D. 512, 84 N. W. 368. "A plea of payment in full is ordinarily good, without specifying the time, place or manner thereof:" Fall *v.* Johnson (1896), 8 S. D. 163, 65 N. W. 909. *Contra*, Wortham *v.* Sinclair (1896), 98 Ga. 173, 25 S. E. 414. A plea of payment cannot be held bad on demurrer: Buist *v.* Fitzsimons (1894), 44 S. C. 130, 21 S. E. 610.

See the following cases for pleas of payment which were held sufficient: Hardin County *v.* Wells (1899), 108 Ia. 174, 78 N. W. 908; Garrison *v.* Murphy (1902), Neb., 89 N. W. 766. An insufficient plea of payment, treated as sufficient by the parties, will be deemed amended so as to properly raise the issue in the supreme court: Mulhall *v.* Mulhall (1895), 3 Okla. 252, 41 Pac. 577.]

[1] [Brassell *v.* Silva (1897), 50 S. C. 181, 27 S. E. 622; State *ex rel.* *v.* Peterson (1897), 142 Mo. 526, 39 S. W. 453; Logan County Nat. Bank *v.* Barclay (1898), 104 Ky. 97, 46 S. W. 675. *Contra*, Columbia Nat. Bank *v.* Western Iron Co. (1896), 14 Wash. 162, 44 Pac. 145; Barker *v.* Wheeler (1901), 62 Neb. 150, 87 N. W. 20.]

[2] Quinn *v.* Lloyd, 41 N. Y. 349, 352, per Lott J.: "The denial involved an issue

out an indebtedness by the defendant, and added "that the same was still due and unpaid," the general denial was held a sufficient answer to allow proof of payment.[1] In an action for work and labor, the complaint alleged the services to a specified amount in value, and that there was a balance due the plaintiff, "after deducting all payments made by defendant to plaintiff thereon, of $175." The general denial, it was held, entitled the defendant to prove all the payments which he had made.[2] This special rule has been repeatedly acted upon by the courts of California. Indeed, as has been before stated,[3] they have gone much farther, and have made it a general requisite, in actions upon promissory notes at least, that the complaint must aver the non-payment as a breach in a distinct form, or it will fail to state a cause of action; and that the general denial of such a pleading necessarily admits evidence of payment. In some of the cases the judges have gone to the length of declaring that the general denial, like the general issue of *nil debet* or *non assumpsit*, always admits the defence of payment.[4]

§ 577. * 701. What may be shown under the Defence of Payment. When a defence of payment is pleaded, it is competent to show that the payment was actually made in cash, or in some

upon all the facts above stated and denied, not only of the agreement and of the time which the plaintiff worked, but necessarily of the different payments made, so as to determine what in fact was the balance of the defendant's debt. That balance could not be ascertained without an inquiry as to the amount of the payments, as well as the value of the work performed." Also per Woodruff J. (p. 354): "It was wholly unnecessary for the plaintiff to sue for a balance as such. He might allege the contract, performance on his part, and claim payment; and then, if the defendant desired to prove payment, he must allege payment in his answer. But where the plaintiff sues for a balance, he voluntarily invites examination into the amount of the indebtedness, and the extent of the reduction thereof by payment." Further, Knapp *v.* Roche, 94 N. Y. 329; but see Dry Dock, E. B. & B. R. Co. *v.* N. & E. R. Ry. Co. (Com. Pl. 1893), 22 N. Y. Suppl. 556. [Robertson *v.* Robertson (1900), 37 Ore. 339, 62 Pac. 377, citing the text.]

[1] Marley *v.* Smith, 4 Kan. 183, 186. Explained in Stevens *v.* Thompson, 5 Kan. 305.

[2] White *v.* Smith, 46 N. Y. 418. See also Looby *v.* West Troy, 24 Hun, 78 (a special case in which an accord and satisfaction was allowed to be proved under a general denial).

[3] § * 665.

[4] Frisch *v.* Caler, 21 Cal. 71; Fairchild *v.* Amsbaugh, 22 Cal. 572; Wetmore *v.* San Francisco, 44 Cal. 294, 299, per Crockett J.; Davanay *v.* Eggenhoff, 43 Cal. 395, 397, per Rhodes J. See also *ante*, § * 665; Mickle *v.* Heinlen, 92 Cal. 596.

[In Bank of Shasta *v.* Boyd (1893), 99 Cal. 604, 34 Pac. 337, the court said: "It is well settled in this State that the allegation of non-payment, in a complaint on a promissory note, is material to the cause of action, as without such an allegation no breach of the promise would appear, and that when the complaint is not verified a general denial puts in issue every material allegation of the complaint."]

other manner agreed upon by the parties: as that it was made by the delivery of chattels, which were received by the creditor in satisfaction of his demand;[1] or by the giving and acceptance of anything that is received in the place of money, and in discharge of the debt.[2] But under the answer of payment in an action upon a note, the defendant cannot prove a want of consideration for the note, or a mistake in its execution, or an error in the prior accounting and the ascertaining the balance for which it was given, or the execution of a contemporaneous writing which modifies or controls the legal effect of the note; and the same doctrine is plainly applicable to actions upon any species of written agreement.[3]

§ 578. * 702. **Arbitrament and Award. Former Recovery.** The defence of an arbitrament and award covering the same matters in controversy as those stated in the complaint is new matter, and must be pleaded;[4] and so also is the defence of a former recovery for the same cause of action,[5] and of a former partial recovery.[6]

§ 579. * 703. **Actions for the Recovery of Chattels.** In an action to recover possession of chattels, the complaint alleging property in the plaintiff, and the answer specifically denying the wrongful taking and detention of the goods, and no more, the facts relied upon by the defendant as constituting his actual defence were, that the plaintiff and one G. were partners and the real owners

[1] Farmers' Bank *v.* Sherman, 33 N. Y. 69. Also, receipt by plaintiff of the proceeds from collaterals in his hands, Wolcott *v.* Ensign, 53 Ind. 70. [Edmunds *v.* Black (1896), 13 Wash. 490, 43 Pac. 330.]

[2] Hart *v.* Crawford, 41 Ind. 197.

[McLaughlin *v.* Webster (1894), 141 N. Y. 76, 35 N. E. 1081; State Bank *v.* Kelly (1899), 109 Ia. 544, 80 N. W. 520 (ratification of agent's act in receiving note); Thompson-Houston Elec. Co. *v.* Palmer (1893), 52 Minn. 174, 53 N. W. 1137 (laws of another State as to legal effect of accepting note).]

[3] Lowry *v.* Shane, 34 Ind. 495.

[4] Brazil *v.* Isham, 12 N. Y. 9, 17.

[Evidence tending to impeach an award actually made is not admissible under a general denial: Conn. Fire Ins. Co. *v.* O'Fallon (1896), 49 Neb. 740, 69 N. W. 118. The defence of an agreement to arbitrate is new matter: Merchants' Ins. Co. *v.* Stephens (1900), Ky., 59 S. W. 511. See also Kahn *v.* Traders' Ins. Co. (1893), 4 Wyo. 419, 34 Pac. 1059.]

[5] Hendricks *v.* Decker, 35 Barb. 298; Piercy *v.* Sabin, 10 Cal. 22; Norris *v.* Amos, 15 Ind. 365. See also Cave *v.* Crapto, 53 Cal. 135; Fanning *v.* Hibernia Ins. Co., 37 Ohio St. 344; Meiss *v.* Gill, 44 Ohio St. 253; Louisville, N. A. & C. Ry. Co. *v.* Cauley, 119 Ind. 142. But see Terry *v.* Munger, 49 Hun, 560.

[McLean *v.* Baldwin (1902), 136 Cal. 565, 69 Pac. 259; Whitcomb *v.* Hardy (1897), 68 Minn. 265, 71 N. W. 263; Dixon *v.* Caster (1903), — Kan. —, 70 Pac. 871; McCarty *v.* Kinsey (1899), 154 Ind. 447, 57 N. E. 108. See the last three cases above cited for methods of pleading this defence.]

[6] Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429, 443.

of the goods in question, and that G. had bailed them to the defendant, who retained them in virtue of such bailment. This defence, however, was held inadmissible under the pleadings, because, first, the unqualified ownership of the plaintiff was admitted on the record by the failure of the answer to deny the allegation of property contained in the complaint; and, secondly, the authority conferred by one owner, G., upon the defendant, to take and retain possession of the chattels, was new matter, and should have been pleaded.[1] And, in a similar action, a defence that the defendant had loaned money to the plaintiff's intestate, who was the late owner of the chattels, and had received from him the possession thereof, and retained them in possession as security for such advances, is new matter, and cannot be proved unless specially pleaded;[2] and the same is true of the defence, that the plaintiff's title is fraudulent and void as against his creditors.[3]

§ 580. * 704. **Actions for Tort.** In an action to recover damages for the conversion of chattels, a justification by the defendant as sheriff, under an attachment, judgment, execution, and levy against a third person, charging that the goods were the property of such judgment debtor, and had been fraudulently assigned and transferred by him to the plaintiff, so that the latter's title was void, cannot be proved under an answer of denials, but must be pleaded as new matter.[4] There are cases which go to the extent of holding that, under the general denial, — which traverses the indispensable averment of a sufficient property in the plaintiff, — the defendant cannot show property in

[1] Tell *v.* Beyer, 38 N. Y. 161. A lien on the chattel or other special property therein cannot be shown under a general denial: Guille *v.* Wong Fook, 13 Ore. 577.

[2] Gray *v.* Fretwell, 9 Wis. 186.

[And the defence of right of possession by reason of a lien is new matter: Mellott *v.* Downing (1901), 39 Ore. 218, 64 Pac. 393.]

[3] Frisbee *v.* Langworthy, 11 Wis. 375. *Contra*, see Young *v.* Glascock, 79 Mo. 574; Stern Auction, etc. Co. *v.* Mason, 16 Mo. App. 473; Sopris *v.* Truax, 1 Col. 89; Bailey *v.* Swain, 45 Ohio St. 657; Holmberg *v.* Dean, 21 Kan. 73; Merrill *v.* Wedgwood, 25 Neb. 283. [Coos Bay R. R. Co. *v.* Siglin (1894), 26 Ore. 387, 38 Pac. 192.]

[4] Jacobs *v.* Remsen, 12 Abb. Pr. 390; Graham *v.* Harrower, 18 How. Pr. 144. In the latter case, T. R. Strong J. seems to concede, that, under a denial of the allegation of property in the plaintiff, the defendant may prove general property in himself, but not a justification under judicial process. Frisbee *v.* Langworthy, 11 Wis. 375, an action to recover possession, but governed by the same rule as to pleading a justification. Isley *v.* Huber, 45 Ind. 421; Boaz *v.* Tate, 43 Ind. 60, 71, 72; Johnson *v.* Cuddington, 35 Ind. 43; Langton *v.* Hagerty, 35 Wis. 150, 161. *Contra*, see Mason *v.* Vestal, 88 Cal. 396; Tupper *v.* Thompson, 26 Minn. 385.

himself:[1] but this ruling seems opposed to the weight of authority; and it is certainly contrary to the plainest principles of pleading, for such facts, when proved, merely contradict the plaintiff's averment of his own title.[2]

§ 581. * 705. **Same Subject.** In the action for breaking and entering the plaintiff's premises (trespass *qu. cl. fr.*), with the complaint in the proper form, and without any unnecessary averments, the general denial does not raise any issue as to the title to the land, and no evidence attacking such title can be received except under a separate defence;[3] nor can any defence of justification be proved unless specially pleaded.[4] Where two or more unite as plaintiffs in an action for the taking and carrying away their goods, a defence that "the plaintiffs are not joint owners of the goods and chattels mentioned in the complaint" is new matter.[5] To a complaint for an assault and battery committed by a railroad conductor in forcibly ejecting the plaintiff from the cars, the general denial was pleaded: under this issue, the defendant was not permitted to show the regulations of the company, that they were reasonable, and that he was complying with them in doing the act complained of.[6] The defence of recaption, or its equivalent, in an action against a sheriff for an escape, is

[1] Dyson *v.* Ream, 9 Iowa, 51.

[2] See *supra*, §§ * 677, * 678. But the defence of title in a third person is new matter. Smith *v.* Hall, 67 N. Y. 48.

[3] Squires *v.* Seward, 16 How. Pr. 478; Rathbone *v.* McConnell, 20 Barb. 311; Althouse *v.* Rice, 4 E. D. Smith, 347.

[4] Johnson *v.* Cuddington, 35 Ind. 43.

[Hauger *v.* Benua (1899), 153 Ind. 642, 53 N. E. 942; Myers *v.* Longstaff (1900), 14 S. D. 98, 84 N. W. 233; Clifton *v.* Lange (1899), 108 Ia. 472, 79 N. W. 276; Raynor *v.* Wilmington Seacoast Ry. Co. (1901), 129 N. C. 195, 39 S. E. 821; Fenstermaker *v.* Tribune Pub. Co. (1895), 12 Utah, 439, 43 Pac. 112; Wilken *v.* Exterkamp (1897), 102 Ky. 143, 42 S. W. 1140; Stark *v.* Publishers, etc. Co. (1901), 160 Mo. 529, 61 S. W. 669; Upchurch *v.* Robertson (1900), 127 N. C. 127, 37 S. E. 157; Mangold *v.* Oft (1901), 63 Neb. 397, 88 N. W. 507; Barr *v.* Post (1898), 56 Neb. 698, 77 N. W. 123.]

[5] Walrod *v.* Bennett, 6 Barb. 144.

[6] Pier *v.* Finch, 29 Barb. 170. In an action for false arrest and imprisonment, proof of the plaintiff's bad character in respect to the offence for which he was arrested cannot be proved under the general denial. Scheer *v.* Keown, 34 Wis. 349. The following defences are further instances of new matter, — in an action against a sheriff for false return, etc., defence that the property was exempt, Kiskadden *v.* Jones, 63 Mo. 190; in action against husband and wife for wife's tort, her defence of compulsion by her husband, Clark *v.* Boyer, 32 Ohio St. 299; in action for injuries caused by a hole wrongfully made in a sidewalk, defence of license from the city government, Clifford *v.* Dam, 81 N. Y. 52. See, further, that the defence of justification is new matter, Konigsberger *v.* Harvey, 12 Ore. 286; Thomas *v.* Werremeyer, 34 Mo. App. 665; Willson *v.* Manhattan Ry. Co. (Com. Pl., 1892), 20 N. Y. Suppl. 852 (in action for false imprisonment); compare State *v.* Beckner (Ind., Jan. 1891), 26 N. E. Rep. 553.

new matter. An answer setting up this defence having been pleaded, the defendant, at the trial, offered to prove, not the return or the retaking of the prisoner, but that he would have voluntarily returned, and was intending to do so, had he not been prevented from accomplishing his purpose by the fraud of the plaintiff. This defence was held inadmissible under a general denial, or under the special answer of recaption, because it was new matter, and the allegations and proofs must agree.[1] The defence of recoupment of damages is in all cases new matter, and must therefore be pleaded, although it is often a partial defence analogous to those in mitigation.[2]

§ 582. * 706. **Actions Concerning Lands.** In the legal action to recover possession of land, the complaint or petition being in the common form, alleging in general terms that the plaintiff is seised in fee of the premises, and the wrongful taking and withholding possession thereof by the defendant, and the answer consisting merely of denials general or specific, the defendant cannot, it has been held, prove a prior *equitable* title in himself derived from the plaintiff or his grantor, although a *legal* title in himself may be proved, as this would directly contradict the averment in the complaint that the plaintiff was owner of the premises.[3] An action was brought by a wife against her husband

[1] Richtmeyer *v.* Remsen, 38 N. Y. 206, 208, per Grover J.: "The question is whether these grounds of defence must be set up in the answer; that is, whether the defence offered consists of new matter, or whether it merely disproves any of the material allegations of the complaint. All that the plaintiff must allege and prove to maintain his action is the recovery of the judgment, the issue and delivery of execution to the sheriff, the capture of the debtor on the execution, and the escape from custody before suit brought against the sheriff therefor. We have seen that the sheriff may defend the action by proving a recaption of the debtor before suit brought, or facts legally excusing him from making such recaption. Proof of such facts does not controvert any allegations of the complaint. It is, therefore, new matter, constituting a defence to the action, and, under the code, is inadmissible unless set up in the answer."

[2] Crane *v.* Hardman, 4 E. D. Smith, 448.

[3] Stewart *v.* Hoag, 12 Ohio St., 623; Lombard *v.* Cowham, 34 Wis. 486, 491; Hartley *v.* Brown, 46 Cal. 201. See *supra*, § * 679, as to what defences may be proved under the general denial in this action. A title accruing to the defendant since the commencement of the action must be pleaded by a supplemental answer. Roper *v.* McFadden, 48 Cal. 346, 348; McLane *v.* Bovee, 35 Wis. 27, 34. The rule as to defences in ejectment is further illustrated by Powers *v.* Armstrong, 35 Ohio St. 357; Emily *v.* Harding, 53 Ind. 102; Marks *v.* Sayward, 50 Cal. 57; Manly *v.* Howlitt, 55 id. 94, and see the recent cases added under § * 682; as to other special actions concerning laws, see Morenhaut *v.* Wilson, 52 Cal. 263 (abandonment of a mining claim); McCreary *v.* Marston, 56 id. 403 (in action of unlawful detainer by a lessor, defence that the execution of the lease was obtained by fraud or mistake); Higler

to establish her title to certain lands. The complaint alleged facts showing that she was the equitable owner of the lands, which had been purchased by the husband with her money under an understanding that the conveyance was to be made directly to her, but which he had, in fraud of her rights, procured to be made to himself: it prayed that she might be declared the owner, and that a deed to her from her husband might be ordered. W., a judgment creditor of the husband, was permitted to intervene, and was made a party defendant. He simply pleaded a general denial. This answer, it was held, put in issue only the averments of the complaint, and did not permit the defendant W. to set up and prove his character or rights as a judgment creditor of the husband. In short, he could obtain no advantage from his intervention, because no allusion was made in the complaint to his position and claims as a creditor: that subject-matter was entirely outside of its averments.[1] A widow sued to recover her dower in lands which the husband had conveyed to the defendant during the marriage without any release from herself, and stated in her complaint the facts necessary to make out the cause of action. The answer set up as a defence that the husband left a last will, in which he devised and bequeathed to the plaintiff certain property to be received by her in lieu of dower; that she had elected to take the gift under the will, and had thus barred her right of dower. This defence was held to be new matter, and to have been admitted by the plaintiff's neglect to reply and controvert its statements.[2] In an action brought by the owners of lots abutting upon a certain alley in a city, to restrain the corporation from improving such alley, on the ground that it was a private passage belonging to the plaintiffs, the complaint contained the averments of property in the plaintiffs necessary to show a right of action. The answer stated facts showing that the original owner of the land — the grantor or source of title of the plaintiffs — had dedi-

v. Eddy, 53 id. 597 (tender since suit brought).

[But see Oregon Ry. & Nav. Co. *v.* Hertzberg (1894), 26 Ore. 216, 37 Pac. 1019, holding that under Hill's code, § 319, no estate in defendant or another can be proved unless pleaded.]

[1] Watkins *v.* Jones, 28 Ind. 12.

[2] McCarty *v.* Roberts, 8 Ind. 150. A reply to all new matter was necessary. In a creditor's suit to reach a debt due to the judgment debtor as the vendor of land from the vendee thereof, both being defendants, the latter's answer, that the purchase-price had been fully paid to the vendor, was held to be new matter, and to require a reply, in Ohio, Edwards *v.* Edwards, 24 Ohio St. 402, 411.

cated this alley to public use, and that it had thus been made a highway. These facts, it was held, could not be proved under a general denial: they were new matter, and must be specially pleaded.[1] The defence of long-continued adverse user or prescription in actions affecting the title or possession of lands, or involving the existence of easements, is, in general, new matter;[2] for, in the usual form of such actions, the defence will be in the nature of a justification of the acts complained of. Thus, for example, in an action brought to remove a dam maintained by the defendant, and to restrain his diversion of water from the stream, and for damages, the defence of a long adverse user or prescription, by which his right to the dam and to the water had become perfect, is new matter, and should be pleaded.[3]

§ 583. * 707. **Actions upon Contract.** The defence of usury is clearly new matter;[4] and the facts showing the usurious agreement and the entire transaction must be stated with fulness and circumstantiality.[5] The general denial in an action to recover damages for the breach of a promise to marry does not admit the defence of the improper habits and bad character of the plaintiff; as, that she habitually used intoxicating liquors to excess, and was in the habit of becoming intoxicated. Such facts, if they amount to a defence in bar, are new matter, and

[1] Evansville *v.* Evans, 37 Ind. 229, 236. This decision seems to be opposed to the well-settled doctrines concerning the office and effect of the general denial. The complaint alleged a property in the plaintiffs, which was the very gist of their action; and a general denial would permit the defendant to contradict such allegation. Proving a dedication to the public is nothing more nor less than showing title in the defendant, the city; and this directly controverts the material statements of the complaint.

[2] [Newcomb *v.* Crews (1895), 98 Ky. 339, 32 S. W. 947; Wilson *v.* Wilson (1895), 117 N. C. 351, 23 S. E. 272.]

[3] Mathews *v.* Ferrea, 45 Cal. 51.

[The defence of homestead must be pleaded: Marshburn *v.* Lashlie (1898), 122 N. C. 237, 29 S. E. 371. So also the defence that plaintiff, after acquiring title, conveyed it to a third party: Kennedy *v.* McQuaid (1894), 56 Minn. 450, 58 N. W 35. And in a partition suit the abandonment of the homestead must be pleaded: Bealey *v.* Blake (1900), 153 Mo. 657, 55 S. W. 288.]

[4] Catlin *v.* Gunter, 1 Duer, 253, 265; Fay *v.* Grimsteed, 10 Barb. 321. Compare Adamson *v.* Wiggins, 45 Minn. 448, *ante*, § * 678 note.

[Brundage *v.* Burke (1895), 11 Wash. 679, 40 Pac. 343; Bell *v.* Stowe (1895), 44 Neb. 210, 62 N. W. 456; Rainbolt *v.* Strang (1894), 39 Neb. 339, 58 N. W. 96; Campbell *v.* Linder (1897), 50 S. C. 169, 27 S. E. 648; Bird *v.* Kendall (1901), 62 S. C. 178, 40 S. E. 142; Maize *v.* Bradley (1901), Ky., 64 S. W. 655.]

[5] Manning *v.* Tyler, 21 N. Y. 567, 568; Rountree *v.* Brinson, 98 N. C. 107; Anglo-Am. Land, etc. Co. *v.* Brohman, 33 Neb. 409; Lockwood *v.* Woods, 3 Ind. App. 258.

[Rainbolt *v.* Strang (1894), 39 Neb. 339, 58 N. W. 96; Bell *v.* Stowe (1895), 44 Neb. 210, 62 N. W. 456.]

must be alleged in the answer.[1] The owner of a building incumbered by a mortgage procured it to be insured against fire, the policy being made payable to the mortgagee. In an action on this policy brought by the payee therein, the defence that the mortgage had been foreclosed, the land sold, and the mortgage debt partly discharged out of the proceeds, was held inadmissible under an answer of mere denials. These facts constituted a partial defence in the nature of payment, and were clearly new matter.[2] In a suit against a surety, the defence of his discharge from liability by reason of an extension of the time of payment granted to the principal debtor, in pursuance of a private agreement made with the creditor, is new matter, and cannot be proved unless pleaded as such;[3] and also his discharge by reason of any other subsequent agreement between the principals to the contract.[4]

§ 584. * 708. **Defence of Illegality.** The rule is well settled in strict accordance with the true theory of pleading under the codes, that all defences based upon the asserted illegality of the contract in suit, which admit the fact of a transaction between the parties purporting to be an agreement, and apparently binding, but which insist that by reason of some violation of the law the same is illegal and void, are new matter, and must be set up in the answer in order to be provable.[5] A few examples will

[1] Button *v.* McCauley, 38 Barb. 413. Compare Tompkins *v.* Wadley, 3 N. Y. S. C. 424, 430, which holds that in such an action an act of unchastity committed by the plaintiff can be proved in mitigation under the general denial.

[Defence by reason of diseased condition of plaintiff held to be new matter: Vierling *v.* Binder (1901), 113 Ia. 337, 85 N. W. 621.]

[2] Grosvenor *v.* Atlantic F. Ins. Co., 1 Bosw. 469.

[3] Newell *v.* Salmons, 22 Barb. 647.

[Bishop *v.* Hart (1901), 114 Ia. 96, 86 N. W. 218 (action against guarantor); Osborn & Co. *v.* Evans (1894), 91 Ia. 13, 58 N. W. 920. So also the renewal of a note extending time beyond day when action was commenced, is new matter: California State Bank *v.* Webber (1895), 110 Cal. 538, 42 Pac. 1066.]

[4] Horton *v.* Ruhling, 3 Nev. 498. In an action upon an account stated, the defence of mistake or error in any of its items is new matter, and cannot be proved under a general denial, Warner *v.* Myrick, 16 Minn. 91; and the facts which authorize the application of the "scaling laws" in North Carolina to contracts of indebtedness, Bank of Charlotte *v.* Britton, 66 N. C. 365. That the defence of rescission or abandonment is new matter, see Reynolds *v.* Reynolds, 45 Mo. App. 622; but that it may be shown under the general denial that the contract sued upon was conditional, and, by force of the condition, has terminated, see Danenbaum *v.* Person (N. Y. City Ct. 1888), 3 N. Y. Suppl. 129.

[5] [Powell *v.* Flanary (1900), 109 Ky. 342, 59 S. W. 5; Cullison *v.* Downing (1903), 42 Ore. 377, 71 Pac. 70; Haddock *v.* Salt Lake City (1901), 23 Utah, 521, 65 Pac. 491; Ah Doon *v.* Smith (1893), 25 Ore. 89, 34 Pac. 1093; Miller *v.* Hirschberg (1895), 27 Ore. 522, 40 Pac. 506; Durham Fertilizer Co. *v.* Pagett (1893), 39 S. C. 69, 17 S. E.

illustrate this rule.[1] In an action against a city upon a contract made with the plaintiff by the street commissioners, the answer alleged that these officers did not proceed according to the statute defining their powers, that they did not publish the proper notice of the letting the contract prescribed by the city charter, and that the contract itself was therefore invalid. To this answer there was no reply; and as the code of Minnesota required a reply to all new matter, the defendant claimed that these averments were by reason of the omission admitted to be true. The court so held, pronouncing the defence new matter which could not be proved under a general denial.[2] The defence that the contract in suit was entered into on Sunday, and is for that reason illegal and void under the statute, is new matter;[3] and that the demand was for liquors sold by an innkeeper on credit contrary to statute;[4] and that the plaintiff carried on business by himself under a firm name, there being no partnership, in

563; Woodbridge *v.* Sellwood (1896), 65 Minn. 135, 67 N. W. 799; Maitland *v.* Zanga (1896), 14 Wash. 92, 44 Pac. 117; McDearmott *v.* Sedgwick (1897), 140 Mo. 172, 39 S. W. 776, overruling Sprague *v.* Rooney, 104 Mo. 360; Horton *v.* Roheff (1903), — Neb. — , 95 N. W. 37. In School District *v.* Sheidley (1897), 138 Mo. 672, 40 S. W. 656, the court said: "The rule is that if a plaintiff, in order to make out his cause of action, is required to show that the contract sued upon is, for any reason, illegal, the court should not enforce it, whether pleaded as a defence or not. But when the illegality does not appear from the contract itself, or from the evidence necessary to prove it, but depends upon extraneous facts, the defence is new matter and must have been pleaded in order to be available."]

[1] The defence of fraud is new matter, and must be pleaded in all actions, whether brought upon contract or to enforce alleged rights of property in the plaintiff. Jenkins *v.* Long, 19 Ind. 28; Farmer *v.* Calvert, 44 Ind. 209, 212; Daly *v.* Proetz, 20 Minn. 411, 417; Jameson *v.* Coldwell (Ore.), 31 Pac. Rep. 279 (illegal contract); Buchtel *v.* Evans, 21 Ore. 315 (same); *contra*, Sprague *v.* Rooney, 104 Mo. 349; compare last note but one under § * 679, *ante*; last note under § * 703, *ante*; and § * 704, with notes. As to defences of fraud and illegality, see Dalrymple *v.* Hillenbrand, 62 N. Y. 5; 2 Hun, 488; Leavitt *v.* Catler, 37 Wis. 46; Casad *v.* Holdridge, 50 Ind. 529; Sharon *v.* Sharon, 68 Cal. 29; for other special defences, see Dalrymple *v.* Hunt, 5 Hun, 111 (a former recovery); Riggs *v.* Am. Tract Soc., 84 N. Y. 330, 337, 338 (action to set aside a contract made by an insane person; defence that it was made in good faith and for his benefit); Goodwin *v.* Mass. Mut. L. Ins. Co., 73 N. Y. 480, 496 (in action on a policy of life insurance); Hegler *v.* Eddy, 53 Cal. 597 (tender after the suit was begun). Defence of champerty is new matter: Moore *v.* Ringo, 82 Mo. 468; defence that the contract sued upon is a wagering contract, is new matter: Cummisky *v.* Williams, 20 Mo. App. 606; *contra*, Hentz *v.* Miner, 58 Hun, 428; that the contract was an attempt corruptly to influence legislation: Milbank *v.* Jones, 127 N. Y. 370.

[2] Nash *v.* St. Paul, 11 Minn. 174, 178; and see Finley *v.* Quirk, 9 Minn. 194, 200, 203.

[3] Finley *v.* Quirk, 9 Minn. 194, 200, 203.

[4] Denten *v.* Logan, 3 Met. (Ky.) 434.

[See also Shawyer *v.* Chamberlain (1900), 113 Ia. 742, 84 N. W. 661; Dillon *v.* Darst (1896), 48 Neb. 803, 67 N. W. 783.]

violation of a statute;[1] and that the contract was in restraint of trade.[2]

§ 585. * 709. **Further Illustrations of New Matter.** In actions upon instruments which *prima facie* import a consideration, — that is, upon notes, bills, and other negotiable paper, and writings under seal, — the defence of a want of consideration is new matter;[3] but where there is no such presumption in favor of the contract, the same defence may be proved under the general denial.[4] Where suit is brought for goods sold and delivered, or bargained and sold, the defence of a warranty, on the sale, and a breach thereof, is clearly new matter.[5] If an action is brought for the possession or for the value of securities claimed to belong to the plaintiff, and alleged to have been in some manner wrongfully transferred to and detained by the defendant, the defence that the latter purchased the same in good faith, and is a *bona fide* holder thereof, is, in general, new matter.[6] It is plain, however, that the character of this defence will largely depend upon the form of the complaint. The latter might naturally contain averments denying the good faith of the defendant's possession, or stating a want of consideration in the transfer to him, so that a mere denial would raise an issue, and admit evidence of the defence. A judgment having been confessed in which the statement of indebtedness was so informal and in-

[1] O'Toole *v.* Garvin, 3 N. Y. S. C. 118.

[2] Prost *v.* More, 40 Cal. 347.

[3] Frybarger *v.* Cokefair, 17 Ind. 404; Bingham *v.* Kimball, 17 Ind. 396; Dubois *v.* Hermance, 56 N. Y. 673, 674; Beeson *v.* Howard, 44 Ind. 413, 415; Brown *v.* Ready (Ky. 1893), 20 S. W. Rep. 1036.

[Huntington *v.* Lombard (1900), 22 Wash. 202, 60 Pac. 414; Knight *v.* Finney (1899), 59 Neb. 274, 80 N. W. 912; Sharpless *v.* Giffen (1896), 47 Neb. 146, 66 N. W. 285; F. L. & T. Co. *v.* Siefke (1894), 144 N. Y. 354, 39 N. E. 358; Sams *v.* Derrick (1898), 103 Ga. 678, 30 S. E. 668. The facts showing want of consideration should be set out: Port Huron, etc. Co. *v.* Clements (1902), 113 Wis. 249, 89 N. W. 160; Griffith *v.* Wright (1899), 21 Wash. 494, 58 Pac. 582; Duckworth *v.* McKinney (1900), 58 S. C. 418, 36 S. E. 730. But see Taylor *v.* Purcell (1894), 60 Ark. 606, 31 S. W. 567. In Osborne & Co. *v.* Hanlin (1902), 158 Ind. 325, 63 N. E. 572, the court said: "A plea which in general terms alleges no consideration is good, but one which attempts to set up a whole or partial failure of consideration must state facts sufficient to establish such failure." But see Shirk *v.* Neible (1900), 156 Ind 66, 59 N. E. 281. Under a plea of no consideration it cannot be shown that the consideration was illegal: Babcock *v.* Murray (1894), 58 Minn. 385, 59 N. W. 1038.]

[4] See cases cited *supra*, § * 676. In the latter class of actions, a consideration must be averred in the complaint.

[Greer *v.* Latimer (1896), 47 S. C. 176, 25 S. E. 136. But failure of consideration is not raised by a general denial: Nunn *v.* Jordan (1903), 31 Wash. 506, 72 Pac. 124; Murray *v.* Live Stock Co. (1895), 12 Wash. 259, 40 Pac. 942.]

[5] Fetherly *v.* Burke, 54 N. Y. 646.

[6] Weaver *v.* Barden, 49 N. Y. 286, 297, per Grover J.

complete that the whole was *prima facie* void as against other creditors, an action was brought to set aside the judgment so confessed. The answer in this action set out in full all the facts of the original indebtedness, which tended to show that an actual debt existed, and that the confession was in good faith and valid. This answer the Supreme Court of California held to be new matter: it was in avoidance, and not in denial of the case made by the complaint.[1]

§ 586. * 710. **New Matter Distinguished from Denials by Supreme Court of Missouri.** The distinction between new matter and denials was clearly stated in a recent decision by the Supreme Court of Missouri. In an action upon an attachment bond, the petition set out the bond, and alleged as a breach that the plaintiff in the attachment suit had failed to prosecute the same, and that the attachment had been abated by a judgment of the court in that proceeding. The answer admitted the bond, denied the breach, and asserted that the original suit was still pending by a motion in arrest of judgment and for a new trial. No reply having been pleaded, these averments of the answer were held at the trial to have been admitted. This ruling was reversed on error, and the answer was held to be merely a denial.[2]

§ 587. * 711. **Examples of Defences in Abatement.** The non-joinder of necessary parties cannot be proved under the general denial; it is new matter, and must be pleaded:[3] nor can the mis-joinder of plaintiffs be relied upon under a denial; the question must be raised by a demurrer or by a special answer.[4] The de-

[1] Pond *v.* Davenport, 45 Cal. 225. The correctness of this decision may be doubted. The answer is rather an argumentative denial. The complaint in effect charged fraud; and, if a general denial had been pleaded, the same facts would have been evidence in its support to disprove the fraud.

[2] State *v.* Williams, 48 Mo. 210, 212: "The general rule is, that any fact which avoids the action, and which the plaintiff is not bound to prove in the first instance in support of it, is new matter; but a fact which merely negatives the averments of the petition is not new matter, and need not be replied to. Moreover, an answer setting up new matter by way of defence should confess and avoid the plaintiff's cause of action. Bauer *v.* Wagner, 39 Mo. 385; Northrup *v.* Miss. Vall. Ins. Co., 47 Mo. 435. The allegation in question is merely in denial of facts which the plaintiff must prove to make out his *prima facie* cause of action."

[3] Abbe *v.* Clarke, 31 Barb. 238.

[Johnson *v.* Gooch (1894), 114 N. C. 62, 19 S. E. 62; Cone *v.* Cone (1901), 61 S. C. 512, 39 S. E. 748; North Powder Mill. Co. *v.* Coughanour (1898), 34 Ore. 9, 54 Pac. 223; Deegan *v.* Deegan (1894), 22 Nev. 185, 37 Pac. 360. The above cases hold that the plea must specify the parties who should have been joined.]

[4] Gillam *v.* Sigman, 29 Cal. 637; Mills *v.* Carthage, 31 Mo. App. 141. See also Dutcher *v.* Dutcher, 39 Wis. 651, and the other additional cases cited *ante*, under § * 698.

fence that the plaintiff is not the real party in interest is new matter. A general averment, however, to that effect, is not enough: the facts must be stated which constitute the defence, and which show that he is not the real party in interest.[1] The objection that the plaintiff has not the legal capacity to sue, unless it appears on the face of the complaint or petition so that it can be raised by demurrer, is new matter. Being in the nature of a dilatory defence, like that of a defect of parties, the facts which constitute it must be stated with certainty: a mere general averment would raise no issue.[2] In application of this rule, the objection that the plaintiff or the defendant is a married woman, when relied on as a defence, cannot be proved under a general denial, but must be pleaded as new matter;[3] and in an action by an executor or administrator, the general denial does not put in issue the plaintiff's title to sue.[4] The defence that the action was commenced before the cause of action had accrued cannot, it has been held, be proved under a general denial, but must be set up in the answer specially.[5] Thus in an action for work and labor on an open account, where the answer was a general denial, the defence that the account was not due at the time the action was commenced according to the terms of a

[1] Jackson *v.* Whedon, 1 E. D. Smith, 141; Savage *v.* Corn Exch. F. Ins. Co., 4 Bosw. 1; Raymond *v.* Prichard, 24 Ind. 318; Garrison *v.* Clark, 11 Ind. 369; Swift *v.* Ellsworth, 10 Ind. 205; Lamson *v.* Falls, 6 Ind. 309; Curtis *v.* Gooding, 99 Ind. 45; Hereth *v.* Smith, 33 Ind. 514; Giraldin *v.* Howard, 103 Mo. 40.

[Esch *v.* White (1901), 82 Minn. 462, 85 N. W. 238, 718; Lesh *v.* Meyer (1901), 63 Kan. 524, 66 Pac. 245; Wakeman *v.* Norton (1897), 24 Colo. 192, 49 Pac. 283; Nat. Dist. Co. *v.* Cream City Imp. Co. (1893), 86 Wis. 352, 56 N. W. 864.]

[2] Cal. Steam Nav. Co. *v.* Wright, 8 Cal. 585; Wade *v.* State, 37 Ind. 180, 182; Wright *v.* Wright, 54 N. Y. 437, 441, 59 Barb. 505; Burnside *v.* Matthews, 54 N. Y. 78, 82, "must be pleaded specially and with certainty to a particular intent;" Barclay *v.* Quicksilver Min. Co., 6 Lans. 25, 30; Phœnix Bk. *v.* Donnell, 40 N. Y. 410.

[Infancy held in Winer *v.* Mast (1896), 146 Ind. 177, 45 N. E. 66, to be a defence in bar and not in abatement.]

[3] Dillaye *v.* Parks, 31 Barb. 132; Johnson *v.* Miller, 47 Ind. 376, 377; Landers *v.* Douglas, 46 Ind. 522; McDaniel *v.* Carver, 40 Ind. 250; Elson *v.* O'Dowd, 40 Ind. 300; Van Metre *v.* Wolf, 27 Iowa, 341; Wagner *v.* Ewing, 44 Ind. 441; Kennard *v.* Sax, 3 Ore. 263, 265. The defence of *infancy* is new matter: Prall *v.* Peters, 32 Neb. 832.

[Fulton *v.* Ryan (1900), 60 Neb. 9, 82 N. W. 105; Linton *v.* Jansen (1903), — Neb. —, 95 N. W. 675.]

[4] White *v.* Moses, 11 Cal. 69. It is the rule in some States that a general denial admits the *corporate existence* of the plaintiff, even if that is alleged in the complaint: Dietrichs *v.* Lincoln & N. W. R. Co., 13 Neb. 43; National Life Ins. Co. *v.* Robinson, 8 Neb. 452; Beatty *v.* Bartholomew Cy. Agr. Soc., 76 Ind. 91, and cases cited; [Sparks *v.* Nat. Accident Ass'n (1896), 100 Ia. 458, 69 N. W. 678.]

[5] [Elder *v.* Rourke (1895), 27 Ore. 363, 41 Pac. 6, citing the text; Southey *v.* Dowling (1898), 70 Conn. 153, 39 Atl. 113; Goodrich *v.* Bldg. Ass'n (1895), 96 Ga. 803, 22 S. E. 585.]

special contract was excluded on the ground that it should have been pleaded.[1] The defence that another action is pending for the same cause must be specially pleaded, unless it is raised by demurrer.[2]

§ 588. * 712. **Miscellaneous Defences.** The defence of license is new matter, and cannot be proved unless pleaded.[3] According to the decided weight of authority, an estoppel *in pais* cannot be proved under a general denial, but is new matter.[4] An accord

[1] Hagan *v.* Burch, 8 Iowa, 309; Smith *v.* Holmes, 19 N. Y. 271.

[2] Walsworth *v.* Johnson, 41 Cal. 61.

[Witte *v.* Foote (1895), 90 Wis. 235, 62 N. W. 1044; Lowman *v.* West (1894), 8 Wash. 355, 36 Pac. 258; Spencer *v.* Johnston (1899), 58 Neb. 44, 78 N. W. 482; Monroe *v.* Reid (1895), 46 Neb. 316, 64 N. W. 983.

The defence must be presented seasonably to the trial court: Glover *v.* St. Louis, etc. Co. (1896), 138 Mo. 408, 40 S. W. 110.

Such a plea cannot prevail unless the two causes of action are pending in the same jurisdiction: Sandwich Mfg. Co. *v.* Earl (1894), 56 Minn. 390, 57 N. W. 938; Rice *v.* Ashland County (1902), 114 Wis. 130, 89 N. W. 908; Caine *v.* Seattle & Northern Ry. Co. (1895), 12 Wash. 596, 41 Pac. 904.

To give occasion for a plea in abatement, the prior action must be the same cause, between the same parties in the same interest, the same rights must be asserted and the same relief prayed for: Richardson *v.* Opelt (1900), 60 Neb. 180, 82 N. W. 377. See also Dodge *v.* Cornelius (1901), 168 N. Y. 242, 61 N. E. 244; Watson *v.* Richardson (1900), 110 Ia. 698, 80 N. W. 416; Beardsley *v.* Morrison (1899), 18 Utah, 478, 56 Pac. 303; Pratt *v.* Howard (1899), 109 Ia. 504, 80 N. W. 546; Wilson *v.* Atlanta, etc. Ry. Co. (1902), 115 Ga. 171, 41 S. E. 699; Calteaux *v.* Mueller (1899), 102 Wis. 525, 78 N. W. 1082; Koch *v.* Peters (1897), 97 Wis. 492, 73 N. W. 25; Tacoma *v.* Power Co. (1896), 15 Wash. 515, 46 Pac. 1043.

The defence of another action pending may be defeated by a dismissal of the other action, and a reply to that effect to the said defence: Carson-Rand Co. *v.* Stern (1895), 129 Mo. 381, 31 S. W. 772.

Matter in abatement is waived if not pleaded: Lombard *v.* McMillan (1897), 95 Wis. 627, 70 N. W. 673; Webber *v.* Ward (1896), 94 Wis. 605, 69 N. W. 349.]

[3] Beaty *v.* Swarthout, 32 Barb. 293, 294; Haight *v.* Badgeley, 15 Barb. 499; Snowden *v.* Wilas, 19 Ind. 10; Gilbert *v.* Sage, 5 Lans. 287; Alford *v.* Barnum, 45 Cal. 482, 485; Chase *v.* Long, 44 Ind. 427, 428; [Cone *v.* Ivinson (1893), 4 Wyo. 203, 33 Pac. 31.]

[4] Wood *v.* Ostram, 29 Ind. 177, 186; Davis *v.* Davis, 26 Cal. 23; Etcheborne *v.* Auzerais, 45 Cal. 121; Clark *v.* Huber, 25 Cal. 593, 597; but see Caldwell *v.* Auger, 4 Minn. 217; and Parker *v.* Dacres, 1 Wash. 190; Churchill *v.* Baumann, 95 Cal. 541. An estoppel by judgment must be pleaded if there is or has been any opportunity to do so. Clink *v.* Thurston, 47 Cal. 21, 29; Meiss *v.* Gill, 44 Ohio St. 253; *per contra*, Larum *v.* Wilner, 35 Iowa, 244, 247; and see *ante*, § * 702. See also, as to defence of estoppel, Hanson *v.* Cheatovich, 13 Nev. 395; Pugh *v.* Ottenheimer, 6 Ore. 231; Remillard *v.* Prescott, 8 id. 37. That estoppel is new matter, see Central Nat. Bk. *v.* Doran, 109 Mo. 40; Bray *v.* Marshall, 75 Mo. 327; De Votie *v.* McGerr, 15 Colo. 467; Gaynor *v.* Clements, 16 Colo. 209; and that the facts constituting the estoppel must be shown, see Beck *v.* Milford, 90 Ind. 291; Stewart *v.* Beck, 90 Ind. 458; Burlington Indep. Dist. *v.* Merchants' Bk., 68 Iowa, 343; Miller *v.* Anderson, 19 Mo. App. 71; Page *v.* Smith, 13 Ore. 410; McKeen *v.* Naughton, 88 Cal. 462. *Contra*, that estoppel may be proved under the general denial, see Towne *v.* Sparks, 23 Neb. 142. *Statute of frauds*, Sherwood *v.* Saxton, 63 Mo. 78; Wells *v.* Monihan, 129 N. Y. 161; Maybee *v.* Moore, 90 Mo.

and satisfaction is also new matter;[1] and a discharge in bankruptcy or insolvency;[2] and a defence based upon a statutory

340; but see Unglish *v.* Marvin, 128 N. Y. 380; Harris *v.* Frank, 81 Cal. 280. *Tender*, Hegler *v.* Eddy, 53 Cal. 597.

[Hardy Implement Co. *v.* South Bend Iron Works (1895), 129 Mo. 222, 31 S. W. 599; Jasper County Ry. Co. *v.* Curtis (1900), 154 Mo. 10, 55 S. W. 222; Thompson *v.* Cohen (1894), 127 Mo. 215, 28 S. W. 984; Cockrill *v.* Hutchinson (1896), 135 Mo. 67, 36 S. W. 375; Sanders *v.* Chartrand (1900), 158 Mo. 352, 59 S. W. 95; Throckmorton *v.* Pence (1893), 121 Mo. 50, 25 S. W. 843; Cadematori *v.* Gauger (1901), 160 Mo. 352, 61 S. W. 195; Seibert *v.* Bloomfield (1901), Ky., 63 S. W. 584; Excelsior Coal Co. *v* Virginia Coal Co. (1902), Ky., 66 S. W. 373; Beardsley *v.* Clem (1902), 137 Cal. 328, 70 Pac. 175; Newhall *v.* Hatch (1901), 134 Cal. 269, 66 Pac. 266; Reynolds *v.* Pascoe (1901), 24 Utah, 219, 66 Pac. 1064; Rio Grande West. R. R. Co. *v.* Power Co. (1900), 23 Utah, 22, 63 Pac. 995; Poynter *v.* Chipman (1893), 8 Utah, 442, 32 Pac. 690; Bruce *v.* Phœnix Ins. Co. (1893), 24 Ore. 486, 34 Pac. 16; Bays *v.* Trulson (1893), 25 Ore. 109, 35 Pac. 26; Swank *v.* St. Paul City Ry. Co. (1895), 61 Minn. 423, 63 N. W. 1088; Stephenson *v.* Bankers' Life Ass'n (1899), 108 Ia. 637, 79 N. W. 459; Kahler *v.* Iowa, etc. Ins. Co. (1898), 106 Ia. 380, 76 N. W. 734; Spencer *v.* Papach (1897), 103 Ia. 513, 70 N. W. 748, 72 N. W. 665; Sherod *v.* Ewell (1897), 104 Ia. 253, 73 N. W. 493; Warder *v.* Cuthbert (1896), 99 Ia. 681, 68 N. W. 917; Golden *v.* Hardesty (1895), 93 Ia. 622, 61 N. W. 913; Hector Min. Co. *v.* Valley View Min. Co. (1901), 28 Colo. 315, 64 Pac. 205; Adams *v.* Adams (1903), — Ind. —, 66 N. E. 153; Taylor *v.* Patton (1903), — Ind. —, 66 N. E. 91; Dudley *v.* Pigg (1897), 149 Ind. 363, 48 N. E. 642; Frain *v.* Burgett (1898), 152 Ind. 55, 50 N. E. 873; Center School Tp. *v.* State *ex rel.* (1897), 150 Ind. 168, 49 N. E. 961; Kiefer *v.* Klinsick (1895), 144 Ind. 46, 42 N. E. 447; Union Bank *v.* Hutton (1903), — Neb. —, 95 N. W. 1061; Neb. Mortgage, etc. Co. *v.* Van Kloster (1894), 42 Neb. 746, 60 N. W. 1016; Cobbey *v.* Buchanan (1896), 48 Neb. 391, 67 N. W. 176; Blue Valley Lumber Co. *v.* Couro (1900), 61 Neb. 39, 84 N. W. 402; Burwell Irrig. Co. *v.* Lashmett (1900), 59 Neb. 605, 81 N. W. 617; Holmes *v.* Lincoln Salt Lake Co. (1899), 58 Neb. 74, 78 N. W. 379; Henderson *v.* Keutzer (1898), 56 Neb. 460, 76 N. W. 881; German Nat. Bank *v.* First Nat. Bank (1898), 55 Neb. 86, 75 N. W. 531; Boales *v.* Ferguson (1898), 55 Neb. 565, 76 N. W. 18; Gaylord *v.* Neb. Sav. Bank (1898), 54 Neb. 104, 74 N. W. 415; City Nat. Bank *v.* Thomas (1896), 46 Neb. 861, 65 N. W. 895; Scroggin *v.* Johnston (1895), 45 Neb. 714, 64 N. W. 236; Palmer Oil Co. *v.* Blodgett (1899), 60 Kan. 712, 57 Pac. 947; City of Chippewa Falls *v.* Hopkins (1901), 109 Wis. 611, 85 N. W. 553; Bank of Antigo *v.* Ryan (1899), 105 Wis. 37, 80 N. W. 440; Pratt *v.* Hawes (1903), 118 Wis. 603, 95 N. W. 965; Interstate Savings, etc. Ass'n *v.* Knapp (1898), 20 Wash. 225, 55 Pac. 48; Jacobs *v.* First Nat. Bank (1896), 15 Wash. 358, 46 Pac. 396; Moore *v.* Brownfield (1894), 10 Wash. 439, 39 Pac. 113; Schurtz *v.* Colvin (1896), 55 O. St. 274, 45 N. W. 527; Village of Chester *v.* Leonard (1897), 68 Conn. 495, 37 Atl. 397; Tuells *v.* Torras (1901), 113 Ga. 691, 39 S. E. 455.]

[1] Coles *v.* Soulsby, 21 Cal. 47, 50.

[In Carpenter *v.* Chicago, etc. Ry. Co. (1895), 7 S. D. 584, 64 N. W. 1120, the court said: "To establish a plea of accord and satisfaction under the statute, it must not only appear that there was an agreement to accept, in full settlement of an obligation, something different from or less than that to which one of the parties thereto is entitled, but it must be shown that such agreement has been fully executed, and the obligation extinguished by the creditor's actual acceptance of the consideration specified in the agreement constituting the accord." See also Hale *v.* Grogan (1896), 99 Ky. 170, 35 S. W. 282; Van Housen *v.* Broehl (1899), 59 Neb. 48, 80 N. W. 260; Long *v.* Scanlan (1898), 105 Ga. 424, 31 S. E. 436; Oil Well Supply Co. *v.* Wolfe (1894), 127 Mo. 616, 30 S. W. 145.]

[2] Cornell *v.* Dakin, 38 N. Y. 253, 256. See also Styles *v.* Fuller, 101 N. Y. 622.

provision prohibiting banks from paying out notes not received by them at par;[1] and a defence founded upon the plaintiff's failure to perform a contract collateral to the demand set up in the complaint, and upon which the liability of the defendant depended.[2]

[1] Codd *v.* Rathbone, 19 N. Y. 37.

[2] Blethen *v.* Blake, 44 Cal. 117; and the defence of irregularity on the part of the arbitrators in an action upon an award, Day *v.* Hammond, 57 N. Y. 479, 484.

[*Defences of New Matter.*

The following defences have been held to be new matter:

Act of God: Pengra *v.* Wheeler (1893), 24 Ore. 532, 34 Pac. 354; Chicago, R. I. & Pac. Ry. Co. *v.* Shaw (1901), 63 Neb. 380, 88 N. W. 508.

Alteration of instrument: Mozley *v.* Reagan (1899), 109 Ga. 182, 34 S. E. 310; Ninman *v.* Suhr (1895), 91 Wis. 392, 64 N. W. 1035; Maguire *v.* Eichmeier (1899), 109 Ia. 301, 80 N. W. 395; Wall *v.* Muster's Ex'rs (1901), Ky., 63 S. W. 432.

Assumption of risk: Nicholaus *v.* Chicago, etc. Ry. Co. (1894), 90 Ia. 85, 57 N. W. 694; Faulkner *v.* Mammoth Min. Co. (1901), 23 Utah, 437, 66 Pac. 799; Dorsett *v.* Clement-Ross Mfg. Co. (1902), 131 N. C. 254, 42 S. E. 612.

Bona fides: Maxwell *v.* Foster (1902), 64 S. C. 1, 41 S. E. 776.

Champerty: Disbrow *v.* Board of Supervisors (1903), 119 Ia. 538, 93 N. W. 585; Potter *v.* Ajax Min. Co. (1900), 22 Utah, 273, 61 Pac. 999; Croco *v.* Oregon Short Line Co. (1898), 18 Utah, 311, 54 Pac. 985.

Collateral security held by plaintiff: Flint *v.* Nelson (1894), 10 Utah, 261, 37 Pac. 479.

Compromise: Pullins' Adm'r *v.* Smith (1899), 106 Ky. 418, 50 S. W. 833.

Condition or exception in contract: Railway Officials, etc. Ass'n *v.* Drummond (1898), 56 Neb. 235, 76 N. W. 562; Farmers', etc. Ins. Co. *v.* Wiard (1899), 59 Neb. 451, 81 N. W. 312; Johnston *v.* Northwestern Live Stock Ins. Co. (1896), 94 Wis. 117, 68 N. W. 868; Farmers', etc. Ins. Co. *v.* Peterson (1896), 47 Neb. 747, 66 N. W. 847; Smith *v.* Continental Ins. Co. (1899), 108 Ia. 382, 79 N. W. 129; Latimer *v.* Woodmen (1901), 62 S. C. 145, 40 S. E. 155.

Consent and connivance in action for criminal conversation: Morning *v.* Long (1899), 109 Ia. 288, 80 N. W. 390.

Contract limiting liability: Register Printing Co. *v.* Willis (1894), 57 Minn. 93, 58 N. W. 825; Michalitschke Bros. *v.* Wells, Fargo & Co. (1897), 118 Cal. 683, 50 Pac. 847; Kansas City, etc. R. R. Co. *v.* Pace (1901), 69 Ark. 256, 63 S. W. 62.

Contributory negligence: Hughes *v.* Chicago & Alton R. R. Co. (1894), 127 Mo. 447, 30 S. W. 127; McFarland *v.* Mo. Pac. Ry. Co. (1894), 125 Mo. 253, 28 S. W. 590; Hill *v.* Meyer Bros. Drug Co. (1897), 140 Mo. 433, 41 S. W. 909; Louisville & Nashville R. R. Co. *v.* Copas (1894), 95 Ky. 460, 26 S. W. 179 (even where the petition negatives it); Hunter *v.* Grande Ronde Lumber Co. (1901), 39 Ore. 448, 65 Pac. 598; Martin *v.* Railway Co. (1897), 51 S. C. 150, 28 S. E. 303; Ford *v.* Chicago, etc. R. R. Co. (1898), 106 Ia. 85, 75 N. W. 650; Willis *v.* City of Perry (1894), 92 Ia. 297, 60 N. W. 727; Union Stock Yards Co. *v.* Conoyer (1893), 38 Neb. 488, 56 N. W. 1081; Ohlweiler *v.* Lohmann (1894), 88 Wis. 75, 59 N. W. 678; Holland *v.* Oregon Short Line R. R. Co. (1903), — Utah, —, 72 Pac. 940.

But where contributory negligence is negatived in the complaint the issue is raised by a general denial: Denver, etc. R. R. Co. *v.* Smock (1897), 23 Colo. 456, 48 Pac. 681; Long *v.* Railway Co. (1897), 50 S. C. 49, 27 S. E. 531. *Contra,* Louisville & Nashville R. R. Co. *v.* Copas (1894), 95 Ky. 460, 26 S. W. 179.

A general averment of contributory negligence is sufficient: Cogdell *v.* Wilmington, etc. R. R. Co. (1902), 130 N. C. 313, 41 S. E. 541; Chesapeake & Ohio Ry. Co. *v.* Smith (1897), 101 Ky. 104, 42 S. W. 538. But see Cogdell *v.* Wilmington &

§ 589. * 713. **Statute of Limitations.** Different rules prevail in the different States in respect to pleading the Statute of

W. R. R Co. (1903), 132 N. C. 852, 44 S. E. 618.

Corporation by-law: Angier *v.* Equitable Bldg. Ass'n (1899), 109 Ga. 625, 35 S. E. 64.

Custom: Eller *v.* Loomis (1898), 106 Ia. 276, 76 N. W. 686.

Damages sustained by defendant: Harrington *v.* Foley (1899), 108 Ia. 287, 79 N. W. 64.

Defect in registration of official bond: Warren *v.* Boyd (1897), 120 N. C. 56, 26 S. E. 700.

Double agency: Childs *v.* Ptomey (1895), 17 Mont. 502, 43 Pac. 714.

Facts suspending operation of statute: West *v.* Bishop (1900), 110 Ia. 410, 81 N. W. 696.

Failure to save insured goods: Davis *v.* Mutual Fire Ins. Co. (1895), 96 Ia. 70, 64 N. W. 687.

Fire set by insured: Corkery *v.* Security Ins. Co. (1896), 99 Ia. 382, 68 N. W. 792; Heidenreich *v.* Aetna Ins. Co. (1894), 26 Ore. 70, 37 Pac. 64.

Forfeiture: Power *v.* Sla (1900), 24 Mont. 243, 61 Pac. 468; Pickett *v.* Fidelity Co. (1901), 60 S. C. 477, 38 S. E. 160; Bishop *v.* Baisley (1895), 28 Ore. 119, 41 Pac. 937.

Injury by fellow servant: Laying *v.* Mt. Shasta Mineral Spring Co. (1901), 135 Cal. 141, 67 Pac. 48, citing numerous cases: Peters *v.* McKay (1902), 136 Cal. 73, 68 Pac. 478; Bowling Green Stone Co. *v.* Capshaw (1901), Ky., 64 S. W. 507. See also Chicago, B. & Q. R. R. Co. *v.* Oyster (1899), 58 Neb. 1, 78 N. W. 359. But in Missouri it is held that this defence may be shown under a general denial: Kaminski *v.* Tudor Iron Works (1902), 167 Mo. 462, 67 S. W. 221. So in Wilson *v.* Railway Co. (1897), 51 S. C. 79, 28 S. E. 91.

Laches: Gay *v.* Havermale (1902), 27 Wash. 390, 67 Pac. 804; Town of Fairplay *v.* Board of Comm'rs (1901), 29 Colo. 57, 67 Pac. 152; French *v.* Woodruff (1898), 25 Colo. 339, 54 Pac. 1015. It was held in Wagner *v.* Sanders (1901), 62 S. C. 73, 39 S. E. 950, that laches might be set up by the court without being pleaded by the defendant.

Liquidation: Kirkland *v.* Dryfus (1897), 103 Ga. 127, 29 S. E. 612.

Misnomer of defendant: Bird *v.* St. John's Episcopal Church (1899), 154 Ind. 138, 56 N. E. 129.

Non-incorporation: Brady *v.* Nat. Supply Co. (1901), 64 O. St. 267, 60 N. E. 218.

Privilege: Gilman *v.* McClatchy (1896), 111 Cal. 606, 44 Pac. 241.

Ratification of altered contract: Erickson *v.* First Nat. Bank (1895), 44 Neb. 622, 62 N. W. 1078.

Release: Rivers *v.* Blom (1901), 163 Mo. 442, 63 S. W. 812; Frank *v.* Cobban (1897), 20 Mont. 168, 50 Pac. 423; Hale *v.* Grogan (1896), 99 Ky. 170, 35 S. W. 282.

Rescission: Kennedy *v.* School Dist. (1898), 20 Wash. 399, 55 Pac. 567.

Security held by plaintiff in an action by creditor's bill: O'Brien *v.* Stambach (1897), 101 Ia. 40, 69 N. W. 1133.

Settlement: Hulbert *v.* New Nonpareil Co. (1900), 111 Ia. 490, 82 N. W. 928.

Statute of frauds: Hillhouse *v.* Jennings (1901), 60 S. C. 373, 38 S. E. 599; Abba *v.* Smyth (1899), 21 Utah, 109, 59 Pac. 756; Bean *v.* Lamprey (1901), 82 Minn. 320, 84 N. W. 1016; Iverson *v.* Cirkel (1894), 56 Minn. 299, 57 N. W. 800; Tynon *v.* Despain (1896), 22 Colo. 240, 43 Pac. 1039; Crane *v.* Powell (1893), 139 N. Y. 379, 34 N. E. 911; Matthews *v.* Matthews (1897), 154 N. Y. 288, 48 N. E. 531; Sanger *v.* French (1898), 157 N. Y. 213, 51 N. E. 979; St. Louis, etc. Ry. Co. *v.* Hall (1903), — Ark. —, 74 S. W. 293; Thomas *v.* Churchill (1896), 48 Neb. 266, 67 N. W. 182. Unless the defendant raises the defence of the statute of frauds by answer or demurrer, he waives it: Crane *v.* Powell (1893), 139 N. Y. 379, 34 N. E. 911; Tift *v.* Wight & Weslosky Co. (1901), 113 Ga. 681, 39 S. E. 503; Wiseman *v.* Thompson (1895), 94 Ia. 607, 63 N. W. 346.

Statutory bars: McCann *v.* Pennie (1893), 100 Cal. 547, 35 Pac. 158; Fischer *v.* Metropolitan Life Ins. Co. (1901), 167 N. Y. 178, 60 N. E. 431.

Subrogation: Hunter *v.* Hunter (1900), 58 S. C. 382, 36 S. E. 743.

Suicide: Latimer *v.* Woodmen (1901), 62 S. C. 145, 40 S. E. 155.

Ultra Vires: Lewis *v.* Clyde S. S. Co.

Limitations. In some, by reason of an express provision of their codes, the defence must always be specially set up in the answer, and can never be raised by demurrer, even though the averments of the complaint should show that the cause of action is barred.[1] In others it may always be taken advantage of by demurrer whenever the complaint or petition discloses a cause of action which appears to be barred by the statute.[2] The courts

(1903), — N. C. —, 44 S. E. 666; Ferst's Sons *v.* Bank of Waycross (1900), 111 Ga. 229, 36 S. E. 773; Hart *v.* Phenix Ins. Co. (1901), 113 Ga. 859, 39 S E. 304; Citizens State Bank *v.* Pence (1900), 59 Neb. 579, 81 N. W. 623; Lewis *v.* Clyde S. S. Co. (1902), 131 N. C. 652, 42 S. E. 969; United States Mortgage Co. *v.* McClure (1902), 42 Ore. 190, 70 Pac. 543.

Undue Influence: Kelly *v.* Perrault (1897), Idaho, 48 Pac. 45.

Unreasonableness of ordinance: Bluedorn *v.* Mo. Pac. Ry. Co. (1893), 121 Mo. 258, 25 S. W. 943.

Waiver: Rasmussen *v.* Levin (1901), 28 Colo. 448, 65 Pac. 94; Swearingen *v.* Lahner (1894), 93 Ia. 147, 61 N. W. 431; McCoy *v.* Iowa Ins. Co. (1898), 107 Ia. 80, 77 N. W. 529; Kahler *v.* Iowa, etc. Ins. Co. (1898), 106 Ia. 380, 76 N. W. 734.

Want of funds: Netzer *v.* Crookston City (1894), 59 Minn. 244, 61 N. W. 21; McNulty *v.* City of New York (1901), 168 N. Y. 117, 61 N. E. 111; Hollings *v.* Bankers' Union (1902), 63 S. C. 192, 41 S. E. 90.

Want of jurisdiction: Johnson *v.* Detrick (1899), 152 Mo. 243, 53 S. W. 891; Kahn *v.* Southern Bldg. Ass'n (1902), 115 Ga. 459, 41 S. E. 648; Kyd *v.* Exchange Bank (1898), 56 Neb. 557, 75 N. W. 524; Herbert *v.* Wortendyke (1896), 49 Neb. 182, 68 N. W. 350; Burlington Relief Dep't *v.* Moore (1897), 52 Neb. 719, 73 N. W. 15; Hurlburt *v.* Palmer (1894), 39 Neb. 158, 57 N. W. 1019; Anheuser-Busch Brewing Ass'n *v.* Peterson (1894), 41 Neb. 897, 60 N. W. 373; Eel River R. R. Co. *v.* State *ex rel.* (1895), 143 Ind. 231, 42 N. E. 617.

Objection to the jurisdiction may be raised by answer in connection with matters in bar: Herbert *v.* Wortendyke (1896), 49 Neb. 182, 68 N. W. 350; Baker *v.* Union Stock Yards Nat. Bank (1902), 63 Neb. 801, 89 N. W. 269; Lowe *v.* Riley (1898), 57 Neb. 252, 77 N. W. 758.

The sufficiency of the petition is not a test of jurisdiction: Dryden *v.* Parrotte (1901), 61 Neb. 339, 85 N. W. 287; Winningham *v.* Trueblood (1899), 149 Mo. 572, 51 S. W. 399.]

Work done by member of family in an action for work and labor: Schroeder *v.* Schroeder (1903), — Ia. —, 93 N. W. 78.

[1] [Satterlund *v.* Beal (1903), — N. D. —, 95 N. W. 518.]

[2] [Everett *v.* O'Leary (1903), — Minn. —, 95 N. W. 901; Green's Adm'r *v.* Irvine (1902), Ky., 66 S. W. 278; Motes *v.* Gila Valley, etc. Ry. Co. (1902), Ariz., 68 Pac. 532; Wagener *v.* Boyce (1898), Ariz., 52 Pac. 1122; Smith *v.* Martin (1901), 135 Cal. 247, 67 Pac. 779; Bliss *v.* Sneath (1898), 119 Cal. 526, 51 Pac. 848; Fullerton *v.* Bailey (1898), 17 Utah, 85, 53 Pac. 1020; Smith *v.* Day (1901), 39 Ore. 531, 65 Pac. 1055; Pass *v.* Pass (1896), 98 Ga. 791, 25 S. E. 752; Cowhick *v.* Shingle (1894), 5 Wyo. 87, 37 Pac. 689; Huckelbridge *v.* Atchison, etc. Ry. Co. (1903), — Kan. —, 71 Pac. 814; Lewis *v.* Duncan (1903), 66 Kan. 306, 71 Pac. 577; Best *v.* Zutavern (1898), 53 Neb. 604, 74 N. W. 64; Missouri Pac. Ry. Co. *v.* Hemingway (1902), 63 Neb. 610, 88 N. W. 673; Osborn *v.* Portsmouth Nat. Bank (1899), 61 O. St. 427, 56 N. E. 197.

But a general demurrer on the ground that no cause of action is stated will not raise the issue: Fullerton *v.* Bailey (1898), 17 Utah, 85, 53 Pac. 1020; Bliss *v.* Sneath (1898), 119 Cal. 526, 51 Pac. 848; Board *v.* First Presbyterian Church (1898), 19 Wash. 455, 53 Pac. 671; Joergenson *v.* Joergenson (1902), 28 Wash. 477, 68 Pac. 913. *Contra*, Cowhick *v.* Shingle (1894), 5 Wyo. 87, 37 Pac. 689; Eayrs *v.* Nason (1898), 54 Neb. 143, 74 N. W. 408.

In ruling upon a demurrer on the

of still other States occupy a middle ground between these extremes. If the provisions of the statute relied on are not absolute, but contain exceptions or provisos within which the case could possibly fall, and which might, therefore, prevent the bar of the statute from applying to the cause of action, the demurrer is never proper, because, although not so alleged, the case *might* come within the exception or proviso: the answer is then the only mode of presenting the defence. But if the particular provisions of the statute *are* absolute, and contain no such exceptions or provisos within which the case could possibly fall, a demurrer may be interposed when the objection appears upon the face of the plaintiff's pleading; but if it does not so appear, the defence must be set up by answer.

§ 590. * 714. **Same Subject.** In New York the rule is settled, and applied to all actions whether legal or equitable, that the effect of the Statute of Limitations as a defence can only be made available by an answer; that a demurrer can under no circumstances raise the issue;[1] and finally, that the defence is new matter.[2] In Indiana, if the provision of the statute invoked contains no exceptions or provisos, and it appears on the face of the complaint that the cause of action is barred, the defendant can demur; but when there are exceptions or provisos in the operative clause of the statute relied upon, the defence can only be set up by a special answer, and cannot be made

ground that the action is barred by the statute of limitations, the enquiry must be confined to the face of the complaint and the indorsement of the sheriff upon the summons cannot be considered: Smith *v.* Day (1901), 39 Ore. 531, 65 Pac. 1055.

Under the Wisconsin statutes, St., 1898, §§ 2649, 2651, a demurrer on this ground must specifically point out the particular section of the statute of limitations relied upon: Whereatt *v.* Worth (1900), 108 Wis. 291, 84 N. W. 441; Crowley *v.* Hicks (1898), 98 Wis. 566, 74 N. W. 348.]

[1] [To the same effect see King *v.* Powell (1900), 127 N. C. 10, 37 S. E. 62.]

[2] Sands *v.* St. John, 36 Barb. 628; Baldwin *v.* Martin, 14 Abb. Pr. N. S. 9. See also Dezengremel *v.* Dezengremel, 24 Hun, 457; Riley *v.* Corwin, 17 id. 597; Long *v.* Bank of Yanceyville, 81 N. C. 41; Hyde *v.* Lamberson, 1 Idaho, 536. In the following States, also, the defence cannot be taken by demurrer: in North Carolina, Guthrie *v.* Bacon, 107 N. C. 337; in Arkansas, St. Louis, I. M. & S. Ry. Co. *v.* Brown, 49 Ark. 253; in Iowa, State *v.* McIntire, 58 Iowa, 572; in Colorado, Hunt *v.* Hayt, 15 Pac. 410; Barnes *v.* Union Pac. Ry. Co. (C. C. A.), 54 Fed. Rep. 87. It may be taken by demurrer in Ohio, Seymour *v.* Pittsburg, C. & St. L. Ry. Co., 44 Ohio St. 12; Douglas *v.* Corry, 46 Ohio St. 349; in Missouri, Heffernan *v.* Howell, 90 Mo. 344; in Wisconsin, Tucker *v.* Lovejoy, 73 Wis. 66; in Minnesota, Humphrey *v.* Carpenter, 39 Minn. 115; in Oregon, Spaur *v.* McBee, 19 Ore. 76; Davis *v.* Davis, 20 Ore. 78; in Washington, Wilt *v.* Buchtel, 2 Wash. Ter. 417.

available under a general denial.[1] Even in those States where the statute may be taken advantage of by demurrer, as well as in all the others, it is, when set up by answer, new matter, and can never be proved under a denial, either general or special.[2]

[1] Perkins *v.* Rogers, 35 Ind. 124, 141, and cases cited; Hanna *v.* Jeffersonville, etc. R. Co., 32 Ind. 113; but see Matlock *v.* Todd, 25 Ind. 128, which seems to hold that a demurrer is never proper in *legal* actions, but may be used in equitable actions, according to the former practice in equity. See McCollister *v.* Willey, 52 Ind. 382; Cass Cy. Com'rs *v.* Adams, 76 Ind. 504; Devor *v.* Rerick, 87 Ind. 337; Cook *v.* Chambers, 107 Ind. 67; Shewalter *v.* Bergman, 123 Ind. 155; Medsker *v.* Pogue, 1 Ind. App. 197. All these cases support the rule stated in the text.

[Where, however, the complaint shows that the action is not within any of the exceptions, a demurrer will lie: Dorsey Mach. Co. *v.* McCaffrey (1894), 139 Ind. 545, 38 N. E. 208; Swatts *v.* Bowen (1894), 141 Ind. 322, 40 N. E. 1057. Kentucky follows the same rule: Brandenburg *v.* McGuire (1898), 105 Ky. 10, 44 S. W. 96; Spalding *v.* St. Joseph's School (1899), 107 Ky. 382, 54 S. W. 200.]

[2] McKinney *v.* McKinney, 8 Ohio St. 423; Backus *v.* Clark, 1 Kan. 303; Howell *v.* Howell, 15 Wis. 55, 59. This last case holds that the defendant may *demur*, although the Wisconsin code enacts that "the objection that the action was not commenced within the time limited can only be taken by *answer*." R. S. ch. 138, § 1. The court said that "answer" must be taken in its widest sense of any defensive pleading including a *demurrer*. But see the later case of Tarbox *v.* Supervisors, 34 Wis. 558, which expressly holds that the Statute of Limitations can *only* be taken advantage of by answer in Wisconsin. Hartson *v.* Hardin, 40 Cal. 264. The rule is settled in many States, that when it affirmatively appears on the face of the complaint or petition that the cause of action is barred by the statute, and only then, the defendant may demur; otherwise he must plead the defence specially, since it is never admissible under the general denial, except in the action to recover possession of land in certain States by virtue of express provisions of their codes. See *ante*, § *679; and as to the defence in actions for specific performance, see *ante*, § *681. It is so held in Ohio, Huston *v.* Craighead, 23 Ohio St. 198, 209, 210; in Minnesota, Davenport *v.* Short, 17 Minn. 24, the court saying that they would not extend the rule laid down in Kennedy *v.* Williams, 11 Minn. 314; McArdle *v.* McArdle, 12 Minn. 98; Eastman *v.* St. Anthony's Falls W. P. Co., 12 Minn. 137; Hoyt *v.* McNeil, 13 Minn. 390; in Kansas, Parker *v.* Berry, 12 Kan. 351; in California, Brennan *v.* Ford, 46 Cal. 7, 12; in Iowa, Robinson *v.* Allen, 37 Iowa, 27, 29; Shearer *v.* Mills, 35 Iowa, 499; Moulton *v.* Walsh, 30 Iowa, 361; Springer *v.* Clay Cy., 35 Iowa, 241; in Nebraska, Mills *v.* Rice, 3 Neb. 76, 87; in Missouri the defence can be proved under a general denial, when the action is for the recovery of land, Bledsoe *v.* Simms, 53 Mo. 305, 307; see *ante*, § *679; Fairbanks *v.* Long, 91 Mo. 628; Fulkerson *v.* Mitchell, 82 Mo. 13; Bird *v.* Sellers (Mo. Supr. 1893), 21 S. W. Rep. 91; so also in North Carolina, Falls of Neuse Man. Co. *v.* Brooks, 106 N. C. 107; but the defence must be specially pleaded in other cases, Orr *v.* Rode, 101 Mo. 387; Bell *v.* Clark, 30 Mo. App. 224; Belleville Sav. Bk. *v.* Winslow, 30 Fed. Rep. 488. See also Combs *v.* Watson, 32 Ohio St. 228; Dutcher *v.* Dutcher, 39 Wis. 651; Orton *v.* Noonan, 25 id. 672; Heath *v.* Heath, 31 id. 223; Barden *v.* Columbia Cy. Sup., 33 id. 445; Tarbox *v.* Adams Cy. Sup., 34 id. 558; Ward *v.* Waters, 63 Wis. 39.

[Hayes *v.* Lavagnino (1898), 17 Utah, 185, 53 Pac. 1029; Stoddard County *v.* Malone (1893), 115 Mo. 508, 22 S. W. 469; Hawkins *v.* Donnerberg (1901), 40 Ore. 97, 66 Pac. 691; Battery Park Bank *v.* Loughran (1898), 122 N. C. 668, 30 S. E. 17; Oevermann *v.* Loebertmann (1897), 68 Minn. 162, 70 N. W. 1084; Easton *v.* Somerville (1900), 111 Ia. 164, 82 N. W 475; Goring *v.* Fitzgerald (1898), 105 Ia.

When the Statute of Limitations of another State or country is relied upon as a defence, the answer must contain all the aver-

507, 75 N. W. 358; Jenks *v.* Lansing Lumber Co. (1896), 97 Ia. 342, 66 N. W. 231; Small *v.* Cohen (1897), 102 Ga. 248, 29 S. E. 430; Coney *v.* Horne (1894), 93 Ga. 723, 20 S. E. 213; Stringer *v.* Stringer (1894), 93 Ga. 320, 20 S. E. 242; Hanna *v.* Emerson (1895), 45 Neb. 708, 64 N. W. 229; Blair *v.* Brown (1897), 17 Wash. 570, 50 Pac. 483; Malloy *v.* Chicago & Northwestern R. R. Co. (1901), 109 Wis. 29, 85 N. W. 130; Wallber *v.* Williams (1903), — Wis. —, 93 N. W. 47.

A mere averment in the answer that the action did not accrue within the time limited by the statute of limitations is not sufficient: Dufrene *v.* Anderson (1903), — Neb. —, 93 N. W. 139; Pinkham *v.* Pinkham (1901), 61 Neb. 336, 85 N. W. 285; Scroggin *v.* Nat. Lumber Co. (1894), 41 Neb. 195, 59 N. W. 548; Jenks *v.* Lansing Lumber Co. (1896), 97 Ia. 342, 66 N. W. 231; Lassiter *v.* Roper (1894), 114 N. C. 17, 18 S. E. 946; Heyer *v.* Rivenbark (1901), 128 N. C. 270, 38 S. E. 875; Murray *v.* Barden (1903), 132 N. C. 136, 43 S. E. 600.

But objection to an insufficient plea may be waived: McDonald *v.* Bice (1901), 113 Ia. 44, 84 N. W. 985; Kinkead *v.* Holmes, etc. Co. (1901), 24 Wash. 216, 64 Pac. 157.

On the other hand, it is held in some States that such an averment, although a mere conclusion, is sufficient: Lilly *v.* Farmers' Nat. Bank (1900), Ky., 56 S. W. 722; Snow *v.* Rich (1900), 22 Utah, 123, 61 Pac. 336; Thomas *v.* Glendinning (1896), 13 Utah, 47, 44 Pac. 652; McConnell *v.* Spicker (1901), 15 S. D. 98, 87 N. W. 574; Searls *v.* Knapp (1894), 5 S. D. 325, 58 N. W. 807.

But see, however, Lloyd *v.* Rawl (1902), 63 S. C. 219, 41 S. E. 312, where the court said: "It has been held in this State that the statute of limitations may be proved under the general denial or it may be pleaded specifically." The rule was held to be that when the statute is relied upon merely as a defence, to bar plaintiff's recovery, it must be specially pleaded; but when it is relied upon to show title to real property in defendant, it may be shown under the general denial, as going to controvert plaintiff's allegation of title. See also Sutton *v.* Clark (1901), 59 S. C. 440, 38 S. E. 150.

The statute of limitations can be pleaded only as a defence, but cannot be used as the basis for affirmative relief: Johnson *v.* Wynne (1902), 64 Kan. 138, 67 Pac. 549; Corlett *v.* Ins. Co. (1899), 60 Kan. 134, 55 Pac. 844.

Where an answer pleads a twenty-year statute of limitations and a fifteen-year statute is in fact applicable, the answer will be held good as a plea of the fifteen-year statute: Waymire *v.* Waymire (1895), 144 Ind. 329, 43 N. E. 267.

"When any statute of limitations is pleaded as a defence, if the facts bring the case within any of the exceptions to the statute, they may be set up in the reply. This is the proper practice:" State *ex rel.* *v.* Parsons (1896), 147 Ind. 579, 47 N. E. 17.

Ordinarily a third party may not interpose the defence of the statute: Plummer, Perry & Co. *v.* Rohman (1900), 61 Neb. 61, 84 N. W. 600.

In Corbey *v.* Rogers (1898), 152 Ind. 169, 52 N. E. 748, it was held that in an action to foreclose a mortgage, defendant must aver facts showing that he has such an interest in the real estate as entitles him to plead the statute. See also Lincoln Mortgage & Trust Co. *v.* Parker (1902), 65 Kan. 819, 70 Pac. 892 (in case of demurrer).

The defence is waived if raised neither by answer nor demurrer: Scroggin *v.* Nat. Lumber Co. (1894), 41 Neb. 195, 59 N. W. 548; Dufrene *v.* Anderson (1903), — Neb. —, 93 N. W. 139; Hardwick *v.* Ickler (1897), 71 Minn. 25, 73 N. W. 519; Gilbert *v.* Hewetson (1900), 79 Minn. 326, 82 N. W. 655; Schmitt *v.* Hager (1903), 88 Minn. 413, 93 N. W. 110; *In re* Estate of McMurray (1899), 107 Ia. 648, 78 N. W. 691; Bell *v.* Rice (1897), 50 Neb. 547, 70 N. W. 25; Winters *v.* Means (1897), 50 Neb. 209, 69 N. W. 753; Hobson *v.* Cummins (1899), 57 Neb. 611, 78 N. W. 295; McCormick Harv. Mach. Co. *v.* Cummins (1899), 59 Neb. 330, 80 N. W. 1049.

The statute begins to run from the time that the debtor is subject to be sued

ments of fact necessary to bring the case within the provisions of such foreign enactment: nothing will be presumed in favor of the pleader.[1]

SECTION FIFTH.

THE UNION OF DEFENCES IN THE SAME ANSWER.

§ 591. * 715. **Introductory.** All the codes, with some slight difference in the language, but with none in the meaning and effect of the clause, provide that the defendant may set up in his answer as many defences and counter-claims and set-offs as he may have, whether they be such as have heretofore been denominated legal or equitable, or both.[2] When defences are thus united, they must each be separately stated, and refer to the causes of action they are intended to answer. I shall, in the present section, collect the practical rules which have been adopted by the courts in construing this provision, touching the mode of pleading different defences in one answer.

I. *How the Separate Defences should be stated.*

§ 592. * 716. **Each Defence must be Complete in itself.** The distinction between partial and full defences has already been pointed out. Assuming that the defences are not intended to be partial, each must of itself be a complete answer to the whole cause of action against which it is directed, as perfectly so as though it

or from the time that the creditor can, by his own act or of his own volition, become entitled to maintain an action: Winchester Turnpike Co. *v.* Wickliffe's Adm'r (1897), 100 Ky. 531, 38 S. W. 866; Osborne *v.* Lindstrom (1899), 9 N. D. 1, 81 N. W. 72.]

[1] Gillett *v.* Hill, 32 Iowa, 220. See, as to the degree of particularity required in pleading the statute, Piper *v.* Hoard, 107 N. Y. 67; Pemberton *v.* Simmons, 100 N. C. 316; Turner *v.* Shuffler, 108 N. C. 642; Walker *v.* Laney, 27 S. C. 150; Templeton *v.* Sharp (Ky., Nov., 1888), 9 S. W. Rep. 507; Thomas *v.* Chamberlain, 39 Ohio St. 112; Paine *v.* Comstock, 57 Wis. 159; Smith *v.* Dragert, 60 Wis. 139; Ruggles *v.* Fond du Lac Cy., 63 Wis. 205; Meade *v.* Gilfoyle, 64 Wis. 18; Minneapolis Harvester Works *v.* Smith (Neb. 1893), 53 N. W. 973 (statute of foreign State); Spanish Fork City *v.* Hopper (Utah, 1891), 26 Pac. Rep. 293; in California, Code of Civil Procedure, § 458.

[Valz *v.* First Nat. Bank (1895), 96 Ky. 543, 29 S. W. 329; Richardson *v.* Mackay (1896), 4 Okla. 328, 46 Pac. 546. These cases hold that the foreign statute must be pleaded. In the absence of pleading and proof the foreign statute will be presumed the same as the domestic statute: Mowry *v.* McQueen (1900), 80 Minn. 385, 83 N. W. 348.]

[2] [Held in Mengert *v.* Brinkerhoff (1903), — O. St. —, 66 N. E. 530, that a defendant *must* plead all his defences, or they are waived.]

were pleaded alone. It is not necessary that each defence should answer the entire complaint when that contains two or more distinct causes of action, because these causes of action may depend upon separate circumstances, and demand separate answers. If a defence, however, is addressed to the whole complaint, as such, it must completely controvert the whole.[1] The rule, as stated in its general form, is, that each defence must be sufficient in itself, in its material allegations or its denials, to constitute an answer to the cause or causes of action against which it is directed, and thus to defeat a recovery thereon.[2] This proposition refers to the substance of the defence. In reference to the form and manner of stating this substance, it must, either by actual statement in full, or by a proper reference to and adoption of matter in another defence found in the same answer, contain averments of all the material facts or denials which together make up the defence. Each must in its composition be complete, sufficient, and full; it must stand upon its own allegations: it cannot be aided, nor its imperfect and partial statements helped out, by matter found in another defence, unless such matter is expressly referred to, and in an express manner adopted or borrowed from that other, and made a part of itself. The reference, however, to the former defence, and the adoption of its matter, if permitted at all, must be express; for otherwise the allegations of one cannot be treated as incorporated in or helping out those of another. This rule is well settled by the authorities, although often disregarded in practice.[3] If the defence is professedly a partial one,

[1] [Walker *v.* Walker (1897), 150 Ind. 317, 50 N. E. 68.]

[2] [The code requirement that each defence must be distinctly stated in a separate paragraph is substantial as well as formal: Taylor *v.* Purcell (1894), 60 Ark. 606, 31 S. W. 567.]

[3] Baldwin *v.* U. S. Tel. Co., 54 Barb. 505, 517: "By the well-settled rules of pleading, each answer [defence] must of itself be a complete answer to the whole complaint, as perfectly so as if it stood alone. Unless it, in terms, adopts or refers to the matter contained in some other answer, it must be tested as a pleading alone by the matter itself contains." Nat. Bk. of Mich. *v.* Green, 33 Iowa, 140, 144: "When the answer contains separate defences, each defence must be sufficient in itself: it cannot be aided by matter in another defence. If not thus complete and sufficient, it is demurrable." Defences should be separately stated and numbered: but a failure to comply with this rule can only be taken advantage of by a motion to correct; if such motion is not made, the objection is waived. Truitt *v.* Baird, 12 Kan. 420, 423. Each defence must be complete in itself, and cannot be aided by reference to the allegations in another, Potter *v.* Earnest, 45 Ind. 416; Mason *v.* Weston, 29 Ind. 561; Day *v.* Vallette, 25 Ind. 42; Leabo *v.* Detrick, 18 Ind. 414; Nat. Bk. of Mich. *v.* Green, 33 Iowa, 140; Knarr *v.* Conaway, 42 Ind. 260, 264. See also, as

the foregoing rule applies only so far as respects the manner and form of stating the facts. In a partial as well as in a full defence, the averments cannot be aided by matter found in another defence, unless the same is expressly referred to and adopted.[1] It should be observed also, that in the case of answers containing several defences, as well as of complaints containing several causes of action, certain allegations may be introductory, not forming a portion of either defence in particular, but belonging alike to all, so that they should be once made at the commencement of the answer before any one of the separate defences is stated.[2]

§ 593. * 717. **Suggested Method of Pleading Specific Denials. Common-Law Theory.** In this connection I shall offer a few suggestions in reference to the proper mode of pleading specific denials; a mode which is perhaps not in terms prescribed by the codes, but which is, I think, plainly included within the spirit of the statutory requirements, and which, if universally adopted, would do much to perfect the practical workings of the theory which lies at the foundation of the reformed procedure. The

to completeness of each defence, Frazer *v.* Frazer, 70 Ind. 411; Lash *v.* Rendell, 72 Ind. 475; and additional cases cited, *ante*, under § * 608; as to effect of a defence pleaded to one of two separate causes of action, see Musser *v.* Crum, 48 Iowa, 52.

[But several breaches of warranty by the insured do not constitute separate defences, and should all be pleaded as a single defence: Hennessy *v.* Metropolitan Life Ins. Co. (1902), 74 Conn. 699, 52 Atl. 490. The same is true where the defence consists of a series of acts which together constitute one transaction: Hovland *v.* Burrows (1893), 38 Neb. 119, 56 N. W. 800.]

[1] [Jackson *v.* School District (1900), 110 Ia. 313, 81 N. W. 596; Douglass *v.* Ins. Co. (1893), 138 N. Y. 209, 33 N. E. 938; Simonds *v.* East Windsor Elec. Ry. Co. (1900), 73 Conn. 513, 48 Atl. 210; Weston *v.* Estey (1896), 22 Colo. 334, 45 Pac. 367; Harman *v.* Harman (1899), 54 S. C. 100, 31 S. E. 881, quoting the text; Gilreath *v.* Furman (1900), 57 S. C. 289, 35 S. E. 516; Hindman *v.* Edgar (1888), 24 Ore. 581, 17 Pac. 862; Pate *v.* Allison (1901), 114 Ga. 651, 40 S. E. 715 (holding that words of reference are ineffectual).

Statements made in one defence in a verified pleading cannot be used as evidence against the party upon issues tendered by other defences: McDonald *v.* Southern Cal. R. R. Co. (1894), 101 Cal. 206, 35 Pac. 643. But see Hopkins *v.* Dipert (1902), 11 Okl. 630, 69 Pac. 883, where the court said: "When a general denial is sufficient to entitle a party to make a complete defence to an action, it is not good practice to attempt to set up a state of facts on defence by way of a second count, which can be proved under the general denial; and unless such second defence does contain averments of facts which cannot be proven under the general denial, and which amount to a defence, it does not state facts sufficient to constitute a defence to the action, and a demurrer thereto should be sustained." Where separate defences are not separately stated the remedy is by motion: Seaton *v.* Grimm (1899), 110 Ia. 145, 81 N. W. 225. And an insufficient separate defence may be stricken out on motion: Harman *v.* Harman (1899), 54 S. C. 100, 31 S. E. 881.]

[2] [Gardner *v.* McWilliams (1902), 42 Ore. 14, 69 Pac. 915.]

advocates of the common-law pleading have never ceased to urge that it served to bring out and present to the jury for their decision a *single issue*, — the affirmation and negation of a single fact, the verdict upon which determined the entire controversy. This *theory* is certainly very beautiful. We know, however, that in practice the results were far different. Instead of this single issue, in the actions of assumpsit, of debt on simple contract, and of trover, the general issue had come to be almost the only answer used, and under it nearly every possible defence was admissible. This evil produced the reform of 1834 in England. That reform consisted in limiting the effect of the general issue in respect of the defences which could be admitted under it. All matters in confession and avoidance were required to be specially pleaded; and many of the matters stated in the declaration, which went to make up the cause of action, were required to be specifically denied by a separate traverse to each. To illustrate: In the action of assumpsit, if the contract sued on was express, the general issue of *non-assumpsit* only denied the making of the contract, the promise; if it was implied, the same general issue only denied the existence of the facts from which the promise would by law be inferred. If the defendant desired to deny the alleged breach, he was obliged to do so by a separate specific denial, or "special traverse" as it was called. In this manner the issues were made and kept single; at least, if there were several issues formed by the various traverses and pleas comprised in the same answer, each was single, — the affirmation and negation of one material, issuable fact. Each "special traverse" was a distinct plea by itself, and denied some averment in the declaration which was necessary to the maintenance of the action, so that, if the defendant was successful on any one traverse, he defeated the entire recovery in respect to that cause of action. This great reform undoubtedly restored the common-law system of pleading somewhat to its original theory.

§ 594. *718. **Objections to the Code Answered.** While a similar condition of affairs was existing in this country, the Reformed American Procedure was introduced with its radical changes, its complete departure from the ancient notions. Enemies of the system, both on the bench and at the bar, have constantly reiterated the objection that it made no provision for the development through the means of pleading, ~~and for the presentation to juries,~~

of single and separate issues of fact. No objection could be more grossly unfounded. The common-law methods, as wrought out by the courts, had certainly and notoriously failed to produce that desired result; and these objectors, when they assailed the code and compared it with the former system, obstinately shut their eyes to what that system *actually did* in its every-day working, and only repeated what the theorists asserted that it *ought to do*. If the spirit and design of the code, as clearly shown through all of its important clauses and sections, were accepted and carried out by the courts and the profession, and if its plain requirements were obeyed to the full extent of their meaning, the very same beneficial results attained in England by the legislation and judicial action of 1834 would be accomplished wherever the new procedure has been established.

§ 595. * 719. **Same Subject.** It seems to me to be the evident purpose of the codes that all issues of fact should be separated and made single; and that, if such a practice has not yet been generally attained, it is because the rules prescribed by the statute have been violated or ignored; in short, the fault cannot be charged to the system itself. The codes expressly prescribe that each defence must be separate and distinct, and must be so pleaded. In respect to defences of new matter, this requirement is as precise and exacting as any rule of the common law.[1] It is the duty of courts to insist upon a compliance with this statutory regulation, if juries are to be at all aided in their labors by the issues as presented upon the records. To combine a defence of accord and satisfaction, for example, with one of payment, is as marked a violation of the new procedure as of the common-law theory. Is there any different principle or rule in reference to defences of denial? I answer, No. No such difference can be pointed out in the statute itself; and this fact alone is sufficient to show the correctness of the answer. But the proof of its correctness is positive. The code permits a general denial which controverts all the material allegations of the complaint or petition, and thus presents a broad issue, but still an issue which

[1] See Rose *v.* Hurley, 39 Ind. 77, 81. In an action upon a note given for the price of an article sold by the plaintiff to the defendant, one defence of the answer contained mingled allegations of a warranty given on the sale, which had been broken, and of fraudulent representations in respect to the article made by the seller. This defence was overruled on demurrer. The opinion of Downey J. is valuable and instructive.

is not incumbered with any matter by way of confession and avoidance. The code also permits specific denials; that is, a separate denial of some material allegation of the complaint or petition. *These specific denials are identical in design and effect with the special traverses provided for by the English rules of* 1834. Each specific denial should be an entire defence by itself, and should be so pleaded, because it should be the denial of some single, material, issuable matter averred in the complaint necessary to the existence of the cause of action, so that, if sustained, it would entirely defeat a recovery on that cause of action. As the code requires each defence to be separately stated, it follows that a specific denial should always constitute by itself a distinct and complete defence, and should be pleaded in such form, as much so as any defence of new matter. If the true design and intent of the code in this respect were fully carried out, two or more specific denials could never be combined in one and the same defence. The answer might contain several such denials, but each would be stated as one entire, independent defence, distinct from all the others, and thus presenting one issue of fact, arising from the averment of the complaint or petition and its traverse.[1]

§ 596. *720. **Same Subject.** If the mode of pleading thus described should be generally adopted, — and it seems to be in strict accordance with both the design and the requirements of the codes, — the immediate result would be the forming of single issues on the record for the consideration of the jury, depending upon one affirmation and one negation, far more perfectly in the actual practice than was accomplished while the ancient procedure remained in existence. The confused method of pleading which has undoubtedly become too common, the failure to distinguish and extract the material issues from the overlying mass of useless details which frequently incumbers the record, is, therefore, no fault of the codes; it is rather in direct opposition to their intent and their express enactments; and it has done far more than all other causes to diminish their usefulness, and to hinder the complete reform which they were designed

[1] [See, however, Greenthal *v.* Lincoln, Seyms & Co. (1896), 67 Conn. 372, 35 Atl. 266, where Baldwin J., delivering the opinion of the court, says: "The Practice Act distinctly abandoned the professed aim of the common law to bring every legal controversy to an issue upon some single, certain, and material point."]

to consummate. To whatever agency this partial failure is to be attributed, one thing is certain, — that the courts have ample power to remedy it, and to accomplish all the beneficial objects of the new procedure which were looked for by its authors.

II. *What Kinds of Defences may be joined in one Answer; those in Abatement, and those in Bar.*

§ 597. * 721. **Defences in Abatement and in Bar may be joined in one Answer.** It is now settled, in direct opposition to the common-law rule, that defences which seek only to abate the particular action in which they are pleaded may be united with those which seek to bar all recovery upon the cause of action.[1] Being joined in the same answer, they are to be tried and determined together at the one trial. The only possible difficulty in the practical operation of this rule arises from the different effects of a judgment in favor of the defendant, rendered upon one or the other of these classes of defences. As such a decision upon the former class does not destroy the plaintiff's right of action, nor prevent him from properly commencing and maintaining another suit for the same cause, while a similar decision upon the latter class does produce that final effect upon the right, and as by a general verdict given for the defendant upon *all* the issues contained in the record, and a judgment entered thereon, it might be difficult, and perhaps impossible, to determine which of these results should follow from the judgment thus pronounced, it is plain that, at the trial of an action in which the answer unites the two kinds of defence, the judge should carefully distinguish the issues arising from them, and should submit them separately to the jury, and direct a separate and special verdict upon each. By pursuing this course, the record would show exactly the nature of the decision, and of the judgment entered thereon. This mode of procedure has been sanctioned by the highest courts.[2]

[1] [Where facts are set up which go to show a misjoinder but which also go to the merits, the answer will not be held to raise the objection of misjoinder: Leavitt *v.* S. D. Mercer Co. (1902), 64 Neb. 31, 89 N. W. 426.]

[2] Sweet *v.* Tuttle, 14 N. Y. 465, 468; Gardner *v.* Clark, 21 N. Y. 399; Mayhew *v.* Robinson, 10 How. Pr. 162; Bridge *v.* Payson, 5 Sandf. 210; Freeman *v.* Carpenter, 17 Wis. 126; Thompson *v.* Greenwood, 28 Ind. 327; Bond *v.* Wagner, 28 Ind. 462; Page *v.* Mitchell, 37 Minn. 368. But see, *per contra*, Hopwood *v.* Patterson, 2 Ore. 49; Fordyce *v.* Hathorn, 57 Mo. 120; Cannon *v.* McManus, 17 Mo. 345; Rippstein *v.* St. Louis Mut. L. Ins. Co., 57 Mo. 86, which retain the

§ 598. * 722. **Inconsistent Defences.** Three different questions are presented under this head: (1) Can inconsistent defences be united in the same answer? (2) When are particular defences inconsistent? (3) If a denial and a defence by way of confession and avoidance are joined, do the admissions of the latter overcome the denials of the former, so that the plaintiff is relieved from the necessity of proving the allegations denied? Although these questions are clearly distinct, yet the two former have often if not generally been confounded in the same decisions, so that it will be difficult to keep them entirely separate in the discussion without much repetition. [Assuming that the defences are utterly inconsistent, the rule is probably established by the weight of judicial authority, that, unless expressly prohibited by the statute, they may still be united in one answer.[1]] It fol-

common-law rule, and hold that a defence in abatement is waived by pleading matter in bar. The rule in Missouri is now settled in accordance with the general doctrine stated in the text; Little *v.* Harrington, 71 Mo. 390; Byler *v.* Jones, 79 Mo. 261; Young Men's Chr. Ass'n *v.* Dubach, 82 Mo. 475; Cohn *v.* Lehman, 93 Mo. 574; Christian *v.* Williams (Mo. Supr. 1892), 20 S. W. Rep. 96; McIntire *v.* Calhoun, 27 Mo. App. 513. In Gardner *v.* Clark, *supra*, Selden J. said (p. 401): "The only serious inconvenience suggested as likely to result from this construction of the code is, that when an answer embraces both a defence in abatement and one in bar, if the jury find a general verdict, it will be impossible to determine whether the judgment rendered upon the verdict should operate as a bar to another suit for the same cause of action or not. It would, however, be the duty of the judge at the circuit, in such a case, to distinguish between the several defences in submitting the cause to the jury, and to require them to find separately upon these. In that way, it is probable that the confusion which might otherwise result may, in most cases, be avoided. At all events, the code admits, I think, of no other construction." See also Dutcher *v.* Dutcher, 39 Wis. 651; Hooker *v.* Green, 50 id. 271. In Indiana, by Rev. St. 1881, § 365, an answer in abatement must precede, and cannot be pleaded with, an answer in bar.

[Garretson *v.* Ferrall (1894), 92 Ia. 728, 61 N. W. 251; Union Guaranty Co. *v.* Craddock (1894), 59 Ark. 593, 28 S. W. 424; Trigg *v.* Ray (1897), 64 Ark. 150, 41 S. W. 55. *Contra*, Carmien *v.* Cornell (1897), 148 Ind. 83, 47 N. E. 216. A plea to the jurisdiction may be coupled with a plea to the merits: Johnson *v.* Detrick (1899), 152 Mo. 243, 53 S. W. 891.

It is held in some States that a defendant may plead and demur at the same time to the same cause of action: Arizona, Rev. St. 1901, § 1350; Lamb *v.* Ward (1894), 114 N. C. 255, 19 S. E. 230; Stahn *v.* Catawba Mills (1898), 53 S. C. 519, 31 S. E. 498. But see Fidelity & Deposit Co. *v.* Parkinson (1903), — Neb. —, 94 N. W. 120, holding that a demurrer is not a proper part of an answer, and should be disregarded.]

[1] [Inconsistent defences were allowed in the following cases: Burns *v.* Chicago, etc. Ry. Co. (1900), 110 Ia. 385, 81 N. W. 794; Thorson *v.* Baker (1898), 107 Ia. 49, 77 N. W. 510; Warshawky *v.* Anchor Ins. Co. (1896), 98 Ia. 221, 67 N. W. 237; Kerslake *v.* McInnis (1902), 113 Wis. 659, 89 N. W. 895; South Milwaukee Boulevard Co. *v.* Harte (1897), 95 Wis. 592, 70 N. W. 821; Societa Italiana *v.* Sulzer (1893), 138 N. Y. 468, 34 N. E. 193; Lawrence *v.* Peck (1893), 3 S. D. 645, 54 N. W. 808; Green *v.* Hughitt School Tp. (1894), 5 S. D. 452, 59 N. W. 224; Pike *v.* Sutton (1895), 21 Colo. 84, 39 Pac.

lows that the defendant cannot be compelled to elect between such defences, nor can evidence in favor of either be excluded at the trial on the ground of the inconsistency.[1] [But a different rule prevails in some States.[2]]

1084; Carlile *v.* The People (1899), 27 Colo. 116, 59 Pac. 48; Hill *v.* Groesbeck (1901), 29 Colo. 161, 67 Pac. 167; Millan *v.* Railway Co. (1899), 54 S. C. 485, 32 S. E. 539; Threadgill *v.* Commissioners (1895), 116 N. C. 616, 21 S. E. 425; McLamb *v.* McPhail (1900), 126 N. C. 218, 35 S. E. 426; Upton *v.* Railroad Co. (1901), 128 N. C. 173, 38 S. E. 736 (but see Fayetteville Waterworks Co. *v.* Tillinghast (1896), 119 N. C. 343, 25 S. E. 960); Miles *v.* Woodward (1896), 115 Cal. 308, 46 Pac. 1076; Banta *v.* Siller (1898), 121 Cal. 414, 53 Pac. 935 (no difference between verified and unverified pleadings in this respect).

In Montana, in the case of Arnold *v.* Passavant (1897), 19 Mont. 575, 49 Pac. 400, the court seemed to indicate a willingness to allow inconsistent defences when no prejudice would result, but it was only by way of *dictum*.

In De Lissa *v.* Coal Co. (1898), 59 Kan. 319, 52 Pac. 886, the court said: "We are aware that in actual practice objections are often made and sustained to defences in answers upon the ground that they are inconsistent with each other. The question of the validity of such objections has seldom been presented to this court, and no attempt has ever been made to declare a general rule upon the subject. Only the special facts of the cases presented have been passed upon. However, considering the numerical weight of the authorities, it would seem that the objection to defences in an answer upon the ground of their inconsistency with each other could never be sustained." The court then quotes the text in support of this proposition, and avoids the necessity of committing itself by holding that in the case at bar the defences pleaded were not inconsistent. But see *dictum* of Johnson J., in Kansas Nat. Bank *v.* Quinton (1897), 57 Kan. 750, 48 Pac. 20, suggesting the other rule.]

[1] Springer *v.* Dwyer, 50 N. Y. 19; Buhne *v.* Corbett, 43 Cal. 264, which holds directly that a defendant may plead as many defences as he pleases. Each must be consistent with itself, but need not be consistent with the others; and there is no distinction in this respect between verified and unverified answers. Bell *v.* Brown, 22 Cal. 671; Willson *v.* Cleaveland, 30 Cal. 192; Mott *v.* Burnett, 2 E. D. Smith, 50, 52; Hollenbeck *v.* Clow, 9 How. Pr. 289; Butler *v.* Wentworth, 9 How. Pr. 282, 17 Barb. 649; Smith *v.* Wells, 20 How. Pr. 158, 167; Vail *v.* Jones, 31 Ind. 467; Crawford *v.* Adams, Stanton's Code (Ky.), 91; Weston *v.* Lumley, 33 Ind. 486, 488. See also People *v.* Lothrop, 3 Call, 428, 450; Moore *v.* Willamette Co., 7 Ore. 355; Barr *v.* Hack, 46 Iowa, 308; Wright *v.* Bacheller, 16 Kan. 259; Brace *v.* Burr, 67 N. Y. 237, 240; Amador Cy. *v.* Butterfield, 51 Cal. 526; Billings *v.* Drew, 52 id. 565; Citizens' Bank *v.* Closson, 29 Ohio St. 78; Pavey *v.* Pavey, 30 id. 300 (defendant may be compelled to elect); Stebbins *v.* Lardner (S. Dak. 1891), 48 N. W. Rep. 847; Hummel *v.* Moore (Colo.), 25 Fed. Rep. 380; Reed *v.* Reed, 93 N. C. 462.

[2] Derby *v.* Gallup, 5 Minn. 119, 120, an action for taking and carrying away goods. The answer contained two defences: 1. A general denial. 2. Admitted the taking, and justified it under process. The opinion of Atwater J. is very able, and difficult to be answered on principle. See also Cook *v.* Finch, 19 Minn. 407, 411; Conway *v.* Wharton, 13 Minn. 158, 160; Adams *v.* Trigg, 37 Mo. 141: "A party cannot interpose a denial, and then avail himself of a confession and avoidance;" Atteberry *v.* Powell, 29 Mo. 429, a general denial and justification in slander held inconsistent; Fugate *v.* Pierce, 49 Mo. 441, 449; but compare Nelson *v.* Brodhack, 44 Mo. 596, which holds that denials and defences of confession and avoidance are not necessarily inconsistent; Auld *v.* Butcher, 2 Kan. 135; and see Baird *v.* Morford, 29 Iowa, 531, 534, 535. School District *v.* Holmes, 16 Neb.

§ 599. *723. **Same Subject.** In many instances the courts have simply declared that the particular defences united in

486, a general denial and a defence of part payment, held inconsistent. The following New York cases, mostly at Special Term, which hold that inconsistent defences cannot be permitted, have been expressly overruled by the more recent ones in the same State cited above in the preceding note. Roe *v.* Rogers, 8 How. Pr. 356; Schneider *v.* Schultz, 4 Sandf. 664; Arnold *v.* Dimon, 4 Sandf. 680. See also McIntire *v.* Wiegand, 24 Abb. N. Cas. 312 (denial of the making of the contract sued on, and defence that it was procured by plaintiff's fraud, inconsistent, and the denial should be stricken out); Marx *v.* Gross, 58 N. Y. Super. Ct. 221 (same).

[The following cases have held that inconsistent defences cannot be united in the same answer: Hatch *v.* Thompson (1895), 67 Conn. 74, 34 Atl. 770; Fernside *v.* Rood (1900), 73 Conn. 83, 46 Atl. 275; Hollingsworth *v.* Warnock (1901), 112 Ky. 96, 65 S. W. 163; Lane *v.* Bryant (1896), 100 Ky. 138, 37 S. W. 584; Murphy *v.* Russell (1901), Idaho, 67 Pac. 421 (when they are mutually contradictory); Steenerson *v.* Waterbury (1893), 52 Minn. 211, 53 N. W. 1146; Blodgett *v.* McMurty (1894), 39 Neb. 210, 57 N. W. 985; Home Fire Ins. Co. *v.* Decker (1898), 55 Neb. 346, 75 N. W. 841; Columbia Nat. Bank *v.* German Nat. Bank (1898), 56 Neb. 803, 77 N. W. 346; Oakes *v.* Ziemer (1900), 61 Neb. 6, 84 N. W. 409; Lamberton *v.* Shannon (1896), 13 Wash. 404, 43 Pac. 336; Allen *v.* Olympia Light & Power Co. (1895), 13 Wash. 307, 43 Pac. 55; Seattle Nat. Bank *v.* Carter (1895), 13 Wash. 281, 43 Pac. 331; Davis *v.* Ford (1896), 15 Wash. 107, 45 Pac. 739; Lord *v.* Horr (1902), 30 Wash. 477, 71 Pac. 23; Phœnix Ins. Co. *v.* Carnahan (1900), 63 O. St. 258, 58 N. E. 805 (the test being whether all can be verified by oath without swearing falsely); Dwelling House Ins. Co. *v.* Brewster (1895), 43 Neb. 528, 61 N. W. 746; State *ex inf. v.* Firemen's Fund Ins. Co. (1899), 152 Mo. 1, 52 S. W. 595.

Oregon follows the same rule, and holds that where denials and affirmative defences, inconsistent with each other, are united in the same answer, the direct admissions contained in the affirmative defences will be taken as true: Baines *v.* Coos Bay Nav. Co. (1902), 41 Ore. 135, 68 Pac. 397; Randall *v.* Simmons (1902), 40 Ore. 554, 67 Pac. 513; Veasey *v.* Humphreys (1895), 27 Ore. 515, 41 Pac. 8; Maxwell *v.* Bolles (1895), 28 Ore. 1, 41 Pac. 661. In Veasey *v.* Humphreys (*supra*), the court made the following suggestion as to pleading denials and affirmative defences: "It often happens that new matter directly alleged would be inconsistent with an absolute traverse, so that both could not be verified, and, in such case, if the pleader desires to avail himself of both defences, that is, to put the opposing party to the proof of his plea, and at the same time save to himself an affirmative defence, it is essential that the allegations of new matter should be qualified, or else should be preceded by a qualified traverse. These observations apply to such defences as are only apparently inconsistent, but when clearly so it is doubtful whether they can be pleaded in the same answer." The qualification of the new matter should be as found in the old precedents. "Thus, as found in Chitty, the contract to be avoided should be alluded to as 'the said supposed contract,' etc."

The test of inconsistency is whether proof of one defence would tend to disprove another: Robinson *v.* Hill (1902), Ky., 66 S. W. 623; Smith *v.* Doherty (1901), 109 Ky. 616, 60 S. W. 380; Cate *v.* Hutchinson (1899), 58 Neb. 232, 78 N. W. 500; People's Nat. Bank *v.* Geisthardt (1898), 55 Neb. 232, 75 N. W. 582; Murphy *v.* Russell (1901), Idaho, 67 Pac. 421.

A motion requiring defendant to elect upon which defence he will go to trial, is the proper method of objecting to inconsistent defences: Lane *v.* Bryant (1896), 100 Ky. 138, 37 S. W. 584; Hollingsworth *v.* Warnock (1901), — Ky. —, 65 S. W. 163; Dunn *v.* Bozarth (1899), 59 Neb. 244, 80 N. W. 811; Davis *v.* Ford (1896), 15 Wash. 107, 45 Pac. 739 (motion to strike out); De Lissa *v.* Coal Co. (1898), 59

the answers before them were not in fact inconsistent, and have not passed upon the question in its general form. In many of these cases, however, the defences were apparently as inconsistent as those which have been rejected by other courts in the decisions last quoted. I have placed in the foot-note a number of examples, and have indicated the nature of the defences thus suffered to be united.[1]

Kan. 319, 52 Pac. 886; McCormick Harv. Mach. Co. *v.* Hiatt (1903), — Neb. —, 95 N. W. 627.

If no motion is made the objection will be deemed waived: Dunn *v.* Bogarth (1899), 59 Neb. 244, 80 N. W. 811. Such a motion comes too late after filing a reply: Vernon *v.* Union Life Ins. Co. (1899), 58 Neb. 494, 78 N. W. 929. "Where inconsistent defences are pleaded, and one is eliminated by an instruction, plaintiff cannot complain:" Green *v.* Tierney (1901), 62 Neb. 561, 87 N. W. 331.]

[1] Nelson *v.* Brodhack, 44 Mo. 596, action of ejectment, general denial, and Statute of Limitations; holds that general denial and confession and avoidance are not necessarily inconsistent, and overrules Bauer *v.* Wagner, 39 Mo. 385; and see McAdow *v.* Ross, 53 Mo. 199, 202; Cavitt *v.* Tharp, 30 Mo. App. 131, action on a note, denial of plaintiff's ownership, and payment; Schuchman *v.* Heath, 38 Mo. App. 280, action on a note, denial of execution, and Statute of Limitations; Kelly *v.* Bernheimer, 3 N. Y. Sup. Ct. 140, the court will not compel an election between defences "unless they are so far inconsistent that both cannot properly coexist in the same transaction;" Kellogg *v.* Baker, 15 Abb. Pr. 286, a general denial, Statute of Limitations, and release, are not inconsistent; Lansing *v.* Parker, 9 How. Pr. 288, in assault and battery, a general denial, self-defence, and defence of possession of land, are not inconsistent; Ostrom *v.* Bixby, 9 How. Pr. 57, denial and Statute of Limitations; Ormsby *v.* Douglas, 5 Duer, 665, slander, denial, and justification; Hackley *v.* Ogmun, 10 How. Pr. 44, action to recover possession of chattels, general denial, and a justification of the taking; Booth *v.* Sherwood, 12 Minn. 426, trespass to lands; answer, (1) denies title, and (2) license; Steenerson *v.* Waterbury (Minn. 1893), 53 N. W. Rep. 1146, action for services rendered; answer, general denial, and payment; Pike *v.* King, 16 Iowa, 49, general denial and set-off; Willson *v.* Cleaveland, 30 Cal. 192, ejectment, denial of title, and Statute of Limitations.

[Additional instances of defences held not to be inconsistent are found in the following cases: George Fowler, Sons & Co. *v.* Brooks (1902), 65 Kan. 861, 70 Pac. —: general denial and contributory negligence; Leavenworth Light, etc. Co. *v.* Waller (1902), 65 Kan. 514, 70 Pac. 365: same; Pugh *v.* Oregon Imp. Co. (1896), 14 Wash. 331, 44 Pac. 689: same; Lord *v.* Horr (1902), 30 Wash. 477, 71 Pac. 23: in a suit for reformation, that the deed expressed the contract and that there was such a mutual mistake as entitled defendant to rescind; Gates *v.* Avery (1901), 112 Wis. 271, 87 N. W. 1091: same; Kline *v.* Hanke (1894), 14 Mont. 361, 36 Pac. 454: in an action for rent, eviction by plaintiff and that defendants were only tenants from month to month; Blodgett *v.* McMurty (1894), 39 Neb. 210, 57 N. W. 985: general denial and estoppel; Home Fire Ins. Co. *v.* Decker (1898), 55 Neb. 346, 75 N. W. 841: failure to furnish proofs of loss and that plaintiff caused premises to be burned; Cate *v.* Hutchinson (1899), 58 Neb. 232, 78 N. W. 500: general denial and unreasonable and unjust account; Corbitt *v.* Harrington (1896), 14 Wash. 197, 44 Pac. 132: a denial of knowledge or information as to the execution of a guaranty and fraud in its execution, if it was executed; Booco *v.* Mansfield (1902), 66 O. St. 121, 64 N. E. 115: denial of execution and plea of no consideration; Smith *v.* Doherty (1901), 109 Ky. 616, 60 S. W. 380: same; First Nat. Bank *v.* Wisdom's Ex'rs (1901); 111 Ky. 135, 63 S. W. 461: same; Spencer *v.* Society of

§ 600. * 724. **Effect of Admissions in One Defence upon Issues Raised in Another.** When a denial is pleaded in connection with a defence of new matter, or two defences of new matter are set up, the admissions in the one can never be used to destroy the effect of the other. The concessions of a defence by way of confession and avoidance do not obviate the necessity of proving the averments contradicted by the denial.[1] This rule is universal. Even in those States where inconsistent defences are not permitted to stand, the remedy is by striking out, or by compelling an election, and not by using the admissions of one to destroy the issues raised by the other.[2]

§ 601. * 725. **Facts Pleaded as both Defence and Counter-Claim.** When the facts stated in an answer constitute both a defence and a counter-claim, and are not twice pleaded in separate divisions, but are alleged only once with a proper demand for relief as in a

Shakers (1901), Ky., 64 S. W. 468: same; Hausman *v.* Mulheran (1897), 68 Minn. 48, 70 N. W. 866: an admission of rent due and a counter-claim for repairs made; Robinson *v.* Hill (1902), Ky., 66 S. W. 623: breach of warranty and settlement; Fisher *v.* Stevens (1898), 143 Mo. 181, 44 S. W. 769: in ejectment, a general denial and an equitable defence that defendant purchased the land at a trustee's sale; De Lissa *v.* Coal Co.: general denial of contract and fraud; Bank of Glencoe *v.* Cain (1903), 89 Minn. 473, 95 N. W. 308; same.

In the following cases the defences were held inconsistent: Omaha Fire Ins. Co. *v.* Dierks (1895), 43 Neb. 473, 61 N. W. 745: that the policy was not in force at the time of the loss and want of notice of loss; Hollingsworth *v.* Warnock (1901), 112 Ky. 96, 65 S. W. 163: accidental shooting and shooting in self-defence; Lane *v.* Bryant (1896), 100 Ky. 138, 37 S. W. 584: denial of speaking slanderous words and justification; Baines *v.* Coos Bay Nav. Co. (1902), 41 Ore. 135, 68 Pac. 397: denial of execution of note and allegations that it was executed in pursuance of a fraudulent conspiracy; Davis *v.* Ford (1896), 15 Wash. 107, 45 Pac. 739: an affirmative defence admitting a contract and a denial of the same; Dwelling House Ins. Co. *v.* Brewster (1895), 43 Neb. 528, 61 N. W. 746: denial and waiver, estoppel or avoidance.]

[1] [See, however, Hamill *v.* Copeland (1899), 26 Colo. 178, 56 Pac. 901, where a defence of new matter was held to relieve the plaintiff from proving a contract which defendant had denied in another defence. And in several of those States where inconsistent defences are not allowed, the force of a denial inconsistent with an admission is destroyed by the latter.

In Lamberton *v.* Shannon (1896), 13 Wash. 404, 43 Pac. 336, it was held that a general denial, "except as herein expressly admitted, explained or qualified," will, in the absence of anything restricting the application of such qualification, apply to an affirmative defence pleaded in the same answer, and the force of the denial will be limited by the averments of new matter there contained.]

[2] Quigley *v.* Merritt, 11 Iowa, 147; Shannon *v.* Pearson, 10 Iowa, 588; Grash *v.* Sater, 6 Iowa, 301; Siter *v.* Jewett, 33 Cal. 92; Nudd *v.* Thompson, 34 Cal. 39, 47; Buhne *v.* Corbett, 43 Cal. 264. See Venice *v.* Breed, 65 Barb. 597, 603, per Mullin J. See also Amador Cy. *v.* Butterfield, 51 Cal. 526; Billings *v.* Drew, 52 id. 565; Lawrence *v.* Peck (S. Dak. 1893), 54 N. W. Rep. 808.

[Douglass *v.* Ins. Co. (1893), 138 N. Y. 209, 33 N. E. 938; Church *v.* Pearne (1903), 75 Conn. 350, 53 Atl. 955.]

counter-claim, the defect, if any, can only be reached by motion. If not so remedied, the defendant may at the trial rely upon the answer in both of its aspects.[1]

SECTION SIXTH.

COUNTER-CLAIM, SET-OFF, CROSS-COMPLAINT, AND CROSS-DEMAND.

§ 602. * 726. Statutory Provisions. Two Groups. Special Provisions of Indiana and Iowa Codes. Similarity of Code Provisions. A reference to the statutory provisions collected at the commencement of section first of this chapter shows that some important differences exist among the various codes in respect to the matters stated in the above title. Most of the codes may be separated into two groups, each following a certain well-defined type. The first group contains those which provide for a "counter-claim," and for no other sort of cross-demand, and which adopt the following formula in defining it: "The counter-claim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."[2]

[1] Lancaster, O., Man. Co. *v.* Colgate, 12 Ohio St. 344; but *per contra*, see Campbell *v.* Routt, 42 Ind. 410, 415, which holds that the same pleading cannot be both a "defence" and a counter-claim; if it purports to be a counter-claim, and sets up a cause of action, and prays for relief, the defendant cannot treat it as a defence in bar merely.

[See Farmers' Nat. Bank *v.* Hunter (1899), 35 Ore. 188, 57 Pac. 424, where the court intimates the opinion that Hill's Ann. Laws, § 73, giving defendant the right to set forth as many defences as he may have, applies to matters which are defensive only, and does not sanction joining a counter-claim with other defences.]

[2] [Northern Trust Co. *v.* Hiltgen (1895), 62 Minn. 361, 64 N. W. 909: A counter-claim to be admissible under G. S. 1894, § 5237, subd. 2, must exist in favor of a defendant and against a plaintiff at the time the action is commenced. And further, such demand is not available as a counter-claim when it is acquired by defendant long after the insolvency of the party against whom it exists. Wigmore *v.* Buell (1897), 116 Cal. 94, 47 Pac. 927: In an action of ejectment to recover certain lands, defendant cannot plead a counter-claim for damages to an adjacent tract of land owned by him, caused by plaintiff's cattle running upon the said tract. Said action for damages neither arises out

The second group embraces those in which the "counter-claim" is substantially identical with the *first* subdivision of the section just quoted, and in which a "set-off" is also defined in substantial agreement with the *second* subdivision. The following are the formulas adopted in this group: "The counter-claim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." "A set-off can only be pleaded in actions founded on contract, and must be a cause of action arising upon contract, or ascertained by a decision of the court." The codes of Indiana and of Iowa cannot be referred to either of these two general groups: their provisions are quite different in language from the common type, and much broader in meaning. They will be found quoted at large in section first of this chapter.[1] In several of the States a special provision is made for the introduction of new parties made necessary by the pleading of a "counter-claim" or "set-off."[2] The counter-claim in the ordinary form must be in favor of a defendant and against a plaintiff between whom a several judgment on the action is possible. This requirement, as will be seen in the sequel, may sometimes fail of working complete justice between the parties. Thus, for example, when a surety is sued, and a cross-demand against the plaintiff exists in favor of the principal debtor, the surety cannot interpose this claim because it is not in his own favor. To obviate this and similar difficulties, the codes of Indiana and of Iowa have added special provisions covering the class of cases described, and authorizing one defendant, under certain specified circumstances, to avail himself of a counter-claim or set-

of the transaction nor is it connected with the subject of the action.

The counter-claim is the creature of the code, and the code provides for it in two cases, (1) a cause of action arising out of the transaction set forth by plaintiff or connected with the subject of the action, (2) in an action on contract, any other contract existing at the commencement of the action. This limitation as to existence at the commencement of the action applies only to the second class: Piedmont Bank *v.* Wilson (1899), 124 N. C. 561, 32 S. E. 889. See also Kirby *v.* Jameson (1896), 9 S. D. 8, 67 N. W. 854; Gurske *v.* Kelpin (1901), 61 Neb. 517, 85 N. W. 557; Bank of Arkansas City *v.* Hasie (1897), 57 Kan. 754, 48 Pac. 22.]

[1] See *supra*, §§ *583, *584.

[2] See *supra*, § *584 (n.), where these sections of the statutes are given in full. The New York Code of Civil Procedure provides (§ 501) that "the counter-claim must tend, in some way, to diminish or defeat the plaintiff's recovery."

off existing in favor of a co-defendant, when the liability of both to the plaintiff is joint, or one is a surety for the other.[1] From a comparison of the various clauses above quoted or referred to, it is plain that the judicial decisions giving a construction to the sections of the codes embraced in the first and second groups can all be used in constructing the full theory of the "counter-claim" which forms so marked and important an element in the new procedure. In all these States, the "counter-claim" singly, or the "counter-claim" and "set-off" taken together, are not only the same in substance, but are defined in almost exactly the same language, so that the interpretation given by the courts of one State can aid in determining the questions which may arise in another. The decisions made in Indiana and Iowa, however, must to a certain extent stand by themselves; for they are based upon statutes which are in many respects special in their terms, and different in their meaning.

§ 603. * 727. **Arrangement of Subject-Matter for Discussion.** The subject-matter of this section will be arranged in the following order, and distributed into the following subdivisions: I. A general description of the "counter-claim," its nature, objects, and uses. II. The parties in their relations with the counter-claim; including the requirements that the demand must be, 1. In favor of the defendant who pleads it; and 2. Against the plaintiff; and, 3. When it may be set up in favor of one or some of several defendants or against one or some of several plaintiffs; that is, when a several judgment may be had in the action between such defendant and plaintiff. III. The subject-matter of the counter-claim, or, in other words, the nature of the causes of action which may be pleaded as counter-claims. This most important subdivision will include several heads: viz., 1. Whether a counter-claim must be a *legal* claim for damages, — like the set-off or the recoupment of the former system, — or whether it may be for equitable or other special relief; 2. When the counter-claim is, or is alleged to be, a cause of action arising out of the *contract* set forth in the complaint or petition as the foundation of the plaintiff's claim; 3. When it is, or is alleged to be, a cause of action arising out of the *transaction* set forth in the complaint or petition as the foundation of the plaintiff's claim; 4. When it is, or is alleged to be, a cause of action

[1] See *supra*, § * 584 (n.), for these sections in full.

connected with the subject of the action. The discussion of these topics will require the special examination and interpretation of certain phrases and clauses of the statute, upon the true meaning of which they all to a great extent depend: namely, (*a*) the interpretation of "the foundation of the plaintiff's claim," or when is a contract or transaction "the foundation of the plaintiff's claim"? (*b*) interpretation of "arising out of," or when does a cause of action "arise out of" a contract or transaction? (*c*) interpretation of "transaction," (*d*) and of "subject of the action;" (*e*) and of "connected with the subject of the action," or when is a cause of action "connected with the subject of the action"? Resuming the statement of subordinate heads: 5. In actions founded on contract, a counter-claim founded on another contract, which embraces in particular (*a*) the power of electing between actions in form founded on contract and those in form founded on tort; and (*b*) the requirement that the cause of action must exist at the time when the suit was commenced. IV. Set-off as defined in several of the codes. V. Certain miscellaneous rules applicable to all counter-claims and set-offs. VI. The special provisions found in the codes of certain States, and especially in those of Indiana and of Iowa. VII. The reply. This arrangement, although perhaps not strictly scientific, is in exact conformity with the order pursued by the statute, and is, therefore, the one best adapted for our present purpose. A full discussion of all the topics mentioned will certainly cover the whole ground, and will develop the complete theory of the "counter-claim" as it appears in the codes.

§ 604. * 728. **Counter-Claim to be compared with Cross-Demands of Former System.** It will materially aid in determining the exact province and scope of the counter-claim if we compare it with the cross-demands in legal actions permitted by the former system of procedure. I shall therefore, by way of preface, and without going into unnecessary details, state the fundamental principles upon which those cross-demands were based, and the general rules which governed their use.

§ 605. * 729. **The Cross-Demands Allowed by the Former Procedure.** The cross-demands in legal actions allowed by the former procedure were "set-off" and "recoupment of damages." Originally the common law acknowledged no such defence or proceeding on the part of a defendant: the primitive notion of an

action did not admit the possibility of a defendant being an *actor* and interposing a claim against the plaintiff to be tried in the one suit. The legislature effected the change, and invented the "set-off."[1] Being entirely of statutory origin, the "set-off," when used in actions at law, was necessarily kept within the limits prescribed by the terms of the enactment, and was not extended beyond their fair import. The court of chancery, not acting directly in pursuance of this legislation, but being guided rather by its analogies, was never restricted to its exact provisions, and created an "equitable set-off" broader and more comprehensive than that administered by the courts of law. The original English statute permitted a set-off only in the case of mutual "debts." As this word had a well-known technical meaning in the legal procedure, it served to restrict the use of the set-off to the single class of demands which were at the common law described by the term "debt;" namely, those which arise from contract, and are fixed and certain in their amount. There could not, therefore, be a set-off of general "damages" resulting from the breach of contracts, but only of those claims, the amount of which had been ascertained and settled by the promise itself, so that there could be no discretion in the jury, and no "assessment" by them. This original notion of the set-off was generally perpetuated in the legislation of the various States prior to the Codes of Procedure; although in some its scope had been enlarged, and made to embrace any pecuniary demand arising from contract, whether "debt" or "damages." Where the original notion was preserved, the exact language of the English statute was not always retained; but its force and effect were not materially changed. I have given in the note an abstract of the New York statute as an example of the legislation, since it does not substantially differ from that of other States.[2]

[1] [Gen. Elec. Co. *v.* Williams (1898), 123 N. C. 51, 31 S. E. 288.]

[2] 2 R. S. p. 354, § 18, p. 355, §§ 21, 22; 2 Edm. Stat. at Large, p. 365, § 18, p. 367, §§ 21, 22. The defendant may set off demands which he has against the plaintiff in the following cases: 1. It must arise upon a judgment or upon a contract, express or implied, sealed or unsealed. 2. It must be due to the defendant in his own right, as being the original creditor or as being the assignee and owner. 3. It must be for the price of real estate or personal property sold, or for money paid, or for services done; or, if not one of these, the amount must be liquidated, or be capable of being ascertained by computation. 4. It must have existed at the time of the commencement of the suit, and must then have belonged to the

§ 606. * 730. **Discussion of New York Statute of Set-off.** It is not necessary to discuss this statute, nor to cite cases illustrating its meaning. It has been displaced by the more comprehensive provisions of the code. It is clear that if the plaintiff's action was on a contract and for a "debt," — for the more extended language of the statute describes only a "debt," — and the defendant held another "debt" due from the plaintiff personally, and existing in his own favor, and which did so exist at the commencement of the action, he could plead such demand as a set-off; and if it exceeded the amount of the plaintiff's claim, he could have judgment against the plaintiff for the surplus. Also in an action for the same kind of demand, brought by a plaintiff who had really assigned the claim, and was therefore a nominal party only, or brought by a plaintiff who was a trustee, or sued on behalf of another person, or brought by an assignee of negotiable paper transferred after it became due, the defendant

defendant. 5. The action itself must be founded upon a similar demand which could itself be a set-off. 6. If there are several defendants, the demand must be due to them jointly. 7. It must be a demand existing against the plaintiff in the action, unless the suit be brought in the name of a plaintiff who has no real interest in the contract upon which the suit is founded; in which case no set-off of a demand against the plaintiff shall be allowed, unless as hereinafter specified. It will be remembered, that, when this statute was passed, things in action were not generally assignable, so that an action could be maintained by the assignee as plaintiff: if actually transferred, the action was brought in the name of the assignor as nominal plaintiff; while the real owner — the assignee — was not a party to the record. But full transfers were permitted in the case of negotiable paper: the succeeding subdivisions provide for the special circumstances arising when there has been an assignment. 8. In an action on a contract not negotiable, which has been assigned by the plaintiff (the plaintiff, therefore, being a nominal party, and having no real interest), a demand existing against such plaintiff, or against the assignee, at the time of the assignment, and belonging to the defendant before notice of the assignment, may be set off to the amount of the plaintiff's demand (that is, the demand sued upon). 9. If the action is on negotiable paper, assigned to the plaintiff after it became due, the defendant's demand against the assignor thereof may be set off to the amount of the claim in suit. 10. If the plaintiff is a trustee, or if he has no real interest in the suit, the defendant's demand against the person beneficially interested may be set off to the amount of the claim in suit. In all of these latter cases, the defendant's demand, in order to be a set-off, must fall within the description given in the former subdivisions. If the amount of the set-off as established equals the plaintiff's demand, the judgment shall be rendered that the plaintiff take nothing by his action; if it be less, the plaintiff shall have judgment for the residue only. If there be found a balance due to the defendant, judgment shall be rendered for the defendant for the amount thereof; except that no such judgment shall be rendered against the plaintiff when the contract upon which the suit is founded shall have been assigned before the commencement of the suit, nor when the balance is due from any other person than the plaintiff in the action. [Steck *v.* C. F. & I. Co. (1894), 142 N. Y. 236, 37 N. E. 1; Bennett *v.* Edison Elec. Co. (1900), 164 N. Y. 131, 58 N. E. 7.

might set off a similar kind of demand which he had against either the assignor or the assignee in the first case before notice of the assignment, or against the beneficiary in the second case, or against the assignor in the third case; but he could not by such set-off do more than defeat the plaintiff's recovery: he could not have a judgment for any balance due to himself. The reason for this latter rule is very plain; for in neither of these cases was the plaintiff *the real party in interest and the debtor at the same time.*

§ 607. * 731. **Origin of Set-off and Recoupment. Resemblances and Dissimilarities.** While set-off was entirely of statutory origin, the doctrine and practice of "recoupment of damages" had their inception in the law of judicial decision. From the notion of absolute non-performance as a total defence, the progress was easy and natural, through the partial defences of a part performance and a reduction of damages by means of unskilful or negligent performance, to the admission of a cross-demand in favor of the defendant for damages resulting from the acts or omissions of the plaintiff that amounted to a breach of the contract sued upon. In this manner the doctrine of recoupment took its rise, and it was developed by decision after decision until it became established in the courts of England and of the American States, — a defence as well known and as widely admitted within its scope as the statutory set-off. There were resemblances and dissimilarities between these two defences. Both were confined to actions upon contract, and must themselves arise from contract; but here the resemblance ends. A set-off must be for a debt, a fixed certain sum, at least capable of being ascertained by computation: recoupment was of damages, often entirely unliquidated, and depending upon an assessment by a jury. A set-off was necessarily a demand arising upon a different contract from the one in suit: recoupment was necessarily of damages resulting from a breach of the very same contract sued upon. In set-off the defendant might sometimes recover a balance from the plaintiff: in recoupment this could never be done.[1] The doctrine may be summarily stated. In an action upon a contract to recover either liquidated or unliquidated damages or a debt, the defendant might set up by way of defence and recoup the damages suffered by himself from any

[1] [St. Louis Nat. Bank *v.* Gay (1894), 101 Cal. 286, 35 Pac. 876.]

breach by the plaintiff of the same contract. At an early period it was supposed that only damages arising from the plaintiff's fraud in inducing the defendant to enter into the contract, or in executing the same, could be recouped; but it was subsequently settled that fraud was not a necessary element, and that any breach by the plaintiff of the same contract which he makes the basis of his action would admit the defence of recoupment. The rule was stated in the following manner in a case which arose a short time before the new system of procedure was adopted: "It cannot be denied, consistently with the doctrine now well established, but that, in an action for a breach of contract, the defendant may show that the plaintiff has not performed the same contract on his part, and may recoup his damages for such breach in the same action, whether they were liquidated or not, or may at his election bring a separate action."[1] Recoupment was, however, used solely as a defence: it could do no more than defeat the plaintiff's recovery; even though the defendant's damages should exceed those proved by the plaintiff, he could have no judgment for the surplus.[2]

§ 608. * 732. **Illustrations of Recoupment.** The nature, scope, and intent of the doctrine may be illustrated by a statement of some familiar instances in which recoupment was used; and it will be readily seen in all of them that the defendant's demand was based upon a breach of the contract which was the foundation of the action, although often of other stipulations or covenants in that agreement than the one which it was alleged he himself had broken. Thus, in an action brought to recover the price of land, the defendant could recoup the damages arising from the plaintiff's fraudulent representations concerning the land, by which he had been induced to enter into the contract;[3] and in an action for the price of goods sold, damages resulting from the plaintiff's breach of a warranty on the sale;[4] and in an action for services, damages from the negligent or unskilful manner of their performance;[5] and in an action on a lease for rent or use and occupation, damages from the plaintiff's breach

[1] Mayor, etc. of N. Y. *v.* Mabie, 13 N. Y. 151, 153, per Denio J.; and see Batterman *v.* Pierce, 3 Hill, 171; Murden *v.* Priment, 1 Hilt. 75.

[2] Sickels *v.* Pattison, 14 Wend. 257.

[3] Van Epps *v.* Harrison, 5 Hill, 63.

[4] Reab *v.* McAlister, 8 Wend. 109.

[5] Blanchard *v.* Ely, 21 Wend. 342; Sickels *v.* Pattison, 14 Wend. 257; Still *v.* Hall, 20 Wend. 51; Ives *v.* Van Epps, 22 Wend. 155.

of a covenant to repair, or covenant for quiet enjoyment;[1] or damages from the plaintiff's fraud in inducing defendant to enter into the lease.[2] But recoupment is confined to damages from a breach of the contract sued on.[3] The same doctrine, which has thus far been illustrated exclusively from New York cases, prevailed in the other States to the same extent, and perhaps, in some of them, had even a wider application. A very few examples will suffice. In an action upon a promissory note, the answer alleging that the note was given by the defendant for the price of the plaintiff's services in constructing and mounting a water-wheel, and that the work was done and the wheel made and mounted in a very negligent and unskilful manner, to the defendant's damage, was held to state a proper case for a recoupment of defendant's damages;[4] and in an action upon a sealed agreement to recover an amount due for certain sawing done by the plaintiff in pursuance thereof, and also damages from the defendant's failure to furnish the stipulated number of logs to be sawed, damages arising from the plaintiff's breach of other covenants were recouped;[5] and damages from the plaintiff's failure to build according to the specifications were permitted to be recouped in an action for the price.[6] In Indiana, where the defendant had given a note for the purchase-price of land sold him by the payee, and the latter had afterwards wrongfully entered upon the land and taken and converted the growing crops, it was held in an action upon the note that the damages resulting from these wrongful acts of the plaintiff could not be recouped, since they were independent trespasses, and not breaches of the contract.[7] The doctrine was applied in Missouri to the following facts: The action was brought to recover rent of a farm leased to defendant by a verbal agreement: the answer set up, that, by further provisions of the same contract, the plaintiff stipulated to build and maintain a fence between the premises leased and other land occupied by himself; that he neglected to build the fence, and, by reason of his neglect, his cattle

[1] Whitbeck *v.* Skinner, 7 Hill, 53; Dorwin *v.* Potter, 5 Denio, 306; Mayor *v.* Mabie, 13 N. Y. 151.

[2] Allaire *v.* Whitney, 1 Hill, 484; Whitney *v.* Allaire, 1 N. Y. 305; 4 Denio, 554.

[3] Seymour *v.* Davis, 2 Sandf. 239; Deming *v.* Kemp, 4 Sandf. 147; Terrell *v.* Walker, 66 N. C. 244, 251.

[4] Butler *v.* Titus, 13 Wis. 429.

[5] Morrison *v.* Lovejoy, 6 Minn. 319.

[6] Mason *v.* Heyward, 3 Minn. 182.

[7] Slayback *v.* Jones, 9 Ind. 470.

came upon defendant's farm, and destroyed crops thereon. The damages thus sustained were held to be the proper subject of recoupment.[1]

§ 609. * 733. **Mere Defences Distinguished from Set-off or Recoupment, Counter-Claim or Cross-Demand.** Another species of defence, which existed at the common law and still exists, is sometimes confounded with recoupment or with counter-claim, although it bears no real resemblance to either, and should be carefully distinguished from both; namely, the reduction of the amount claimed to be due in suits for the price of goods sold or of services rendered in most instances when the action is on a *quantum meruit* or *quantum valebant*. In set-off and in recoupment, the essence of the defence consists in a cause of action against the plaintiff or some other person: whether a judgment is recovered or not is immaterial, but a right of action always lies at the bottom of the legal notion. In the defence referred to, there is no such right: it is simply a process of subtracting from the amount of the adverse claim, and therefore operates directly upon that demand. Set-off and recoupment, on the other hand, do not attack the adverse claim itself; and for that reason it is often said that they are not true *defences:* they admit the plaintiff's cause of action, and set up an affirmative cross-demand, so that the sums awarded for each may satisfy one another, leaving only a surplus to be received by the party who obtains the larger amount. The distinction is very plain; but it has sometimes been overlooked. One example will be a sufficient illustration. In an action for the price of goods sold and delivered, and of work and labor done amounting as alleged to $197, the answer set up that the goods furnished and the work done were worth no more than $173, and as to that sum averred payment. On the trial, the defendant offered evidence tending to show that the articles were to be of a certain kind and quality; that they were, on the contrary, very inferior in quality; and the consequent diminution in value and price. This evidence was rejected on the ground that the reduction sought could only be claimed by way of "recoupment of damages or of set-off." The New York Court of Appeals, reversing this ruling, pronounced the defence admissible, since it was in no

[1] Hay *v.* Short, 49 Mo. 139, 142. [Foote & Davis Co. *v.* Malony (1902), 115 Ga. 985, 42 S. E. 413.]

sense a claim for damages against the plaintiff, but simply a diminution of the value of the goods and the labor, as that had been established *prima facie* by the plaintiff.[1] The same principle applies through the whole range of possible defences, under whatever forms they may be set up: if they simply attack the cause of action, and show that *by virtue thereof* the plaintiff ought not to recover at all, or recover all that he demands, they are not, and cannot be, answers in the nature of "set-off" or "recoupment" under the old system, or of "counter-claim" or "cross-demand" under the new. Thus the defence of payment cannot, by any mode of averment, be made a counter-claim;[2] nor that of usury.[3] And generally, whenever the facts pleaded are merely in bar of the action, and the relief demanded by the defendant is only what would be the legal judgment in his favor upon those facts, the answer is not a counter-claim, nor, *a fortiori*, a cross-complaint, although it may be in the form of the latter species of pleading.[4] From this preliminary statement of the former defences which contained some of the elements that are found in the modern counter-claim, and of others which have nothing in common with, but are sometimes mistaken for, the counter-claim, I now proceed to a direct discussion of the latter as it is defined and authorized by the codes, and shall follow the order of treatment already indicated.[5]

I. *A General Description of the Counter-Claim; its Nature, Objects and Uses.*

§ 610. * 734. **Scope of Inquiry herein.** Under this subdivision I shall collect from leading judicial decisions such opinions, and portions of opinions, as have in the clearest and most accurate manner described the general nature, objects, and uses of the counter-claim, and shall add the comments and explanations that seem necessary to a full development of the subject. The discussion is here confined to the *general* properties of the counter-claim, and does not descend to its various special ele-

[1] Moffet *v.* Sackett, 18 N. Y. 522.

[2] Burke *v.* Thorne, 44 Barb. 363.

[3] Prouty *v.* Eaton, 41 Barb. 409, 412, per T. A. Johnson J.

[Smith *v.* Building Ass'n (1896), 119 N. C. 257, 26 S. E. 40; Gen. Elec. Co. *v.* Williams (1898), 123 N. C. 51, 31 S. E. 288.]

[4] Bledsoe *v.* Rader, 30 Ind. 354; Belleau *v.* Thompson, 33 Cal. 495.

[5] [For a history of legislation upon the subject of set-off, and references, see Steck *v.* Colorado Fuel & Iron Co. (1894), 142 N. Y. 236, 31 N. E. 7.]

ments and features, which, depending upon the particular terms of the statutes, demand a more critical examination.

§ 611. * 735. **One Class of Cases Included in Term "Set-off" under Former Procedure not Included in Counter-Claim. Mere Defence not a Counter-Claim.** There are certain conclusions which are evident upon the mere reading of the statute. Under the former procedure, the term "set-off" included two quite distinct classes of cases: namely, (1) those in which the defendant might recover an affirmative judgment for a "debt" against the plaintiff; and (2) those in which the demand in his favor could only be used *defensively* to diminish, or perhaps defeat, the recovery by the plaintiff. The codes provide for both these classes of cases. Those sections which permit the action to be brought by an assignee of a thing in action, and allow under certain circumstances the same matters to be interposed as a *defence* against him which would have been available against the assignor, and those sections which permit the action to be brought by a trustee of an express trust, and allow the same matters to be set up as a defence against him which would have been available against the party beneficially interested, — these sections plainly embrace the second class of "set-offs" above mentioned; namely, those in which the demand could be used as a *defence*, but not as the basis of an affirmative recovery against the plaintiff. On the other hand, these cases are not included within the description given of a counter-claim.[1] A defence, even though it consists of a claim for relief *against some person*, but does not permit a recovery against the *plaintiff*, is *not* a counter-claim. The first class of "set-offs" above mentioned is embraced within the definition of the counter-claim as given by those codes which constitute the first group according to the division made in a former paragraph.[2] In the codes which constitute the second group, the same class of "set-offs" is substantially described under the original name which belonged to that species of answer in the old procedure.[3]

§ 612. * 736. **Recoupment a Species of Counter-Claim. How Modified and Enlarged.** The "recoupment of damages" has undergone a most important modification. It is confessedly covered

[1] [Piedmont Bank *v.* Wilson (1899), 124 N. C. 561, 32 S. E. 889; Lindsay, etc. Co. *v.* Carpenter (1894), 90 Ia. 529, 58 N. W. 900.]

[2] See § *726.

[3] [St. Louis Nat. Bank *v.* Gay (1894), 101 Cal. 286, 35 Pac. 876.]

by the definition of counter-claim given in all the codes without exception. In those forming the two principal groups according to the classification heretofore made, it is described by the express language, "a cause of action arising out of the contract set forth in the complaint as the foundation of the plaintiff's claim;" in that of Indiana it is described by the language, "any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages;" and in that of Iowa by the language, "a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract set forth in the petition." [1] It is beyond dispute, then, that the recoupment of damages, as the same was authorized by the courts under the old practice, is made a species of counter-claim by all the codes. But its effects have been greatly enlarged. As it has been transferred into a counter-claim, it partakes of all the essential features conferred upon that kind of defence by the statute. For this reason, the defendant, who would formerly have set up the facts in recoupment of damages, and who now pleads the same facts as a species of counter-claim, may upon the basis of those facts obtain a judgment for damages in his favor against the plaintiff, if the proofs upon the trial warrant such a result.

§ 613. * 737. **Counter-Claim Broader than Set-off and Recoupment. Kinds of Causes of Action that may be interposed as Counter-Claims.** The two classes of affirmative relief mentioned in the foregoing paragraphs, important as they are, do not exhaust the scope and efficacy of the counter-claim. The causes of action which were the basis of a "recoupment of damages" or of a "set-off," as those terms were legally defined, all necessarily arose from a breach of contract. The language employed by the codes speaks of causes of action as constituting a counter-claim, which do not arise out of contract. It mentions three alternatives, — causes of action (1) arising out of the *contract* set forth in the complaint, or (2) arising out of the *transaction* set forth in the complaint, or (3) *connected with* the subject of the action. Unless we would accuse the legislature of the most absurd and misleading tautology, this language was intended to

[1] See p. 697, *ante*, where statutes are given in full.

affirm that there may be counter-claims which do not arise out of contract. Arising out of the "transaction," and "connected with the subject of the action," are placed in opposition to "arising out of *contract.*" As "recoupment of damages" and "set-off" must be based upon the non-performance of a contract, it follows that the counter-claim was designed to include other demands to which neither of these two terms can apply. What are these other demands? I do not now attempt to answer this question in detail: it is enough to point out the general nature of all such possible cases. If causes of action are for the recovery of money only, they must either be upon contract or for a tort. Is there any possible cause of action upon contract, which is neither a "set-off" nor a "recoupment of damages," and which may be embraced within the definition of a counter-claim? There is: a cause of action for the breach of a contract other than the one sued upon, when the demand is for damages merely, to be assessed by the jury, and not for a debt, is neither a "set-off" nor a "recoupment," and yet is plainly described by the second subdivision of the definition found in all the codes which form the first group, and by the definition of "set-off" found in all those which make up the second group. As the word "transaction" seems to imply causes of action not necessarily upon contract, those arising from tort may perhaps, under proper circumstances, be the subject of counter-claim; but the discussion of this particular question will be deferred to a subsequent part of this section. I will now sum up the possible cases, or classes of cases, which may be included within the broad definition of the counter-claim as given in the codes of the first group: if we pass to the second group, certain of these classes would fall within the term "set-off" rather than counter-claim. Of the causes of action which terminate in a recovery of money alone, the counter-claim expressly embraces (1) the matters which under the former procedure gave rise to a recoupment of damages; (2) the cases of "set-off" in which a judgment for debt against the plaintiff was possible; (3) demands to recover unliquidated damages for the breach of a contract not the foundation of the plaintiff's suit, and possibly (4) demands to recover damages for torts, if the same arose out of the "transaction" set forth in the complaint or petition, or are connected with the subject of the action. These exhaust all the possible instances of a

mere pecuniary recovery. Counter-claim may also embrace cases of an equitable nature in which affirmative relief is granted to the defendant.[1] Such cases are as plainly described by the general language of the codes as those of a purely legal character which seek only a pecuniary judgment. In order to shut out these claims for equitable relief, and to limit the counter-claim to causes of action for the recovery of money, the terms of the statute must be read with restrictions interpolated into their midst which were not placed there by the legislature. Were it not that the ancient set-off and recoupment could only be used in legal actions brought to recover money, no judge would have thought that a like limitation must be put upon the language of the codes. How far the counter-claim includes equitable relief will be fully discussed in the sequel. Finally, the only other cases which could possibly come within the definition of counter-claim are legal causes of action to recover possession of lands, or to recover possession of chattels.

§ 614. * 738. **Essential Elements and Test of Counter-Claim. Must be a Cause of Action.** Having thus enumerated the different kinds of causes of action and of relief which may be used by the defendant as counter-claims, I shall proceed to point out some essential features and elements which must exist in each of these cases; that is, some essential elements which enter into the very notion of the counter-claim. (1) It must be a cause of action.[2] In other words, the facts must be such that they would constitute the entire matter proper and necessary to be set forth in the complaint or petition, if the defendant had chosen to insti-

[1] [Kollock *v.* Scribner (1897), 98 Wis. 104, 73 N. W. 776.]

[2] [Richards *v.* Am. Desk & Seating Co. (1894), 87 Wis. 503, 58 N. W. 787; Union Mercantile Co. *v.* Jacobs (1897), 20 Mont. 270, 50 Pac. 793; Waller *v.* Deranleau (1903), — Neb. —, 94 N. W. 1038; Babcock *v.* Maxwell (1898), 21 Mont. 507, 54 Pac. 943; Askew *v.* Koonce (1896), 118 N. C. 526, 24 S. E. 218; Stotsenburg *v.* Fordice (1895), 142 Ind. 490, 41 N. E. 313; Nicholls *v.* Hill (1894), 42 S. C. 28, 19 S. E. 1017; Tron *v.* Yohn (1896), 145 Ind. 272, 43 N. E. 437; Harris *v.* Randolph County Bank (1901), 157 Ind. 120, 60 N. E. 1025; Lindsay, etc. Co. *v.* Carpenter (1894), 90 Ia. 529, 58 N. W. 900; Helmer *v.* Yetzer (1894), 92 Ia. 627, 61 N. W. 206; Bardes *v.* Hutchinson (1901), 113 Ia. 610, 85 N. W. 797; Rumbough *v.* Young (1896), 119 N. C. 567, 26 S. E. 143; Kahrs *v.* Kahrs (1902), 115 Ga. 288, 41 S. E. 649; Gulliver *v.* Fowler (1894), 64 Conn. 556, 30 Atl. 852; Rhea *v.* Bagley (1899), 66 Ark. 93, 49 S. W. 492; Gurske *v.* Kelpin (1901), 61 Neb. 517, 85 N. W. 557; Lacey *v.* Lacey (1893), 95 Ky. 110, 23 S. W. 673; Arthurs *v.* Thompson (1895), 97 Ky. 218, 30 S. W. 628; Farrell *v.* Burbank (1894), 57 Minn. 395, 59 N. W. 485; White *v.* Blitch (1900), 112 Ga. 775, 38 S. E. 80; Center Creek Water Co. *v.* Lindsay (1900), 21 Utah, 192, 60 Pac. 559.]

tute an independent action between himself as plaintiff and the plaintiff as defendant.[1] When a counter-claim is pleaded, the defendant becomes, as far as respects the matters alleged therein, an *actor:* there are substantially two simultaneous actions pending between the same parties, each of whom is at the same time a plaintiff and a defendant. Since the counter-claim states a cause of action, it is to be governed and judged by the rules which apply to the complaint or petition:[2] the facts alleged must be sufficient to constitute the cause of action, and the relief to which the defendant is entitled should be properly demanded. In short, the pleader should, for the time being, regard himself as acting for a plaintiff, and as drawing a complaint or petition. This rule is so simple and so plain, that it seems almost impossible to mistake it; and yet the books of reports are full of cases in which facts have been set up as counter-claims, which, if admitted to be true, would not have entitled the party pleading them to any relief. The test thus suggested is of universal application. Would the facts averred taken by themselves, if admitted, entitle the defendant to a

[1] ["An answer setting up a counter-claim must contain the substantial requisites of a complaint, and allege facts which legally entitle the defendant to recover in a suit instituted by him for that purpose against the plaintiff; and, if his pleading omits any allegation that would be necessary to state a cause of suit, it will be vulnerable to a demurrer interposed on that ground:" Le Clare *v.* Thibault (1902), 41 Ore. 601, 69 Pac. 552. "A counter-claim must, to be good, contain every allegation which would be needed in a complaint founded on the same cause of action:" Daggs *v.* Phœnix Nat. Bank (1898), Ariz., 53 Pac. 201.

"To constitute a counter-claim, the facts stated must amount to an independent cause of action; when they merely serve to defeat plaintiff's cause of action, they amount to a defence, not a counter-claim:" Walker *v.* Ins. Co. (1894), 143 N. Y. 167, 38 N. E. 106. "A counter-claim, as our decisions affirm, is not a defence to a plaintiff's action, but it is a cross-action by the defendant; and it must state facts sufficient in law to constitute a cause of action; otherwise it will be held bad on demurrer:" Indiana, etc. Ass'n *v.* Crawley (1898), 151 Ind. 413, 51 N. E. 466.

"A counter-claim is an action, and to be properly pleaded it must be set forth with all the allegations necessary to uphold an original petition founded on the same cause of action:" Prichard's Executrix *v.* Peace (1895), 98 Ky. 99, 32 S. W. 296. "An answer is a statement of defence. It is not its office to demand affirmative relief, unless upon a counter-claim; nor can it properly be made to take the place of a motion to cite in new parties. So far as used for such purposes it may be disregarded by the trial court:" Russell *v.* Easterbrook (1898), 71 Conn. 50, 40 Atl. 905. A counter-claim which charges fraud and misconduct in general terms, without specifying particular acts, does not state a cause of action: Alden *v.* Christianson (1901), 83 Minn. 21, 85 N. W. 824.]

[2] It is within the discretion of the court to allow him to amend his pleading by adding another count: Venable *v.* Dutch, 37 Kan. 515.

judgment in his favor against the plaintiff? If not, they do not constitute a counter-claim.

§ 615. * 739. **Implies an Opposing Claim. Limitation herein.** It has sometimes been said that "counter-claim," *ex vi termini*, implies a claim, and also an opposing claim; and that, therefore, there cannot be a valid counter-claim unless there is a demand on behalf of the plaintiff. This is no doubt true within certain limits. The counter-claim as well as the defence assumes that the plaintiff sets up a claim in his complaint. There could be no answer of any kind, defensive or affirmative, unless the plaintiff in the first instance filed or served a pleading containing some demand. But a counter-claim does not necessarily imply that the demand *is a valid one*. The term, if not invented, was applied by the legislature to this species of answer, which is allowed to be used in cases where the plaintiff sets up certain specified causes of action; but the code nowhere requires that the cause of action thus *alleged* should be a good one. To interpolate any such limitation into the language of the statute would be giving an unnecessary meaning to a very simple epithet chosen by the lawmakers to designate a particular kind of pleading. The plaintiff must file a complaint averring facts which are said to constitute a cause of action in his favor. The defendant is expressly permitted to unite in his answer as many defences and counter-claims as he may have. Suppose that he pleads some defence either by way of denial or of new matter, and also a counter-claim. On the trial he establishes his defence, and thus defeats the plaintiff's recovery upon the alleged cause of action. Does this success cut off his power to go on and prove the facts constituting his counter-claim, and to obtain the judgment thereon? Such a conclusion would be a monstrous perversion of the statute, and would be a virtual repeal of its express provisions which permit the defendant to unite as many defences and counter-claims as he may have. When the legislature authorized him to join defences and counter-claims in this manner, it certainly intended that he should use them all, and did not mean that he should go through the empty form of pleading them, and afterwards abandoning those which are affirmative in their nature because successful in those which are negative.[1] This conclusion is self-evident: it necessarily

[1] [Le Clare *v.* Thibault (1902), 41 Ore. 601, 69 Pac. 552: "Before a defendant can be permitted to plead a counter-claim as a defence to plaintiff's cause of suit,

results from the positive provisions of the codes, and cannot be avoided without their virtual repeal. I have dwelt upon this subject at some length, not because there can be any legitimate and well-founded doubt concerning it, but because there are certain judicial *dicta* in a few cases which are supposed to convey a different meaning.[1]

§ 616. * 740. **Cause of Action Alleged must exist in Favor of Defendant who pleads it. Exception hereto in Codes of Indiana and Iowa.** (2) The cause of action thus alleged must exist in favor of the defendant who pleads it. As the counter-claim is defined in nearly all the codes, a defendant is not permitted to set up facts which entitle any other person, defendant or otherwise, to relief. He himself must be the party entitled to the judgment demanded, so that he would be the proper plaintiff, or one of the proper plaintiffs, if the cause of action had been made the basis of an independent suit. It is not, of course, to be understood that a counter-claim must always exist in favor of a single defendant: two or more, when sued jointly, may have a joint cause of action

he must admit the existence, at least, of a part of his adversary's demands." Sydner Pump Co. *v.* Rocky Mount Ice Co. (1899), 125 N. C. 80, 34 S. E. 198: When a non-suit has been entered, it is too late to file a supplemental answer containing a counter-claim, since when there is no action pending there can be no counter-claim. Davis *v.* Seattle National Bank, (1898), 19 Wash. 65, 52 Pac. 526: "A defendant may deny liability and at the same time plead a counter-claim or offset, without subjecting himself to the charge of pleading inconsistent defences, if there is no direct contradiction in the special facts pleaded."]

[1] See Mayor, etc. of N. Y. *v.* Parker Vein Stp. Co., 12 Abb. Pr. 300; 8 Bosw. 300; Bellinger *v.* Craigue, 31 Barb. 534; Prouty *v.* Eaton, 41 Barb. 409. See also Schenectady *v.* Furman, 61 Hun, 171, *post*, § * 744, note. It is settled, however, in Minnesota, that a counter-claim must of necessity admit the cause of action set up by the plaintiff, and that the defendant cannot deny this cause of action, and at the same time plead a counter-claim. In one case the court said: "The nature of a counter-claim would seem to render necessary the admission by defendant of a claim against him in favor of the plaintiff arising out of the contract or the transaction, as the case may require, which is the cause of action, or the ground of the plaintiff's claim set forth in the complaint." All claim of the plaintiff being denied, it was held there could be no counter-claim. Steele *v.* Etheridge, 15 Minn. 501, 509; Mason *v.* Heyward, 3 Minn. 182; Whalon *v.* Aldrich, 8 Minn. 346, 348; Koempel *v.* Shaw, 13 Minn. 488; Morrison *v.* Lovejoy, 6 Minn. 319. I add here the more recent cases which illustrate the general nature and requisites of the counter-claim, with respect to all the features described in the paragraphs of the text. Nothing in these decisions requires any modification of the views stated in the text; in fact, my discussion of the counter-claim in all its bearings is sustained by the current of authority. Davis *v.* Toulmin, 77 N. Y. 280, and cases cited; Francis *v.* Edwards, 77 N. C. 271; Quebec Bk. *v.* Weygand, 30 Ohio St. 126; Schee *v.* McQuilken, 59 Ind. 269; Blakely *v.* Boruff, 71 id. 93; Thompson *v.* Tookey, 71 id. 296; Stockton *v.* Stockton, 73 id. 510; Rucker *v.* Steelman, 73 id. 396; Exline *v.* Lowery, 46 Iowa, 556; Town *v.* Bringolf, 47 id. 133.

against the plaintiff; in which case it might be, and properly should be, pleaded as a counter-claim by them all. To the general rule above stated there is an exception already pointed out in the codes of Indiana and of Iowa, which permits a surety when sued to take advantage of a demand against the plaintiff in favor of his principal, and a joint debtor, when sued, to interpose one in favor of another joint debtor.

§ 617. * 741. **Cause of Action must exist against the Plaintiff.** (3) The cause of action must exist against the plaintiff in the suit, so that a judgment for the relief demanded can be rendered against him. This feature of the counter-claim is evident upon the most cursory reading of the statutory provision; and yet the books are full of cases in which matters have been set up as counter-claims that showed no cause of action whatever against the plaintiff, but one (if at all) existing against some other person not a party to the suit.[1] This error is most likely to arise in actions brought by an assignee of a demand, where the defendant has a claim which would be valid against the assignor. Such claim may, under some circumstances, constitute a perfect defence to the suit, and it may be a set-off according to the provisions of statutes prior to the code; but it cannot be a counter-claim, for the simple but most cogent reason that it does not entitle the defendant to any possible recovery against the plaintiff.[2]

§ 618. * 742. **Subject-Matter of Counter-Claim. General Classes. Statutory Restrictions as to Scope and Character. Analysis of Statutory Provisions.** (4) In reference to their subject-matter, the codes which form the first group separate counter-claims into two general classes: namely, *first*, those which arise out of a cause of action different from the one alleged by the plaintiff; and *secondly*, those which arise out of or are connected with the same cause of action as the one alleged by the plaintiff. In the first of

[1] [U. S. T. Co. *v.* Stanton (1893), 139 N. Y. 531, 34 N. E. 1098; Dolbeer *v.* Stout (1893), 139 N. Y. 486, 34 N. E. 1102; Trester *v.* City of Sheboygan (1894), 87 Wis. 496, 58 N. W. 747; Momsen *v.* Atkins (1900), 105 Wis. 557, 81 N. W. 647; Smith *v.* Dawley (1894), 92 Ia. 312, 60 N. W. 625.]

[2] [Walker *v.* Ins. Co. (1894), 143 N. Y. 167, 38 N. E. 106. In an action by the indorsee after maturity of a promissory note, an indebtedness of the payee to the maker, existing at the date of the transfer of the note, is not a counter-claim, but a defence: Lynch *v.* Free (1896), 64 Minn. 277, 66 N. W. 277. Where an agent sues in his own name, defendant may set up as a partial defence a demand against the principal, but this "is not really a counter-claim," since it is not "a demand which may be the basis of a judgment against the plaintiff:" Bliss *v.* Sneath (1894), 103 Cal. 43, 36 Pac. 1029.]

these classes the cause of action stated by the plaintiff must spring from contract, and the counter-claim must arise out of another contract. These counter-claims are identical with the "set-off" of the codes which belong to the second group, and they embrace, but are not restricted to, the "set-offs" used in the former procedure. They include that ancient "set-off," and also much more; for they cover all cases of *damages* as well as of *debt* resulting from the non-performance of contracts; and, according to the construction supported by the overwhelming weight of authority, they also extend to cases of equitable relief arising from contract. In the second of these classes the cause of action that may be set forth by the plaintiff is not defined or limited in any manner, and may therefore, unless limitations not contained in the statute are to be interpolated by the courts, be of any kind and nature. The counter-claim, however, is restricted in its scope and character, and must conform to one or the other of three requisites: (*a*) If a contract is set forth in the complaint or petition as the foundation of the plaintiff's demand, the counter-claim must arise out of that same contract; and this plainly embraces the ancient recoupment of damages, although far broader in its operation than that species of defence. (*b*) If a "transaction" is set forth as the foundation of the plaintiff's demand, the counter-claim must arise out of that "transaction;" and, so far as "transaction" is something different from or additional to "contract," this is a provision not identical in its effect with either "set-off" or "recoupment:" it clearly embraces many instances of equitable cross-demand and relief in favor of the defendant; and the only real doubt is, whether it extends also to legal causes of action. (*c*) Whatever be the nature of the claim asserted by the plaintiff, — for the codes contain no restriction in respect to this matter, — any counter-claim may be pleaded "which is connected with the subject of the action." [1] I have thus given a simple analysis of the statutory provision, taking the language as the legislature has used it without modification, neither adding to nor subtracting from it. If the courts have at any time placed further limitations upon the scope and operation of the counter-claim, if they have ever refused to admit the broad and comprehensive classification here made, they have done so by narrowing the general language of the statute, and restricting its obvious import. How far judi-

[1] [Warren *v.* Hall (1895), 20 Colo. 508, 38 Pac. 767.]

cial decisions have gone in this process of limitation, and how much authority should be conceded to their interpretation, I shall attempt to ascertain and to determine in subsequent portions of this section. My sole object now is to let the statute speak for itself by presenting an analysis and arrangement of its various clauses. It is certain, from this inspection of its very language, that there is no *express* restriction upon the nature and effect of the relief which may be demanded and obtained by means of a counter-claim, — no express requirement that it must be legal rather than equitable, nor that it must be confined to a money judgment in the form of debt or damages. Nor is there any express provision that the counter-claim must be something essentially antagonistic to, or tending to defeat or lessen, the cause of action set forth by the plaintiff in his complaint or petition. It will be seen, in the further discussions of this section, that the incident last mentioned is declared by several carefully considered decisions to be a necessary element or feature of the counter-claim, implied in its very nature and in the name given to it by the legislature. I do not question the correctness of this conclusion: I merely call attention to the fact, that, in reaching it or any similar result, the courts have added to or taken from the express terms of the codes.

§ 619. * 743. **Illustrative Opinions.** I shall now collect the opinions of several eminent and able judges, selected from a number of leading cases, in order that the reader may be able to compare their conclusions with the results of the foregoing analysis, and to ascertain the general principles upon which the courts have proceeded in constructing the theory of the counter-claim as it is now understood and accepted in the various States. These selections and quotations will be found in the foot-notes.[1] The

[1] Leavenworth *v.* Packer, 52 Barb. 132, 136, per Potter J.: "A counter-claim is a kind of equitable defence which is permitted, under the provisions of the code, to be set up, when it arises out of the contract set forth in the complaint. It is broader and more comprehensive than recoupment, though it embraces both recoupment and set-off; and it is intended to secure to a defendant all the relief which either an action at law, or a bill in equity, or a cross-suit, would have secured on the same state of facts. But it must be something which resists or modifies the plaintiff's claim." See also Clinton *v.* Eddy, 1 Lans. 61, 62; Boston Mills *v.* Eull, 6 Abb. Pr. N. S. 319, 321; Pattison *v.* Richards, 22 Barb. 143, 146; Ogden *v.* Coddington, 2 E. D. Smith, 317; Gleason *v.* Moen, 2 Duer, 639, 642; Schubart *v.* Harteau, 34 Barb. 447; Lignot *v.* Redding, 4 E. D. Smith, 285; Currie *v.* Cowles, 6 Bosw. 453; Wolf *v.* H., 13 How. Pr. 84; Davidson *v.* Remington, 12 How. Pr. 310.

assignee of a demand having brought suit upon it, the defendant alleged as a counter-claim a contract with the assignor, a breach thereof by him, and resulting damages, and prayed judgment for the amount of such damages aganist the defendant. No reply being served to this answer, the defendant urged that its averments were admitted, and that he was entitled to judgment on the record. In rejecting his claim, the New York Court of Appeals described the counter-claim at large, and stated principles of universal application.[1]

§ 620. * 744. **Doctrine that Counter-Claim must be Antagonistic to, and tend to defeat, lessen, or modify, the Claim of Plaintiff.** The doctrine is maintained in several cases, that, as an essential feature or element of every counter-claim, the cause of action which it sets up must be of such a nature that the relief obtained by its means will necessarily interfere with, defeat, lessen, or modify the relief granted to the plaintiff in virtue of the cause of action alleged in his complaint or petition. In other words, the two demands must be, to some extent at least, antagonistic, and tending to destroy or limit each other.[2] In an action brought to

[1] [Dolbeer *v.* Stout (1893), 139 N. Y. 486, 34 N. E. 1102.] Vassear *v.* Livingston, 13 N. Y. 248, per Denio J.: "There is nothing in the nature of a counter-claim stated in the answer. There was never any contract between the plaintiff and the defendant; and although the new matter was, if true, very pertinent to preclude the plaintiff from recovering upon the demand assigned to him, it had no tendency to show an independent cause of action in favor of the defendant against the plaintiff. Section 150 of the code defines a counter-claim. It must be a claim existing in favor of the defendant against the plaintiff, arising either out of the contract or transaction sued upon, or some other contract. Here the defendant had no claim against the plaintiff. If the facts were truly stated, he had grounds for defending himself against the plaintiff's suit, but none whatever for an independent recovery against him. A counter-claim must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant. It is quite obvious that nothing of that nature is stated in this answer." In the same case, the court below, after stating the doctrine in a similar manner, added: "A counter-claim which is not also a set-off is not a *defence*. It is a distinct and independent cause of action, which is not used simply to repel the claims of the plaintiff, but for which a judgment against him is in all events demanded. Previous to the code, it could not be set up by the defendant at all; and the permission to set it up in an answer, although with a change of its name, assuredly has not changed its legal character. A recoupment or a set-off is a *defence;* but a defendant who avails himself of such a defence admits, in whole or in part, the demand of the plaintiff as alleged in the complaint:" s. c. 4 Duer, 285, 293, per Duer J. See also Merrick *v.* Gordon, 20 N. Y. 93, 97, per Comstock J.

[2] [Stolze *v.* Torrison (1903), — Wis. —, 95 N. W. 114; Kaukauna Co. *v.* Kaukauna (1902), 114 Wis. 327, 89 N. W. 542; Appleton Mfg. Co. *v.* Fox River Paper Co. (1901), 111 Wis. 465, 87 N. W. 453: "A counter-claim, when established, must in some way qualify or defeat in

foreclose a mortgage upon land, the holder of the legal title, to whom the premises had been conveyed by the mortgagor, was made a defendant; but no personal judgment for the debt was demanded against him in the complaint, and he was notified to that effect in the usual manner. He pleaded a counter-claim, setting up the following facts: that the plaintiff conveyed the land to the mortgagor by a deed, with full covenants of title; that the mortgagor conveyed the same premises to the defendant by a similar deed, and also assigned the plaintiff's covenants and all rights of action for their breach; that said covenants had been broken by the existence of an outstanding paramount title and prior incumbrances, and the defendant had been evicted under the same, to his great damage, for which damages judgment was demanded against the plaintiff. Evidence in support of this answer was excluded at the trial, and the defendant appealed. The New York Court of Appeals, sustaining the ruling below, announced the doctrine that the demands of the plaintiff and of the defendant must be reciprocal, in order that there can be any place for a counter-claim.[1] In an action to recover the

whole or in part the plaintiff's claim for judgment. . . . It must be a claim existing in favor of the defendant and against the plaintiff between whom a several judgment may be had in the action." Miser *v.* O'Shea (1900), 37 Ore. 231, 62 Pac. 491; Peterson *v.* Bean (1900), 22 Utah, 43, 61 Pac. 213, citing the text.]

[1] National F. Ins. Co. *v.* McKay, 21 N. Y. 191, 195, per Comstock J.: "Upon the defendant's own statement, I do not see that anything was in litigation between him and the plaintiff, or that any judgment could be rendered against him except one for costs for interposing a groundless defence to the action. No cause of action existed against him. The complaint claimed nothing against him personally, and stated no facts as the foundation of such a decree. The answer showed that he had no title or interest in the mortgaged premises to be affected by the decree. His defence must therefore be deemed to have been put in for the mere purpose of establishing a legal cause for an independent suit on the plaintiff's covenants, without any demand against himself being at all involved in the controversy. Without undertaking at this time to expound the provisions of the code which relate to the counter-claim, I am satisfied that they do not apply to such a case as this. Of course the claim could only be enforced in this case by a judgment in the defendant's favor for the damages sustained in consequence of the eviction. But the plaintiff might, notwithstanding such a judgment, be entitled to a decree for a foreclosure and sale. The alleged counter-claim does not impair or affect the right to that relief. I apprehend that a counter-claim, when established, *must in some way qualify, or must defeat, the judgment to which the plaintiff is otherwise entitled.* In a foreclosure suit, a defendant who is personally liable for the debt, or whose land is burdened by the lien, may probably introduce an offset to reduce or extinguish the claim. But where his personal liability is not in question, and where he disclaims all interest in the mortgaged premises, I do not see how he can demand a judgment against the plaintiff on a bill, or a note, or a bond, or a covenant. Such is virtually this case. The defendant has, as he insists, a cause

price of goods sold and delivered, the answer contained a so-called counter-claim which purported to show that the plaintiff held lands under a deed of trust, which he was in equity bound to convey to the defendant, and prayed a judgment directing such conveyance. The Supreme Court in New York decided that these facts, if properly pleaded, would not constitute a counter-claim in opposition to the cause of action stated in the complaint; and directly held the doctrine that a counter-claim must in some sort defeat the plaintiff's recovery, or interfere with the judgment that would otherwise be rendered in his favor.[1]

of action against the plaintiff upon a broken covenant; but that cause of action, if it exists, does not enable him to resist or modify the relief to which the plaintiff is entitled." See also Agate *v.* King, 17 Abb. Pr. 159 (Gen. Term, 1862). An action to foreclose a mortgage against K. and others. K. owned the land, but was not personally liable for the debt, and no personal judgment against him was demanded. He set up, as a counter-claim, a demand for $6,000 damages arising from a breach by the plaintiff of a distinct contract to convey land. This was held not to be a counter-claim: it clearly did not fall under the first subdivision: it did not fall under the second subdivision, because, in an action to foreclose a mortgage as against all the defendants except the one personally liable, the cause of action does not arise out of contract; and also because no judgment was asked against K. Some portions of the opinion do not agree with the reasoning of Comstock J. quoted above: while the *decision* reached is in harmony with that case, the *dicta* of the judge are not entirely so. And see Carpenter *v.* Leonard, 5 Minn. 155. In an action to foreclose a mortgage where the plaintiff asked for a judgment upon the bond for a deficiency, the defendant's counter-claim of damages was allowed: Hunt *v.* Chapman, 51 N. Y. 555. The doctrine of Nat. F. Ins. Co. *v.* McKay has been enacted in the New York C. C. P., § 501. "The counter-claim must tend, in some way, to diminish or defeat the plaintiff's recovery;" Lipman *v.* Jackson Arch. Iron Works, 128 N. Y. 58. Under this provision it was held, in Schenectady *v.* Furman, 61 Hun, 171, that a counter-claim which is entirely inconsistent with any cause of action on the plaintiff's part and which cannot be proved as a claim until it is decided that the plaintiff has no claim, does not 'tend to diminish or defeat the plaintiff's recovery.' This rule, if established, will evidently limit materially the principle stated in § * 739, *ante;* but it is difficult to see why the result necessarily follows from the code provision cited. The learned judge seems to admit that his decision is inconsistent with Glen & Hall Manuf. Co. *v.* Hall, 61 N. Y. 226; *post*, § * 765; but the doctrine now embodied in § 501 of the code was firmly established when the latter case was decided. In Schenectady *v.* Furman, the action was brought to recover for work done, under resolutions of the common council of a city, in removing certain alleged obstructions in a stream running through the defendant's land; the counter-claim was for the injury done to the land; the resolutions being held invalid, the counter-claim was disallowed, for the reason given above.

[1] Mattoon *v.* Baker, 24 How. Pr. 329, 331 (Gen. Term), per Bockes J. After reciting the allegations as given above, the opinion proceeds: "Would this constitute a defence to the plaintiff's action for goods sold? Clearly not. Nor would it be such a counter-claim as the defendant would have a right to interpose by way of answer to the plaintiff's alleged grounds of action. Such equitable claim for relief would afford no answer to the plaintiff's claim for judgment. He would still be entitled to recover according to the allegations of his complaint, without

§ 621. *745. **Application of Doctrine. Limitation Established by New York Courts. Purely Judicial. Criticism.** These cases must be considered as establishing the doctrine that the defendant's cause of action, in order to constitute a valid counter-claim, must to some extent defeat, modify, qualify, or interfere with, the relief which would otherwise be obtained by the plaintiff. The sweeping statements and broad generalities of the opinions ought, however, to be limited within their proper bounds, by pointing out the only possible instances in which the principle can apply.

any deduction even on account of the matters stated in the answer. A counter-claim, to be available to a party, must afford to him protection in some way against the plaintiff's demand for judgment, either in whole or in part. It must therefore consist in a set-off, or claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint. It must present an *answer* to the plaintiff's *demand for relief;* must show that he is not entitled, either at law or under the applications of just principles of equity, to judgment in his favor, as, or to the extent, claimed in the complaint. It must therefore contain not only the substance of what is necessary to sustain an action in favor of the defendant against the plaintiff, but it must also operate in some way to defeat, in whole or in part, the plaintiff's right to recover in the action. An answer which does not meet this requirement is insufficient, whether regarded as a defence or as a counter-claim. If a person be sued on a promissory note, he cannot set up, by way of defence or counter-claim, a contract with the plaintiff for the purchase of lands, and allege payment of the purchase-price, and claim a decree in the action for a specific performance; nor could he, in such an action on a promissory note, have a foreclosure of a mortgage against the plaintiff, especially if the latter were not personally liable for the mortgage debt." The same principle was again approved by the New York Court of Appeals in a recent decision. "Counter-claim," it was said, "is a new term introduced into the code, and which is limited and defined therein. When the action is upon contract, unless the counter-claim arises out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or be connected with the subject of the action, it must be a legal or equitable cause of action against the plaintiff arising upon contract, and existing at the commencement of the action. It is manifest, however, that every cause of action existing in favor of the defendant against the plaintiff, arising upon contract, cannot be the subject of a counter-claim. It must be a cause of action upon which something is due the defendant which can be applied in diminution of the plaintiff's claim. For instance, a cause of action for the specific performance of a contract in reference to real estate arises upon contract, and yet cannot be set up as a counter-claim, unless it grew out of, or is connected with, the cause of action alleged in the complaint. . . . The object of introducing counter-claims into the practice under the code was to enable parties to settle and adjust all their cross-claims in a single action as far as they could." Waddell *v.* Darling, 51 N. Y. 327, 330. See also Pattison *v.* Richards, 22 Barb. 143, 145. This doctrine was fully approved and adopted by the Supreme Court of Wisconsin in the very recent case of Dietrich *v.* Koch, 35 Wis. 618, 626. In the case of Cavalli *v.* Allen, 57 N. Y. 508, which was an action to recover the possession of land, brought by a vendor against the vendee in possession, on the ground that a balance of the purchase-price remained unpaid, the defendant was permitted to set up as a counter-claim a note which he held against the plaintiff, and thus to extinguish the amount due on the land contract.

It is said by one of the judges that the counter-claim "must consist in a set-off or claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint." This rule could only be broken by counter-claims belonging to the second subdivision. In respect to all those falling within the first subdivision, they all, by the very terms of the definition, arise out of the same contract or transaction set forth in the complaint, or they are connected with the subject of the action. There is, therefore, in this class, no room for a possible violation of the rule laid down by the learned judge. The counter-claim must, from its very nature, be connected with the subject of the action; and therefore the relief demanded by it and that prayed for by the plaintiff cannot be entirely independent of each other. It is in counter-claims of the second subdivision alone that the doctrine can be employed and applied with any practical results. And, of these cases, it is plain that all those in which the complaint and the counter-claim both demand a money judgment comply with the rule. It is only when one or the other seeks to recover some equitable relief that its violation becomes possible. The limitation thus established by the New York courts may be, and probably is, correct; but at the same time it is a judicial interpolation into the statutory language, which contains no such restriction. The legislature has said: "When the action arises on a contract, *any other cause of action* also arising on a contract may also be a counter-claim." What grant of authority could be clothed in more *general* terms than this? The courts, however, say, "It is not true that *any* other cause of action arising on contract may be a counter-claim: it must be connected with the subject of the action, and must operate in some way to defeat, in whole or in part, the plaintiff's right of recovery." This mode of interpretation, when carried beyond very narrow limits, becomes a usurpation of the law-making function, and an actual repeal of statutory provisions.

§ 622. * 746. **Decisions in other States.** The decisions made by the courts of other States present the same general notions in respect to the nature and scope of the counter-claim.[1] In Wisconsin the counter-claim is recognized to the fullest extent as including relief of an equitable nature, and as being available in

[1] See Allen *v.* Shackelton, 15 Ohio St. 145, 147, per Wilder J.; Hill *v.* Butler, 6 Ohio St. 207, 216, per Swan J.

actions brought to obtain specific remedies, such as those affecting or establishing the plaintiff's title to land. In a suit to quiet title to land, the plaintiff alleged his possession and claimed his title under a certain tax-deed, which, with all the proceedings in relation thereto, was particularly described. The defendant answered by way of counter-claim that *he* was in possession and asserted his title under another tax sale and deed, which, with the proceedings, was sufficiently set forth. He prayed judgment that the title might be decreed to be in himself. This answer was held to be a good counter-claim, the court declaring that it conformed in every particular with the definition given by the code.[1] The Supreme Court of Missouri has also described the counter-claim in entire conformity with the judicial definitions already given.[2] The language of the provision in the Indiana code is somewhat broader than that which is found in most of the other codes. The interpretation put upon it, however, will aid in ascertaining the general spirit and object of the entire legislation which introduced this class of defences. In an action to rescind a conveyance of land made by the plaintiff to the defendant on the ground of an alleged fraud, the answer, pleaded as a counter-claim, denied the fraud, insisted upon the validity of the deed, stated the plaintiff's continued and wrongful possession and acts of waste, and demanded judgment for the possession of the land, for the rents and profits thereof, and for damages on account of the waste. This answer

[1] Jarvis *v.* Peck, 19 Wis. 74, per Dixon C. J.: "It does not deny the plaintiff's demand, except so far as it is founded upon his possession, but seeks to extinguish it by an equitable cross-action. It is a claim which of itself would constitute a cross-action in favor of the defendant against the plaintiff in a separate suit." See also Powder *v.* Bowdle (N. Dak. 1893), 54 N. W. Rep. 404.

[2] Holzbauer *v.* Heine, 37 Mo. 443, per Wagner J.: "It must contain the substance necessary to sustain an action on behalf of the defendant against the plaintiff, if the plaintiff had not sued the defendant. It must have a tendency to show an independent cause of action, — a claim existing in favor of the defendant against the plaintiff, arising either out of the contract or transaction sued on, or out of some other contract. The term is new to the law; but it is sufficiently plain and simple. When the defendant has a cause of action against the plaintiff, upon which he might have maintained a suit, such cause of action is a counter-claim. The parties, then, have cross-demands; and, in fact, there are two causes of action before the court for trial in the same suit. Both parties are to a certain extent plaintiffs, and both defendants. The answer, then, does not substantially differ from a petition; and the reply performs substantially the same office as the answer to the petition. Each party claims affirmative relief from the other. If both parties establish their claims, the judgment is rendered for one or the other, according as his demand may be found to be in excess." See also Hay *v.* Short, 49 Mo. 139, 142, which corrects a *dictum* of Holmes J. in Jones *v.* Moore, 42 Mo. 419.

was held to be a good counter-claim so far as it sought to recover the possession and the rents and profits, but not in respect to the demand for damages on account of the waste.[1]

§ 623. *747. **Cause of Limitation upon Counter-Claims.** The foregoing citations fully sustain both the conclusions reached in the preliminary independent analysis of the statute, and the course of reasoning upon which they were based. The feature or limitation which is pointed out by some of the cases, as necessarily involved in all counter-claims belonging to the second subdivision, — namely, that the recovery therein must defeat, modify, or interfere with the relief otherwise recoverable by the plaintiff, — results from the fact that the codes make no provisions for two independent and antagonistic judgments rendered in favor of the adverse parties in the same action. One judgment alone is contemplated by the statute, which shall determine the substantial rights of the parties. Even in equitable actions, where relief may be conferred upon defendants as against the plaintiffs or as against each other, such relief must be compatible with that granted to the plaintiff, so that the whole may be contained in one judgment without opposition or contradiction. If an action upon contract is brought to recover money alone, either debt or damages, and a counter-claim for money, arising upon an entirely distinct contract, is interposed, the resulting judgment would

[1] Woodruff *v.* Garner, 27 Ind. 4, per Frazer J.: "Was this counter-claim good on demurrer? It is not questioned that it averred facts sufficient in an independent suit to entitle the defendant to a judgment; but it is urged that these facts could not be pleaded by way of counter-claim in this suit. A counter-claim is defined to be 'any matter arising out of, or connected with, the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim for damages.' It may not be easy to define the full meaning and application of this statute; and it will therefore be safer, and less likely to produce confusion, if the court shall at present consider only the question of its influence upon the case immediately in judgment. To say, as was inadvertently done in Slayback *v.* Jones, 9 Ind. 470, that the counter-claim is the same thing as recoupment, would be giving a definition obviously less comprehensive than that given by the statute above quoted. The counter-claim comprehends recoupment, and much more. It hardly admits of a question that it embraces also what was known as the cross-bill in equity against the plaintiff. Unless this be so, it would result that, in many cases, what formerly might have been settled in one litigation, would, under the code, require two or more separate suits to determine it. This is not the spirit of the code." In Eastman *v.* Linn, 20 Minn. 433, which was also an action to quiet title, a similar counter-claim for the recovery of the land in question by the defendant was sustained. See also Powder *v.* Bowdle (N. Dak. 1893), 54 N. W. Rep. 404. For an exhaustive discussion of the counter-claim as defined by the Indiana code, and for a statement of the rules in relation to its use, see Campbell *v.* Routt, 42 Ind. 410, 413–416.

necessarily be single, since it would be rendered merely for the difference between the two adverse sums found due by the jury or the court. The implied restriction upon the use of counter-claims, therefore, applies only where one or both of the cross-demands are equitable. It cannot be enforced in an action to recover possession of lands or to recover possession of chattels, since in neither of these instances does the cause of action "arise out of contract," and a counter-claim under the second subdivision is therefore impossible.

§ 624. * 748. **How plead Counter-Claim. Characteristic Marks. Reason herein.** I shall finish this inquiry into the general nature of the counter-claim by a brief statement of the mode in which it should be formally pleaded. The defendant must, in some express and definite manner, indicate his design of treating and relying upon this particular portion of his answer as a counter-claim. Whether it stands alone, and thus constitutes the entire answer, or whether it is united with other defences or counter-claims, it must be so distinguished by the formal language employed, that the plaintiff and the court may recognize it at once as a counter-claim, and not as a simple defence. It is not enough that the defendant state facts, which, if true, would constitute a cause of action against the plaintiff: he must also state his intention to regard these facts *as* constituting the affirmative cause of action, and not to regard them as a defence. This intention must be indicated either by *naming* the matter thus pleaded "a counter-claim," — that is, by declaring that it is pleaded as such, — or by concluding it with a prayer for a judgment granting the desired relief. The better practice is — and it should be universal — to use both of these characteristic marks; to commence the particular allegations with the formal statement that they are pleaded as a counter-claim, and to end them with the usual prayer for relief as in a complaint or petition. This practical rule of pleading is fully sustained by the decided cases.[1] There is one con-

[1] [Smith *v.* Coe (1902), 170 N. Y. 162, 63 N. E. 57; Waller *v.* Deranleau (1903), — Neb. —, 94 N. W. 1038; Nicholls *v.* Hill (1894), 42 S. C. 28, 19 S. E. 1017; Harris *v.* Randolph County Bank (1901), 157 Ind. 120, 60 N. E. 1025; Helmer *v.* Yetzer (1894), 92 Ia. 627, 61 N. W. 206; Gurske *v.* Kelpin (1901), 61 Neb. 517, 85 N. W. 557; Le Clare *v.* Thibault (1902), 41 Ore. 601, 69 Pac. 552; Prichard's Executrix *v.* Peace (1895), 98 Ky. 99, 32 S. W. 296; Indiana, etc. Ass'n *v.* Crawley (1898), 151 Ind. 413, 51 N. E. 466; Alden *v.* Christianson (1901), 83 Minn. 21, 85 N. W. 824; Harrison *v.* State Banking & Trust Co. (1902), 15 S. D. 304, 89 N. W. 477; Rylander *v.* Laursen (1902), 113 Wis. 461, 89 N. W. 488; Brauchle *v.* Noth-

trolling reason why the defendant should designate, in a certain

helfer (1900), 107 Wis. 457, 83 N. W. 653; Barker *v.* Ring (1897), 97 Wis. 53, 72 N. W. 222; Morgan *v.* Hayes (1898), 98 Wis. 313, 73 N. W. 786; Conway *v.* Mitchell (1897), 97 Wis. 290, 72 N. W. 752; Nollman *v.* Evenson (1895), 5 N. D. 344, 65 N. W. 686; Zion Church *v.* Parker (1901), 114 Ia. 1, 86 N. W. 60; Walker *v.* Walker (1895), 93 Ia. 643, 61 N. W. 930.

Rood *v.* Taft (1896), 94 Wis. 380, 69 N. W. 183: "In an action on a promissory note given in part payment for a stallion, there could be no recovery of damages against the plaintiff for fraud and deceit in the sale, or for a breach of warranty, unless such matter was pleaded as a counter-claim expressly so denominated, and affirmative relief asked." "Where matter is pleaded both as a defence and as a counter-claim the defensive allegations will not be construed as part of the counter-claim, in the absence of appropriate words of reference."

New Idea Pattern Co. *v.* Whelan (1903), 75 Conn. 445, 53 Atl. 953: "A counter-claim, when pleaded in an answer, must be pleaded 'as such,' and after the matters of strict defence. Gen. St. § 612; Practice Book, forms 356, 444."

Stotsenburg *v.* Fordice (1895), 142 Ind. 490, 41 N. E. 313: "It is now well settled that where the plea is not, strictly speaking, a defence to the cause of action, but sets up a cross-demand, such as set-off or counter-claim, it is not bad as failing to respond to so much of the claim sued upon as may be in excess of the set-off or counter-claim, though it be directed to the entire cause of action."

Tron *v.* Yohn (1896), 145 Ind. 272, 43 N. E. 437: In an action to foreclose a mortgage given for the purchase-money of real estate, evidence of the difference in the quantity of the land as claimed to have been represented by the grantor and that conveyed, is not admissible under a general denial. "The relief sought by the evidence was of an affirmative character, as much so as payment, set-off, settlement, accord and satisfaction, or account stated. It was in the nature of a counter-claim." Kahrs *v.* Kahrs (1902), 115 Ga. 288, 41 S. E. 649: A plea of set-off which fails to set out the demand as plainly as if sued on, is insufficient.

In Babcock *v.* Maxwell (1898), 21 Mont. 507, 54 Pac. 943, the court said: "Defendant having characterized his pleading as a defence, is bound by the choice he makes, and may not afterwards be heard to assert that it is a counter-claim. A counter-claim must be described as such where the question turns upon the want of a reply. 'Such a rule is essential to protect a plaintiff from being misled by an answer, and to prevent the snare of a counter-claim lurking under the cover of a supposed defence, and unconsciously admitted by a failure to reply.'"

Union Mercantile Co. *v.* Jacobs (1897), 20 Mont. 270, 50 Pac. 793: Plaintiff had a judgment against defendants, and defendants, who were alleged to be insolvent, had a judgment of less amount against plaintiff which had been assigned, as plaintiff claimed, to defraud the plaintiff and other creditors. Plaintiff brought an action in equity to have the assigned judgment offset against its judgment. The answer admitted the recovery of the two judgments and the assignment, but denied that the assignment of the judgment was made fraudulently, and further denied each and every allegation in the complaint not specifically admitted. On the trial the defendants were allowed to show that the plaintiff had in its possession book accounts of the defendants sufficient to satisfy its judgment against them, and its action was thereupon dismissed. The action of the trial court in admitting evidence of this counter-claim was sustained on appeal, although no counter-claim had been pleaded. This case reversed on rehearing, 20 Mont. 554, the court holding that a counter-claim must be pleaded or it cannot be proved.

See, however, the following cases:

Brighton, etc. Irrigation Co. *v.* Little (1896), 14 Utah, 42, 46 Pac. 268: The general rule is that the court will not grant a decree for affirmative relief to the defendant without a counter-claim or cross-complaint, but in this particular case the court was required, under the pleadings, to determine the rights of the parties to the canal and waters thereof, and a decree for

and obvious manner, the special character of the pleading. In all affirmative relief was proper without a counter-claim or cross-complaint. Perego *v.* Dodge (1893), 9 Utah, 1, 33 Pac. 221: Where an answer alleges facts which entitle defendant to affirmative relief, it will be granted, even though no counter-claim or cross-complaint was filed.

City of Huron *v.* Meyers (1900), 13 S. D. 420, 83 N. W. 553: Where facts alleged in an answer amount to a counter-claim, they will be so considered although not so designated, and hence are admitted by failure of plaintiff to reply to them. Farrell *v.* Burbank (1894), 57 Minn. 395, 59 N. W. 485. Allegations in an answer manifestly set up as a counter-claim, and praying for affirmative relief, will be treated as a counter-claim, though not designated as such in the answer.

Arthurs *v.* Thompson (1895), 97 Ky. 218, 30 S. W. 628: Sub-sec. 4, Sec. 97, Civil Code, provides that "a defendant shall not have judgment upon a set-off or counter-claim, unless the caption of the answer contain the words 'answer and set-off' or the words 'answer and counter-claim;' but a misdescription in the caption of the nature of the defendant's claim shall not prevent him from having judgment," etc. Held that this only made it necessary to apprise the plaintiff that he asked some relief over against him, and that the caption "answer and counter-claim" mistakenly used instead of the caption "answer and set-off" would not deprive the defendant of such relief as he showed himself entitled to.

McDougald *v.* Hulet (1901), 132 Cal. 154, 64 Pac. 278: A. leased a tract of land, and B. and C. for a sufficient consideration guaranteed the payment of the rent by the lessee. The rent was not paid, and B. brought an action, making A. and C. defendants, asking to have it adjudged how much was due A. under the lease, and that C. was bound to A. for such amount and that plaintiff was only surety, and further it was sought to have judgment that C. pay A. the amount so found and that plaintiff recover from C. all money paid and losses sustained by reason of said guaranty. A. in his answer set out by way of counter-claim and cross-complaint the facts of the transaction, and asked for judgment against plaintiff for the amount which might be found due him under the lease. The trial court found that a large sum was due A. under the lease, but refused to give A. judgment against plaintiff on the ground that the amount due was not the subject of a counter-claim. On appeal it was held that this was error, and took entirely too narrow a view of the matter. The court said, "Plaintiff could not have prevented the recovery by Boggs [A.] in an independent suit. Why should he in this? We do not think it necessary to go into any nice distinctions as to the name given to an answer."]

Bates *v.* Rosekrans, 37 N. Y. 409, 411, per Hunt J.; McConihe *v.* Hollister, 19 Wis. 269; Hutchings *v.* Moore, 4 Metc. (Ky.) 110; Wilder *v.* Boynton, 63 Barb. 547; McAbee *v.* Randall, 41 Cal. 136. See *contra*, Brannaman *v.* Palmer, Stanton's Code (Ky.), p. 90; Sullivan *v.* Byrne, 10 S. C. 122; Union Nat. Bk. *v.* Carr, 49 Iowa, 359; Equitable Life Ass. Soc. *v.* Cuyler, 75 N. Y. 511, 514, 12 Hun, 247; Bates *v.* Rosekrans, 4 Abb. N. S. 276, 37 N. Y. 409; Wright *v.* Delafield, 25 N. Y. 266; Burke *v.* Thorn, 44 Barb. 383; Burrall *v.* De Groot, 5 Duer, 362; Beers *v.* Waterbury, 8 Bosw. 396; Stowell *v.* Eldred, 39 Wis. 614; Selleck *v.* Griswold, 49 id. 39; Gilpin *v.* Wilson, 53 Ind. 443; Holmes *v.* Richet, 56 Cal. 307 (*per contra*, need not be so designated). See, further, in support of the conclusions of the text, Brannan *v.* Paty, 58 Cal. 330; Carpenter *v.* Hewel, 67 Cal. 589; Fuchs *v.* Treat, 41 Wis. 404; Dobbs *v.* Kellogg, 53 Wis. 448; *contra*, Mills *v.* Rosenbaum, 103 Ind. 152; Acer *v.* Hotchkiss, 97 N. Y. 395, 408.

The Kentucky code, § 98, subd. 4, provides that "a defendant shall not have judgment upon a set-off or counter-claim, unless the caption of the answer contain the words 'answer and set-off,' or the words 'answer and counter-claim.'" It is held, however, that the plaintiff may waive the benefit of this subdivision by replying to the answer and counter-claim. Cason *v.* Cason, 79 Ky. 558; Nutter *v.* Johnson, 80 Ky. 426. By the Wisconsin code (R. S. § 2656), as amended, the rule of the text is embodied in the provision, "Each counter-claim must be pleaded as

the States but one or two, the plaintiff must *reply* to a counter-claim, or its averments of fact are admitted to be true.[1] He ought

such, and be so denominated, and the answer shall contain a demand of the judgment to which the defendant supposes himself to be entitled by reason of the counter-claims therein." The plaintiff waives the defect that the counter-claim is not so designated by demurring or replying to it as a counter-claim, even though the objection is raised on the trial: Voechting *v.* Grau, 55 Wis. 312.

[Township of Noble *v.* Aasen (1898), 8 N. D. 77, 76 N. W. 990: Failure to demur to an alleged counter-claim on the ground that the facts stated do not constitute a counter-claim, waives this objection, and the only point then open to the plaintiff, which can be raised at any time, is that the facts stated in the answer do not constitute a cause of action in favor of defendant that could be enforced against plaintiff *under any circumstances*. See also First Nat. Bank *v.* Laughlin (1894), 4 N. D. 391, 61 N. W. 473; Talty *v.* Torling (1900), 79 Minn. 386, 82 N. W. 632; Campbell *v.* Jones (1878), 25 Minn. 157; Lace *v.* Fixen (1888), 39 Minn. 46, 38 N. W. 762; Walker *v.* Johnson (1881), 28 Minn. 147, 9 N. W. 632.

Young *v.* Gaut (1901), 69 Ark. 114, 61 S. W. 372: Where a defendant sets up a counter-claim to which plaintiff makes no reply, if defendant does not move for judgment on the counter-claim the reply will be deemed to have been waived and the issues treated as made. Lacey *v.* Lacey (1893), 95 Ky. 110, 23 S. W. 673: The objection that the wife's answer, in a suit for divorce, seeking alimony was not styled a "counter-claim" was waived by the plaintiff's replying and joining issue on the matter set up therein. See also Warren *v.* Chandler (1896), 98 Ia. 237, 67 N. W. 242.]

[1] [Sloan *v.* Rose (1899), 101 Wis. 523, 77 N. W. 895; City of Huron *v.* Meyers (1900), 13 S. D. 420, 83 N. W. 553; Ravicz *v.* Nickells (1900), 9 N. D. 536, 84 N. W. 353.

Illsly *v.* Grayson (1898), 105 Ia. 685, 75 N. W. 518. Action to recover rent, aided by attachment. Defendant pleaded a counter-claim for work and labor, etc. To this plaintiff filed a reply consisting of a set-off for a balance due him upon a note executed by defendant, etc. The court, after quoting the sections of the code bearing on the matter, said: "It will be observed that while they do not mention either set-off or counter-claim in referring to the reply, yet they do recognize that defences, either negative or affirmative, may be pleaded, provided the matter pleaded be not inconsistent with the petition. Plaintiff could not join the matters pleaded in reply with his action for rent; for the statute says the landlord's lien may be effected (that is, enforced) by action for the rent alone within a limited time. Defendant had the undoubted right to plead his counter-claim; but, if no set-off is allowed by way of reply, he may thus, after litigation ensues, apply any unsettled items of account to his obligation for rent, although he may at the same time be owing his landlord a much larger sum on general account. It may be that such a reply would not be proper in a case where the items included therein could have been embraced in the petition. But where the statute expressly inhibits such a course, it certainly must be true that plaintiff may interpose in his reply, as a matter of defence, any set-off he may have to defendant's counter-claim. . . . The cases of Cox *v.* Jordan, 86 Ill. 560; Galligan *v.* Fannan, 9 Allen, 192; Mortland *v.* Holton, 44 Mo. 58; Miller *v.* Losee, 9 How. Pr. 356; Turner *v.* Simpson, 12 Ind. 413; Blount *v.* Rick, 107 Ind. 238; and Starke *v.* Dicks, 2 Ind. App. 125, — seem to sustain the right to plead in reply a set-off to defendant's counter-claim, provided there is no departure from the antecedent ground of complaint."

Dunham *v.* Travis (1902), 25 Utah, 65, 69 Pac. 468: In an action on a written contract, the answer, after denying the allegations of the complaint, alleged that a mutual mistake had been made in the contract, and prayed to have it corrected, to which no reply was filed. *Held*, that this constituted a counter-claim and not merely matter in defence, and the counter-claim was admitted by failure to reply.

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not to be subjected to this penalty unless he is told in the most express terms that the pleading *is* a counter-claim. It would have been better if the courts had laid down the most explicit rule, and had required the defendant to *name* his pleading: but the cases do not go to this length; and a prayer for relief, appended to the proper allegations of fact, will supply the place of a name. It has been held that when the defendant has set up facts which really constitute a defence, but has mistakenly called them a counter-claim, formally pleading them as such, he must stand by the designation, and cannot treat them as a defence, and have the benefit of them as a bar to the plaintiff's recovery.[1] This ruling, however, is without any cogent reason in its favor, would often work injustice, and seems opposed to some of the cases already quoted.[2]

Woodford (1897), 50 Neb. 118, 69 N. W. 769: "Where to a counter-claim well pleaded the plaintiff interposes no reply, a verdict in his favor in excess of the amount claimed in his petition, less the amount of such counter-claim, should be set aside as unsupported by the pleading:" Medland *v.* Walker (1895), 96 Ia. 175, 64 N. W. 797: Failure to plead to a counter-claim does not have the effect of admitting its allegations where every fact pleaded in the counter-claim is put in issue by the allegations of the petition and the amended and substituted answer.

Bank of Columbia *v.* Gadsden (1899), 56 S. C. 313, 33 S. E. 575: Where a plea of set-off is purely defensive, going merely to defeat plaintiff's recovery, and not authorizing any affirmative relief against the plaintiff, the plaintiff is not bound to reply to it, as required in case of a counter-claim, but may on the trial plead the statute of limitations *ore tenus*, under section 189, providing that new matter in the answer not relating to a counter-claim "is to be deemed controverted by the adverse party as upon a direct denial or *avoidance*, as the case may require."

Replying set-off to set-off: Small *v.* Kennedy (1893), 137 Ind. 299, 33 N. E. 674: "It has often been held by this court that a plaintiff may reply a set-off to a set-off, and upon the same principle there is no reason why he may not reply a counter-claim to a counter-claim." *Per contra:* Hammer *v.* Downing (1901), 39 Ore. 504, 64 Pac. 651: A reply of a set-off to a plea of set-off is bad, and constitutes a departure in pleading.]

[1] Ferreira *v.* De Pew, 4 Abb. Pr. 131 (Sp. Term), per Brady J.; Campbell *v.* Routt, 42 Ind. 410, 415. See also McAbee *v.* Randall, 41 Cal. 136, where the defendant, having named his answer a "counter-claim," was not permitted to treat it as a "cross-complaint."

[2] See De Leyer *v.* Michaels, 5 Abb. Pr. 203.

[*Dismissal of Action as Affecting Counter-Claim:* Judd *v.* Gray (1900), 156 Ind. 278, 59 N. E. 849; Adams *v.* Osgood (1898), 55 Neb. 766, 76 N. W. 446; Rodgers *v.* Parker (1902), 136 Cal. 313, 68 Pac. 975; Islais, etc. Water Co. *v.* Allen (1901), 132 Cal. 432, 64 Pac. 713; Southern Pac. R. R. Co. *v.* Pixley (1894), 103 Cal. 118, 37 Pac. 194; Maffett *v.* Thompson (1898), 32 Ore. 546, 52 Pac. 565; Bardes *v.* Hutchinson (1901), 113 Ia. 610, 85 N. W. 797; Rumbough *v.* Young (1896), 119 N. C. 567, 26 S. E. 143; Axiom Min. Co. *v.* Little (1894), 6 S. D. 438, 61 N. W. 441; Washington Nat. Bank *v.* Saunders (1901), 24 Wash. 321, 61 Pac. 546.

Amount of Counter-Claim as Affecting Jurisdiction: Howard Iron Works *v.* Buffalo Elevating Co. (1903), 176 N. Y. —, 68 N. E. 66; Griswold *v.* Pieratt (1895), 110 Cal. 259, 42 Pac. 820; Freeman *v.* Seitz (1899), 126 Cal. 291, 58 Pac. 690; Martin *v.* Eastman (1901), 109 Wis. 286, 85 N. W. 359; General Elec. Co. *v.* Williams

II. *The Parties in their Relations with the Counter-Claim.*

§ 625. * 749. 1. **Relations of Defendant to Counter-Claim. Must be a Demand in Favor of Defendant who pleads it. Test.** In all the States whose codes do not contain a provision in favor of sureties or joint-debtors, the rule is established without exception that the counter-claim must be a demand existing in favor of the defendant who pleads it; in other words, the defendant cannot set up and maintain as a valid counter-claim a right of action subsisting in favor of another person, even though there may be close legal relations between himself and such other person. The sure test is very simple. Could the defendant have maintained an independent action upon the demand if he had made it the basis of a separate suit? If he could not, then he cannot use it as a counter-claim. To this proposition there is no judicial dissent nor exception; and the cases which I shall cite are intended to illustrate the various circumstances in which the rule has been applied.[1]

§ 626. * 750. **Case of Surety. Relief in Equity.** The most common case is that of a surety. When sued alone, or together with the principal debtor, he cannot interpose as a valid counter-

(1898), 123 N. C. 51, 31 S. E. 288; Haygood *v.* Boney (1894), 43 S. C. 63, 20 S. E. 803; Bunch *v.* Potts (1893), 57 Ark. 257, 21 S. W. 437.]

[1] [Northern Trust Co. *v.* Hiltgen (1895), 62 Minn. 361, 64 N. W. 909; Taylor *v.* Matteson (1893), 86 Wis. 113, 56 N. W. 829; Emerson *v.* Schwindt (1900), 108 Wis. 167, 84 N. W. 186; Sullivan *v.* Nicoulin (1901), 113 Ia. 76, 84 N. W. 978; Lebanon Steam Laundry *v.* Dyckman (1900), Ky., 57 S. W. 227.

Newton *v.* Lee (1893), 139 N. Y. 332, 34 N. E. 905: "In an action to recover for goods alleged to have been sold and delivered to defendants, the latter, after a general denial, set up in their answer 'for a further and separate answer and defence' that the transactions set forth in the complaint were between the plaintiff's assignor and a corporation, under a written contract between vendor and vendee; that the vendor failed to perform its contract, by means whereof the vendee was damaged in a manner set forth; that defendants 'became privy to the contract' by guaranteeing performance on the part of the vendee. Said damages defendants claimed they were 'entitled to recoup and set off as a counter-claim against the pretended cause of action set forth in the complaint.' *Held*, that the second defence, assuming the facts therein stated to be true, had no relation to the cause of 'action set forth in the complaint;' that it set up 'new matter' within the meaning of the provision of the Code of Civil Procedure authorizing a demurrer to a counter-claim; and so, that an order overruling a demurrer thereto was error. It *seems*, that if defendants had been sued as guarantors or sureties, they could not have availed themselves, in exoneration of their liability, of a cause of action for damages for breach of the contract with their principal."

Computing Scale Co. *v.* Churchill (1901), 109 Wis. 303, 85 N. W. 337: "A counter-claim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the causes of action mentioned in the statute."]

claim any cause of action existing in favor of that principal, — not even one arising from a breach by the plaintiff of the very contract in suit.[1] There are instances in which equity will undoubtedly relieve the surety when the principal debtor is insolvent, and holds valid claims against the plaintiff which *he* might assert; but such equitable relief would not be in the form of a counter-claim: it would be *defensive* merely, and would not include any recovery against the plaintiff by the surety. If the principal debtor and the surety are sued together, and the former interposes the counter-claim existing in his own favor and succeeds on it, the result, of course, operates *as a defence* in aid of the surety: the plaintiff's demand being partly or wholly extin-

[1] Gillespie *v.* Torrance, 25 N. Y. 306, 308, 310, per Selden J.; s. c. 4 Bosw. 36; 7 Abb. Pr. 462; La Farge *v.* Halsey, 1 Bosw. 171, 4 Abb. Pr. 397; People *v.* Brandreth, 3 Abb. Pr. N. S. 224 (Ct. of App.), per Hunt and Porter JJ.; East River Bank *v.* Rogers, 7 Bosw. 493; Lasher *v.* Williamson, 55 N. Y. 619; O'Blenis *v.* Karing, 57 N. Y. 649; Gillespie *v.* Torrance was an action against an indorser of a note. He alleged, as a counter-claim, that he indorsed for the accommodation of Van P., the maker; that the note was given for the price of timber sold by the plaintiff to Van P.; that plaintiff warranted the quality of the timber to the buyer, — a breach of this warranty, and consequent damages to Van P., for which defendant demanded judgment. This attempted counter-claim was rejected for the reasons stated in the text. The opinion of Selden J. is very elaborate and instructive. While holding that the surety has no *legal* counter-claim nor set-off, Mr. Justice Selden is of opinion that he would be relieved in equity if the principal debtor was insolvent. This equitable relief, however, would not be in the shape of a *recovery* against the plaintiff. In La Farge *v.* Halsey, the defendants were sureties for the lessee on a lease, and were sued for rent in arrear. They set up, as a counter-claim, damages sustained by the lessee from a breach by the plaintiff of an agreement made between himself and the tenant. This was overruled, because the right of action was in the lessee alone. East River Bank *v.* Rogers was the ordinary case of a guarantor sued for the debt secured. He pleaded, as a counter-claim, a debt due from the plaintiff to his principal, and it was struck out as frivolous. As to counter-claim in favor of a surety, see also Morgan *v.* Smith, 7 Hun, 244, citing Lewis *v.* McMillan, 41 Barb. 420; Smith *v.* Felton, 43 N. Y. 419, and Gillespie *v.* Torrance, *supra;* Davis *v.* Toulmin, 77 N. Y. 280; Scott *v.* Timberlake, 83 N. C. 382; Coffin *v.* McLean, 80 N. Y. 560; Harris *v.* Rivers, 53 Ind. 216; Stockton Sav. & L. Soc. *v.* Giddings, 96 Cal. 84; Thalheimer *v.* Crow, 13 Col. 397.

[Bishop *v.* Mathews (1899), 109 Ga. 790, 35 S. E. 161: A defendant in an action brought against him individually upon a demand for the payment of which he is individually liable, cannot, without showing some equitable reason for being allowed so to do, such as the insolvency of the plaintiff, set off against the plaintiff's claim a debt due by the latter to a partnership of which the defendant is or had been a member.

Crowley *v.* U. S. Fidelity & Guaranty Co. (1902), 29 Wash. 268, 69 Pac. 784: "In an action against the surety upon a building contractor's bond to recover the amount of unpaid bills for material the owner was compelled to pay, the defendant is entitled to offset the value of extra work performed by the contractor, and for this purpose may introduce evidence showing that there was a dispute between the owner and contractor as to the reasonable value of such extras, etc."]

guished, the surety would necessarily obtain the benefit of such extinction.[1]

§ 627. * 751. **Rule not Confined to Sureties. Other Instances.** The rule is not confined to sureties. It requires, in general, — the only exception being the case where a separate judgment is possible, — that the counter-claim should exist in favor of all the defendants, and that all the persons in whose favor it exists should be defendants in the action, and that it should be pleaded in their common behalf. Thus, where one is sued, a demand in favor of himself and a former partner not a party to the suit is inadmissible as a counter-claim ;[2] and, conversely, in an action against partners upon a firm liability, a counter-claim interposed by one of them, alleging a demand for damages accruing to him individually from the breach of a separate contract between himself and the plaintiff, must be rejected, because it is not in favor of all the defendants who are thus jointly sued.[3] A person sued in a representative capacity — for example, as a receiver — to recover trust-funds in his hands, or to enforce the performance of his fiduciary duty, cannot avail himself, by way of counter-claim, of a demand due to himself in his personal and private capacity ;[4]

[1] O'Blenis *v.* Karing, 57 N. Y. 649; Springer *v.* Dwyer, 50 N. Y. 19; Green *v.* Conrad (Mo. Supreme, 1893), 21 S. W. Rep. 839; Becker *v.* Northway, 44 Minn. 61. Where the principal debtor and the plaintiff are insolvent, the surety, who is jointly bound with his principal, may set off his individual claim against the plaintiff, notwithstanding the statutory provision that the "counter-claim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." Clark *v.* Sullivan, 2 N. Dak. 103.

[2] Campbell *v.* Genet, 2 Hilton, 290. See Bird *v.* McCoy, 22 Iowa, 549, — a peculiar case in which parties were held included as defendants in the *firm name* against which the action was brought. See also, as to suits against partners and other joint debtors, Weil *v.* Jones, 70 Mo. 560; Great West. Ins. Co. *v.* Pierce, 1 Wyo. Ter. 45; Wilson *v.* Runkel, 38 Wis. 526; Harris *v.* Rivers, 53 Ind. 216; and cases cited *post*, in notes to §§ * 758, * 759.

[3] Peabody *v.* Bloomer, 5 Duer, 678, 6 Duer, 53, 3 Abb. Pr. 353, per Woodruff J.: "To an action against several joint debtors for a debt due by them as partners, one of them cannot avail himself, either by way of set-off or counter-claim, of such a defence." See this case, and especially the opinion of Hoffman, J. at Special Term on the subject of *joint liability*. See also Wilson *v.* Runkel, 38 Wis. 526.

[Sullivan *v.* Nicoulin (1901), 113 Ia. 76, 84 N. W. 978; Brown *v.* Fresno Raisin Co. (1894), 101 Cal. 222, 35 Pac. 639; Baxter *v.* Sherman (1898), 73 Minn. 434, 76 N. W. 211; McKinnon *v.* Palen (1895), 62 Minn. 188, 64 N. W. 387; Pope Mfg. Co. *v.* Cycle Co. (1899), 55 S. C. 528, 33 S. E. 787; Smith *v.* Diamond (1893), 86 Wis. 359, 56 N. W. 922.]

[4] Johnson *v.* Gunter, 6 Bush, 534; *Re* Jones (Supreme, 1888), 1 N. Y. Suppl. 127.

[Wilkinson *v.* Bertock (1900), 111 Ga. 187, 36 S. E. 623; Carter *v.* Tippins (1901), 113 Ga. 636, 38 S. E. 946; Bishop *v.* Mathews (1899), 109 Ga. 790, 35 S. E.

and the converse of this particular rule is also equally true.[1] Under any and all circumstances, a counter-claim consisting of a demand in favor of a third person not a party to the action, and having no relations with the issues involved therein, is entirely inadmissible.[2]

§ 628. *752. 2. **Relations of Plaintiff to Counter-Claim. Must be a Demand against Plaintiff. Test. Application of Rule most Frequent in what Cases.** The very conception of a counter-claim implies that it is a cause of action against the plaintiff. The test is here equally simple and plain as in the case of the defendant. Would the facts, if alleged in a separate action against the plaintiff, make out a cause of action against him, and show him liable to the appropriate relief? If not, they do not and cannot constitute a counter-claim. This rule, although universal, is most frequently applied in actions brought by assignees of the demands in suit. When the plaintiff is such an assignee, no demand accruing to the defendant against the assignor can possibly be enforced as a counter-claim.[3] Such liability of the assignor may, under certain

161; Davis *v.* Hadden (1902), 115 Ga. 466, 41 S. E. 608; Edwards *v.* Williams (1893), 39 S. C. 86, 17 S. E. 457; Gallagher *v.* Germania Brewing Co. (1893), 53 Minn. 214, 54 N. W. 1115; Gerdtzen *v.* Cockrell (1893), 52 Minn. 501, 55 N. W. 58; Oregon Gold-Mining Co. *v.* Schmidt (1901), Ky., 60 S. W. 530; Headington *v.* Smith (1901), 113 Ia. 107, 84 N. W. 982: In a suit brought in a representative capacity, defendant cannot use as a counter-claim a cause of action existing against the plaintiff as an individual.]

[1] Gansner *v.* Franks, 75 Mo. 64; Lanier *v.* Brunson, 21 S. C. 41.

[Lewis *v.* Pickering (1899), 58 Neb. 63, 78 N. W. 368; Le Clare *v.* Thibault (1902), 41 Ore. 601, 69 Pac. 552: "Invoking the maxim that equity will not suffer a wrong without a remedy, it has been held that a counter-claim arising in a different right will sometimes be allowed in a suit by reason of circumstances that render it equitable to do so."]

[2] Bates *v.* Rosekrans, 37 N. Y. 409, 411; Babbett *v.* Young, 51 Barb. 466; Ernst *v.* Kunkle, 5 Ohio St. 520; Dolph *v.* Rice, 21 Wis. 590, 593; Briggs *v.* Seymour, 17 Wis. 255; Carpenter *v.* Leonard, 5 Minn. 155; Mealey *v.* Nickerson, 44 Minn. 436 (stockholders cannot set off a claim in favor of the corporation). See, however, Moorehead *v.* Hyde, 38 Iowa, 382, — a case in which the defendants were held to be trustees of an express trust in a contract made with the plaintiff, and a counter-claim by them was sustained.

[3] [Smith *v.* Dawley (1894), 92 Ia. 312, 60 N. W. 625; Hoaglin *v.* Henderson (1903), 119 Ia. 720, 94 N. W. 247; Newton *v.* Lee (1893), 139 N. Y. 332, 34 N. E. 905; Emerson *v.* Schwindt (1900), 108 Wis. 167, 84 N. W. 186: "A counter-claim 'must be one existing in favor of the defendant and against a plaintiff between whom a several judgment might be had in the action.'" In this case the defendant in a suit brought by the assignee of a land contract for foreclosure sought to maintain a counter-claim for legal services rendered the assignor, a receiver. *Held*, that it could not be maintained. See also Computing Scale Co. *v.* Churchill (1901), 109 Wis. 303, 85 N. W. 337; Taylor *v.* Matteson (1893), 86 Wis. 113, 56 N. W. 829; Gibson *v.* Trow (1900), 105 Wis. 288, 81 N. W. 411.

New Whatcom *v.* Bellingham Bay Imp Co. (1896), 16 Wash. 138, 47 Pac. 1102.

circumstances, be a good defence in bar of the recovery; but, as it is not a liability of the plaintiff, it cannot be a counter-claim; it is impossible, by means of a valid demand against A. alone, to obtain a judgment against B. The decisions are unanimous, and sustain the doctrine stated above under all possible circumstances.[1] The rule is applied by the cases cited in the note to every species

"In an action by a city to recover benefits for street improvements, the defendant cannot offset a claim for materials furnished the contractor who had charge of making the improvements." See also Sheafe *v.* Hastie (1897), 16 Wash. 563, 48 Pac. 246; Parker *v.* Carolina Bank (1898), 53 S. C. 583, 31 S. E. 673; Efird *v.* Land Co. (1899), 55 S. C. 78, 32 S. E. 758; Lauraglenn Mills *v.* Ruff (1900), 57 S. C. 53, 35 S. E. 387; Rumbough *v.* Young (1896), 119 N. C. 567, 26 S. E. 143; Wilkinson *v.* Bertock (1900), 111 Ga. 187, 36 S. E. 623; Northern Trust Co. *v.* Hiltgen (1895), 62 Minn. 361, 64 N. W. 909; Harrison *v.* State Banking & Trust Co. (1902), 15 S. D. 304, 89 N. W. 477; Field *v.* Austin (1901), 131 Cal. 379, 63 Pac. 292; Bloch Queensware Co. *v.* Metzger (1901), 70 Ark. 232, 65 S. W. 929; Bernstein *v.* Coburn (1896), 49 Neb. 734, 68 N. W. 1021; Johnson *v.* Geneva Pub. Co. (1894), 122 Mo. 102, 26 S. W. 676; Washington Sav. Bank *v.* Butchers', etc. Bank (1895), 130 Mo. 155, 31 S. W. 761.]

[1] Boyd *v.* Foot, 5 Bosw. 110; Vassear *v.* Livingston, 13 N. Y. 248, 252, per Denio J.; s. c. 4 Duer, 285, 293, per Duer J.; Dillaye *v.* Niles, 4 Abb. Pr. 253; Ferreira *v.* De Pew, 4 Abb. Pr. 131; Thompson *v.* Sickles, 46 Barb. 49; McIlvaine *v.* Egerton, 2 Robt. 422; Wolf *v.* H., 13 How. Pr. 84, per E. Darwin Smith J.; Davidson *v.* Remington, 12 How. Pr. 310; Gleason *v.* Moen, 2 Duer, 639; Cumings *v.* Morris, 3 Bosw. 560; Wiltsie *v.* Northam, 3 Bosw. 162; Duncan *v.* Stanton, 30 Barb. 533, 536; Tyler *v.* Willis, 33 Barb. 327; Spencer *v.* Babcock, 22 Barb. 326, 335; Weeks *v.* Pryor, 27 Barb. 79; Van de Sande *v.* Hall, 13 How. Pr. 458, per Paige J.; Linn *v.* Rugg, 19 Minn. 181, 185; Swift *v.* Fletcher, 6 Minn. 550; McConihe *v.* Hollister, 19 Wis. 269. In this case the defendant prayed equitable relief that the mortgage, etc., sued on by an assignee, might be cancelled on account of the mortgagee's fraud in obtaining it. The court held that this answer was in form a counter-claim, but that it could not be relied on as such by the defendant and the relief granted, because the assignor was a necessary party; and the opinion implies that, if he had been made a party, the relief could have been granted. Notwithstanding this array of authorities, and the explicit language of the codes, the doctrine has sometimes been overlooked by courts. Thus, in Page *v.* Ford, 12 Ind. 46, and Slayback *v.* Jones, 9 Ind. 470, the Supreme Court of Indiana entirely failed to notice that the demands existing against an assignor, which were set up by the defendants against the assignee (the plaintiff), could not possibly be counter-claims; and that the discussion of the court upon other points was therefore wholly unnecessary. In the later case of Perry *v.* Chester, 12 Abb. Pr. N. S. 131, Mr. Justice Monell is chargeable with the same palpable oversight. The action was on an appeal bond given by *two* defendants to A., and by him assigned to the plaintiff. *One* of the defendants set up a demand in his own favor alone against A., the assignor, as a counter-claim. The learned judge discusses at great length the question, whether *one* defendant in such an action can rely upon a claim due to himself alone; and finally reaches the conclusion that, as the undertaking of the defendants was *joint*, the demand of the single defendant is not available. He is wholly oblivious to the fact that no such claim could be interposed at all in the action against the plaintiff. See also, as further illustrations of the text, Freeman *v.* Lorillard, 61 N. Y. 612; More *v.* Rand, 60 id. 208; Manney *v.* Ingram, 78 N. C. 96; Holliday *v.* McMullan, 83 id. 270; McCulloch *v.* Vibbard, 51 Hun, 227; National Bank of Chamb. *v.* Grimm, 109 N. C. 93. See also cases cited *ante*, in last note under § *167.

of assignee, private and official; and is established with absolute unanimity.

§ 629. * 753. **Counter-Claim must be a Cause of Action; merely Defensive Matter not Sufficient.** It is an essential element in the legal notion of a counter-claim that it must be a *cause of action;* must consist of a right to some affirmative relief, and not be matter simply defensive, either in bar of the plaintiff's recovery, or in reduction of its amount. Thus, in an action for the price of work, labor, and material, the defendant in his answer set up payments made by him in excess of the plaintiff's demand, but did not in a formal manner call his pleading a counter-claim, nor demand judgment for the surplus. At the trial he insisted that his allegations were admitted because the plaintiff had not replied. His contention was overruled, not upon the defects of form, but upon the absence of any cause of action. The payments as stated to have been made being voluntary, no right to recover back the excess existed; and the answer was nothing more than the defence of payment.[1] And payments or disbursements made by a trustee or holder of a fund, and set up by him in his answer to an action for an account and enforcement of the trust brought by a beneficiary, do not create any right of action, and cannot, therefore, be a counter-claim.[2]

§ 630. * 754. **In Actions by Married Women; by Widows. Must be against Plaintiff in Capacity in which he sues. Against Plaintiff alone and against all the Plaintiffs. Exception.** In actions by married women to recover demands due to them personally as a part of their separate property, or their personal earnings, and the like, debts and liabilities of their husbands cannot be successfully

[1] Holzbauer *v.* Heine, 37 Mo. 443; and see McPherson *v.* Meek, 30 Mo. 345; Lash *v.* McCormick, 17 Minn. 403 (partial failure of consideration); Kent *v.* Cantrall, 44 Ind. 452, 459; McCrary *v.* Deming, 38 Iowa, 527, 531; Lathrop *v.* Godfrey, 6 N. Y. S. C. 96, — a peculiar case, in which a demand against the plaintiff's assignor, who, it was alleged, was the real party in interest, was sustained; citing Hunt *v.* Chapman, 51 N. Y. 555; First Nat. Bk. of Memphis *v.* Kidd, 20 Minn. 234, 242, — an action to foreclose a mortgage, in which defendant claimed that the debt should be enforced upon other lands before proceeding against those in suit. In an action of ejectment, where the defendant alleges ownership in himself, and asks that his title be quieted against the plaintiff, such answer is a counter-claim: Venable *v.* Dutch, 37 Kan. 515; Allen *v.* Douglass, 29 Kan. 412; Sale *v.* Bugher, 24 Kan. 432.

[2] Duffy *v.* Duncan, 35 N. Y. 187, 189. It has been held that no counter-claim is possible against the State beyond the defeating the action brought by it, because a judicial proceeding cannot be maintained against it: the counter-claim can be used as a *defence,* but no further Commonwealth *v.* Todd, 9 Bush, 708.

interposed as counter-claims;[1] and in a suit by a widow to recover dower in land conveyed by her husband during the marriage without her release, the defendant cannot counter-claim damages arising from the breach of a covenant of warranty in the husband's deed; for no right of action exists against her.[2] The demand must also be against the plaintiff in the same capacity as that in which he sues. Thus, where the action is by the plaintiff in his private and personal capacity, a claim against him as an executor or an administrator cannot be made a valid counter-claim.[3] But, in an action by an executor on a note given to the testator, the defendant can set up by way of counter-claim a demand for damages caused by the fraud of the deceased in the sale of land for the price of which the note was given.[4] Not only must the counter-claim be a right of action against the plaintiff, but it must, in general, be against the plaintiff alone, and against all the plaintiffs.[5] The exception to this rule is expressly pro-

[1] Paine *v.* Hunt, 40 Barb. 75.

[2] Hill *v.* Golden, 16 B. Mon. 551, 554.

[3] Merritt *v.* Seaman, 6 Barb. 330. The plaintiff sued on a note given to him as executor after the death of the testator, and the counter-claim was a debt due from the testator. In support of its decision that these demands did not affect the plaintiff in the same capacity, the court cited Fry *v.* Evans, 8 Wend. 530; Mercein *v.* Smith, 2 Hill, 210; but see Westfall *v.* Dungan, 14 Ohio St. 276. See, also, in support of the rule in Merritt *v.* Seaman, Patterson *v.* Patterson, 59 N. Y. 574; Harte *v.* Houchin, 50 Ind. 327; McLaughlin *v.* Winner, 63 Wis. 120; Harris *v.* Taylor, 53 Conn. 500; in an action by an assignee for creditors for the price of goods sold after the assignment, an indebtedness of the assignor cannot be set off: James *v.* McPhee, 9 Col. 486; Otis *v.* Shants, 128 N. Y. 45. Conversely, where the plaintiff sues in a representative capacity, a demand against him in his private capacity is not a proper subject for a counter-claim: Wakeman *v.* Everett, 41 Hun, 278; Gelshenen *v.* Harris, 26 Fed. Rep. 680. When a receiver, trustee, executor, or administrator sues to recover a debt due to the estate, a demand by the defendant for services rendered on behalf of the estate on the plaintiff's employment is a good counter-claim. Davis *v.* Stover, 58 N. Y. 473; Barbee *v.* Green, 86 N. C. 158 (set-off of claim for funeral expenses); Patterson *v.* Patterson, 59 N. Y. 574 (same). The New York Code of Civil Procedure, § 502, subd. 3, contains the following provision: "If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counter-claim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counter-claim, if it might have been so allowed in an action brought by the person beneficially interested." See Pendergast *v.* Greenfield, 40 Hun, 494.

[4] Isham *v.* Davidson, 52 N. Y. 237. See McLean *v.* Leach, 68 N. C. 95; Brandon *v.* Allison, 66 N. C. 532, for the peculiar rules prevailing in North Carolina.

[5] Mynderse *v.* Snook, 1 Lans. 488. The opinion of T. A. Johnson J. contains an elaborate discussion of the general subject of joint and separate demands and judgments. See also S. P. Belknap *v.* McIntyre, 2 Abb. Pr. 366; McPherson *v.* Meek, 30 Mo. 345; Merrick *v.* Gordon, 20 N. Y. 93, 97; N. Y. Ice Co. *v.* Parker, 8 Bosw. 688. It may be interesting and

vided for by the codes, and only exists in those cases where a separate judgment may be rendered for or against the person against whom the counter-claim is pleaded.[1] This exceptional case will be examined in the following subdivision.

§ 631. *755. 3. **When the Counter-Claim may be in Favor of One or More of Several Defendants, and against One or More of Several Plaintiffs. When Possible. Question herein Stated.** The provision found in nearly all the codes, that the counter-claim must exist "in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action," implies that whenever the single defendant or all the defendants jointly may recover against one or some of the plaintiffs and not against all, or whenever one or some of the defendants and not all may recover against the single plaintiff or all the plaintiffs jointly, or whenever both of these possibilities are combined, a counter-claim may be interposed against the one or some of the plaintiffs and not against all, and by the one or some of the defendants and not by all. Such a

instructive to contrast this rule as it has been inferred from the language found in the codes generally with the very different rule that results from the freer provisions of the Iowa statute. In an action brought by a single plaintiff to recover damages for the non-performance of a contract to sell and deliver cattle, the defendants alleged the following facts as a counter-claim, and proved the same at the trial; that subsequently to the agreement sued upon, they entered into a second and different contract with the plaintiff and certain other persons composing a partnership under the firm name of Gadsden & Co., by which they agreed to deliver, and the firm to receive, the same cattle at the same time and place, but at an enhanced price; that this second contract was substituted instead of the former one; that they had fully tendered performance, but the purchasers had wholly refused to accept and pay for the cattle, to their damage, for which they demanded judgment against the plaintiff, Gadsden & Co. of course not being parties to the suit. This counter-claim was sustained, the court saying: "The defendants could hold him [the plaintiff] liable in this action for the damages sustained for not receiving the cattle; that is to say, though others may have been jointly liable with him [the plaintiff], the defendants could recover their damages in this action against him. The defendants could have sued the plaintiff on this contract, and, if so, they could set up their counter-claim, and hold him for his refusal to receive. And within the rule recognized by this court in Ryerson *v.* Hendrie, 22 Iowa, 480, this would be so, though the contract was made with the new parties as a partnership." Redman *v.* Malvin, 23 Iowa, 296, 299. See also Musselman *v.* Galligher, 32 Iowa, 383; Baird *v.* Morford, 29 Iowa, 531, 534; Sherman *v.* Hale, 76 Iowa, 383; Allen *v.* Maddox, 40 Iowa, 124 (a cause of action may be pleaded as a "set-off," under the first subdivision of the code section, by one defendant, where several are jointly sued; or, when it exists against several, it may be pleaded against the single plaintiff).

[1] [Drake *v.* Avanzini (1894), 20 Col. 104, 36 Pac. 846. Where a plaintiff is jointly liable with another to the defendant, a counter-claim will not lie against him alone upon that liability. Holgate *v.* Downer (1899), 8 Wyo. 334, 57 Pac. 918: "It is the general rule, both in law and equity, that joint and separate debts cannot be set off against each other."]

severance in the recovery is possible when the right sought to be maintained on the one side, and the liability to be enforced on the other, are not originally joint. The discussion is therefore reduced to the question, When may a severance in the judgment be had, so that it may be rendered for a part of the plaintiffs and against the others, and against a part of the defendants and for the others? From the answer to this inquiry we shall ascertain between what parties "a several judgment may be had in the action;" and as a further consequence, when the counter-claim may be against one or more of the plaintiffs, or in favor of one or more of the defendants. In pursuing the discussion, I shall collect and examine some of the leading judicial decisions which have given a construction to the clause, and shall endeavor to ascertain from them the general principles and rules that may determine, in each particular case, when a counter-claim of this form and nature is proper.[1]

§ 632. * 756. (1) **Against One or Some of the Plaintiffs. Illustrative Case.** An action for an accounting and recovery of the amounts found due was brought by three plaintiffs against two defendants under the following circumstances. The five parties had entered into an agreement for the publication of a newspaper: the defendants were to be the actual publishers, and to have charge of the business; and, after paying all the expenses, the net proceeds were to be divided into five equal parts, of which the defendants were to retain two, and one of the other "three parts shall be paid by [defendants] in cash to each of the other parties to this agreement," — the plaintiffs. The answer, besides other separate defences, contained a counter-claim consisting of a judgment recovered by the defendant R. against the plaintiff H., and assigned to both the defendants before the suit was commenced. This counter-claim was set up against the plaintiff H. alone. The New York Court of Appeals held that although the action was *in form* joint, yet the right of each plaintiff was several; and a several judgment, declaring the sum to which each was entitled, was necessary.[2] Nothing can be more firmly settled than the

[1] [Lebanon Steam Laundry *v.* Dyckman (1900), Ky., 57 S. W. 227; Murphy *v.* Colton (1896), 4 Okla. 181, 44 Pac. 208; Van Etten *v.* Kosters (1896), 48 Neb. 152, 66 N. W. 1106.]

[2] Taylor *v.* Root, 4 Keyes, 335: "Hence, as to either of the plaintiffs, if the defendants had averred and proved payment in full of his share, the defence as to such plaintiff would have been effectual; and yet the other two plaintiffs would have been entitled to judgment for the several amounts of their shares. . . . The same principle is applicable to a defence in the

general rule, that in the absence of a statutory provision to the contrary, where an action is brought by a partnership on a claim due the firm, no demand in favor of the defendant against one or some of its members can be used as a counter-claim ;[1] but an apparent exception to this rule has been admitted. If the business had been carried on by one or more of the firm as *ostensible* partners, a debt owing by him or them may be interposed as a counter-claim, although all the members have united in the action. By their mode of conducting the business, the ostensible partner or partners had been held out to the world as the real firm, and they could sue or be sued without joining the others as parties to the proceeding.[2] The case of a demand against the plaintiff or plaintiffs on the record, and others who are not parties to the suit, being pleaded as a counter-claim, has already been considered. It does not present *exactly* the question now under consideration, but depends for its solution upon the same general principles. It is settled by the decisions, that a joint indebtedness or liability due from the plaintiff and from others not parties to the suit cannot be used as a counter-claim against the plaintiff, because such a cause of action cannot be severed and a judgment rendered against a part only of the persons liable.[3]

nature of a counter-claim. . . . The plaintiff's position is undoubtedly correct, that where the cause of action is strictly joint, and the recovery, if had, is for the joint benefit of the plaintiffs, the defendant cannot set off or counter-claim the individual debt of either plaintiff to defeat or reduce a joint recovery." Such, however, was not the present case, because there was no joint demand on the part of the plaintiffs. The counter-claim was therefore sustained. See also, as illustrating the general conclusions of the text, Freeman *v.* Lorrillard, 61 N. Y. 612, 617; Field *v.* Hahn, 65 Mo. 417.

[1] Nipper *v.* Jones, 27 Mo. App. 538; Peck *v.* Snow, 47 Minn. 398; Morganthau *v.* King, 15 Col. 413.

[Owsley *v.* Bank of Cumberland (1902), Ky., 66 S. W. 33; Gotthauer *v.* Cunningham (1896), 4 Okla. 551, 47 Pac. 479; Witherington *v.* Huntsman (1897), 64 Ark. 551, 44 S. W. 74; McDonald *v.* Mackenzie (1887), 24 Ore. 573, 14 Pac. 868; Adams *v.* Baker (1898), 24 Nev. 162, 55 Pac. 362; Sweeney *v.* Bailey (1895), 7 S. D. 404, 64 N. W. 188; Folsom *v.* Pailing (1899), 58 Neb. 478, 78 N. W. 926.]

[2] Van Valen *v.* Russell, 13 Barb. 590, 592, per Edwards J.; citing 7 Durnf. & E. T. R. 361 (note *c*); *Ex p.* Enderby, 2 Barn. & C. 389; Smith *v.* Watson, 2 Barn. & C. 401. See also Rush *v.* Thompson, 112 Ind. 158. "Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal;" per Lord Mansfield, in Rabone *v.* Williams, 7 Durnf. & E. T. R. 360 (n.); followed in Hogan *v.* Shorb, 24 Wend. 458; Pratt *v.* Collins, 20 Hun, 126; Tannebaum *v.* Marsellus (N. Y. City Ct. 1893), 22 N. Y. Suppl. 928.

[3] See *supra*, § *754; Schubart *v.* Harteau, 34 Barb. 447; Belknap *v.* McIntyre,

§ 633. * 757. **Several Judgment between Some of the Parties. Inquiry Presented herein. Conflict of Opinion.** Upon the general question, When can a several judgment be rendered between some of the parties to an action? there has been much conflict of judicial opinion, and discrepancy of decision. It resolves itself into the broader inquiry, How far has the common-law doctrine of joint rights and liabilities been changed by the new procedure? The judges of one school have denied *any* modification in these *legal* notions, and have restricted the language of the statute to equitable proceedings. Another school have gone to the opposite extreme, and have declared the ancient rules as to joint right and liability to be utterly abolished, so that a severance among the plaintiffs or defendants in the recovery may be had in all cases.[1]

2 Abb. Pr. 366; Mynderse *v.* Snook, 1 Lans. 488; Spofford *v.* Rowan, 124 N. Y. 108; McCulloch *v.* Vibbard, 51 Hun, 227; Ingols *v.* Plimpton, 10 Col. 535; Wood *v.* Brush, 72 Cal. 224. *Contra* in Iowa, Redman *v.* Malvin, 23 Iowa, 296; and in North Carolina, Sloan *v.* McDowell, 71 N. C. 356–358; Neal *v.* Lea, 64 N. C. 678; Harris *v.* Burwell, 65 N. C. 584. This ruling is not based upon any peculiar statute, but upon the general provision of the code, § 248, that a "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants;" which is the same as found in all the other codes. Where, in Kentucky, an action was commenced against a resident of the State by a non-resident firm, a demand against *one* of the plaintiffs was allowed as an equitable set-off or counter-claim, because the defendant could not sue upon it in that State. Wallenstein *v.* Selizman, 7 Bush, 175. Where the subject of the counter-claim is a tort for which each and all of the wrongdoers are liable, it is no objection that the tort was committed by a firm composed of the plaintiffs and others not parties to the suit. Walker *v.* Johnson, 28 Minn. 147.

[1] See Cowles *v.* Cowles, 9 How. Pr. 361. The action was brought by two plaintiffs upon a promissory note, made payable to them on demand. The defendant alleged facts tending to show that the note was the sole property of the plaintiff, C., and stated a demand in his own favor against C., in every respect proper and sufficient to constitute a counter-claim, if the latter had been the only plaintiff. This answer having been struck out on motion, the General Term, upon appeal, pronounced it a valid counter-claim, and available to the defendant as pleaded. Two questions, it was said, are raised. "First, in an action upon contract by two or more plaintiffs, can one of them have judgment in his favor, the evidence establishing the cause of action in him alone? Secondly, if so, can the defendant, upon showing the cause of action to be solely in the one plaintiff, avail himself of a set-off against that plaintiff in a case where he would have had the right to do so had the action been commenced by that plaintiff alone?" Both of these questions were answered in the affirmative. It was said that the new procedure extended the rules of equity to all legal actions, and so far abrogated the legal notions of joint right and liability: that the sections permitting a judgment "to be given for or against one or more of several plaintiffs, and for or against one or more of several defendants," are most general in their terms, and should not be restricted to actions in which the right sued upon is several, and not joint; and that, a several judgment being thus made *possible*, the conclusion as to the propriety of the counter-claim against one plaintiff followed inevitably from the express language of the statute. In other words, no matter what be the form of the action, although the plaintiffs have alleged

This loose or liberal interpretation has, however, been utterly repudiated by other cases, which, as it seems to me, establish, by a very decided preponderance of judicial authority, the doctrine as now generally accepted in those States whose codes compose the two groups mentioned at the commencement of the section.[1] The doctrine established by these decisions is, that if the demand in suit was originally joint and several, although the action upon it is joint, and *a fortiori* if it was several, a several judgment *might*

a joint right in themselves, the defendant may controvert this allegation, show a several right in one of them alone, and interpose a counter-claim against that one. This decision, it will be noticed, does not go to the length of holding that, when two or more plaintiffs sue upon a legal right which is confessedly joint, the defendant, while admitting this joint cause of action and the union of all the plaintiffs therein, may assert a counter-claim against one, or some of them less than all. The reasoning of the learned judge seems logically to lead to that result, for it argues that a several judgment is possible in all cases upon contract; and, if possible, the counter-claim is expressly permited. See also the *dictum* of Folger J. in Simar *v.* Canaday, 53 N. Y. 298, 301. The same construction is given to the provision in North Carolina. Sloan *v.* McDowell, 71 N. C. 356, 357; Neal *v.* Lea, 64 N. C. 678; Harris *v.* Burwell, 65 N. C. 584.

[1] A few cases will illustrate this prevailing doctrine. In Mynderse *v.* Snook, 1 Lans. 488, 491–493, the court discusses the general doctrine of joint and several liabilities and judgments; and from its able opinion I make the following extracts: "The demand which the defendants had was against the plaintiff and V. jointly as partners and joint contractors with them. It was for damages arising from an alleged breach of the contract by these two partners. This claim, as is apparent, was not against the plaintiff, but against the firm of which he was an individual member. Properly there could be no several judgment between the parties to this action on account of that claim. It was not upon its face or in law a claim against a plaintiff individually. This is the test (Code, § 150). It was a partnership debt if a demand existed. Partners are not joint and several debtors, but joint debtors only. Nothing is better settled than the general rule that a creditor of a partnership is not entitled, as matter of law, to bring a separate action, and have a separate judgment, against one of the several partners when they are all living." The court then examined and criticised certain cases relied upon by the defendants. The language of Ingraham J. in Schubart *v.* Harteau, 34 Barb. 447, was declared to be a mere *dictum*, and its correctness as such was pointedly denied. Briggs *v.* Briggs, 20 Barb. 477, and Parsons *v.* Nash, 8 How. Pr. 454, were distinguished from the case at bar. The point of distinction in both was the fact that the liability of the defendants therein was several as well as joint; so that a several judgment against each of them would have been possible. "The grounds of these decisions," the court continues, "were undoubtedly correct if the demand on which the action was brought was several as well as joint, so that the plaintiff might have had a several judgment in the action against either defendant. It fulfilled, in that view of it, precisely the requirements of the code. Neither of these cases supports the *dictum* in Schubart *v.* Harteau. According to the rule there laid down, the right to interpose and prove a demand by way of counter-claim depends upon the manner and form of the pleadings in the action, rather than upon the general principles of the law. This, I am sure, is not the true meaning of § 150 of the code. By that section, the demand must be of such a nature and character, that, upon the general rules and principles of law, a several judgment may be had upon it in the action. If it is not such, the party offering it is not entitled to use it in that way."

have been recovered, and the counter-claim against part of the plaintiffs, or in favor of a part of the defendants, is possible: when the demand in suit is originally joint, a severance is impossible.

§ 634. * 758. (2) **In Favor of One or Some of the Defendants. Settled Rule herein.** In the following cases the counter-claim was interposed by one or some of the defendants against the single plaintiff, or all the plaintiffs if more than one. The same general principles of joint and several right and liability control this class of actions and the one just considered, and the same decisions are authorities in both.[1] The rule is settled that, in an action against defendants who are *joint* contractors and jointly liable, a separate judgment against one or more less than all is not possible except in a few special personal defences; that in an action, though joint in form, against defendants who are *joint and several* contractors, and *a fortiori* against defendants who are severally liable, such a separate recovery may always be had. The doctrine thus stated has been applied to the case of defendants sued upon a bond in terms joint and several.[2]

[1] Peabody *v.* Bloomer, 5 Duer, 678, 679, per Woodruff J.; s. c. *sub nom.* Peabody *v.* Beach, 6 Duer, 53; 3 Abb. Pr. 353. The same construction was given to the statute by Mr. Justice Marvin, and applied to the admissibility of a counter-claim, in Parsons *v.* Nash, 8 How. Pr. 454; and as his reasoning has been frequently approved, and his conclusions adopted by other courts, I shall quote his opinion, not as a binding authority, — for it was delivered at Special Term, — but as an argument. The three makers of a joint and several note, H., N., and P., were sued in a joint action, H. being the principal debtor, and the others his sureties. The answer was a counter-claim of a judgment in favor of H. alone against the plaintiffs for an amount greater than the sum secured by the note. It was admitted on the trial; and the plaintiffs moved to set aside the verdict. After referring to § 150, the judge proceeds: "The counter-claim is to be a claim existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action. This clearly indicates that there may be cases where the set-off or counter-claim may not be due to or in favor of all the defendants; and to ascertain between whom a several judgment may be had in the action, we must look to other provisions of the code, particularly §§ 136 and 274. In my opinion, in an answer proper for a set-off or counter-claim against several defendants *severally* liable, or *jointly and severally* liable, any one of them may avail himself of his set-off or counter-claim, or any number of the defendants to whom the set-off or counter-claim is jointly due may avail themselves thereof." On the general subject of counter-claims in favor of all or a part of the defendants, see also Bathgate *v.* Haskin, 59 N. Y. 533, 539, 540 (in an action to foreclose a mortgage made to secure a joint bond given by the mortgagor and A. as his surety, a debt due from the plaintiff to the mortgagor is a good counter-claim, although the fact that A. signed as surety did not appear on the face of the bond); Weil *v.* Jones, 70 Mo. 560; Davis *v.* Notware, 13 Nev. 421; Plyer *v.* Parker, 10 S. C. 464; Great West. Ins. Co. *v.* Pierce, 1 Wyom. Ter. 45.

[2] People *v.* Cram, 8 How. Pr. 151. The opinion in this case has been frequently cited with approval, and has never been questioned. See also, to the

§ 635. * 759. **Where Partnership may be sued in Firm Name. Illustrative Cases.** A peculiar question has arisen in those States whose codes permit a partnership to be sued by its firm name. In such an action, a counter-claim in favor of *all* the persons actually composing the firm may be pleaded and proved, although it discloses the existence of partners who had not been mentioned as such in the petition or complaint.[1] In an action upon an injunction bond executed by the plaintiff in an equity suit and sureties, the principal defendant was permitted by the Kentucky Court of Appeals to counter-claim damages sustained by himself individually from the wrongful acts of the plaintiff committed while the injunction was in force.[2] As one of two or more joint debtors cannot rely upon a demand due to him separately, upon the same principle a defendant cannot interpose a counter-claim in favor of himself and another, or others jointly who are not parties to the suit.[3] Bonds having been issued in the name of a town in aid of a railroad under color of statutory proceedings, the town brought an equitable suit against all the holders thereof to have the proceedings declared void, and the bonds themselves cancelled. One of the defendants individually set up as a counter-claim a debt to himself from the town for money loaned. This answer was overruled on the merits, the court holding that it did not fall within the definition of any species of counter-claim. The omission to rest the decision upon the obvious ground, if it

same effect, Briggs *v.* Briggs, 20 Barb. 477, 479; Gordon *v.* Swift, 46 Ind. 208, 209; Johnson *v.* Kent, 9 Ind. 252; Blankenship *v.* Rogers, 10 Ind. 333; Knour *v.* Dick, 14 Ind. 20; Utley *v.* Foy, 70 N. C. 303; Newell *v.* Salmons, 22 Barb. 647; Perry *v.* Chester, 12 Abb. Pr. N. S. 131, 133. If, however, the defendants are *joint* debtors, no such counter-claim is admissible. Pinckney *v.* Keyler, 4 E. D. Smith, 469; Slayback *v.* Jones, 9 Ind. 470; Roberts *v.* Donovan, 70 Cal. 108; Mortimer *v.* Chambers, 63 Hun, 335; Coleman *v.* Elmore (Ore.), 31 Fed. Rep. 391 (action against partners).

[Murphy *v.* Colton (1896), 4 Okla. 181, 44 Pac. 208; Brodek *v.* Farnum (1895), 11 Wash. 565, 40 Pac. 189; Adams *v.* Baker (1898), 24 Nev. 162, 55 Pac. 362; Sweeney *v.* Bailey (1895), 7 S. D. 404, 64 N. W. 188.]

[1] Bird *v.* McCoy, 22 Iowa, 549.

[2] Tinsley *v.* Tinsley, 15 B. Mon. 454. Although the particular question under discussion was not alluded to by the court, its very silence must be taken as an admission that such a counter-claim in favor of one defendant was proper.

[3] Stearns *v.* Martin, 4 Cal. 227, 229; Hopkins *v.* Lane, 87 N. Y. 501; Proctor *v.* Cole, 104 Ind. 373; but see Seaman *v.* Slater, 49 Fed. Rep. 37 (when one of the owners of a vessel is sued for the entire amount of damages, resulting from the breach of a charter-party, and is to be compelled to pay the entire sum, he can set off the amount due upon the charter-party). Where the plaintiff brought suit against two defendants, and the action failed against one, it was held that a joint demand in favor of the defendants could not be set up as a counter-claim: Copeland *v.* Young, 21 S. C. 275.

existed, that a counter-claim in favor of one defendant was improper, was a plain though silent admission that this objection was untenable. In such an action a separate judgment is not only possible, but is, in fact, absolutely necessary.[1]

§ 636. * 760. **Construction Given to Language of Iowa Code in Musselman v. Galligher.** As the Iowa code is unlike that of any other State in this respect, I quote somewhat freely from a case which gives a construction to its language, and explains its peculiar provisions. In an action against a husband and wife jointly, three counter-claims or cross-demands were pleaded as follows: (1) By both defendants jointly to recover damages caused by the plaintiff's malicious prosecution of the wife; (2) by the husband alone to recover damages caused by the malicious prosecution of his minor children; (3) by the husband alone to recover damages caused by the malicious prosecution of himself. The judgment of the court, giving a construction to the statute, and passing upon the validity of this counter-claim, will be found in the foot-note.[2]

[1] Venice *v.* Breed, 65 Barb. 597, 605, 606.

[2] Musselman *v.* Galligher, 32 Iowa, 383, 389. There are, *first*, "set-off," which is an independent cause of action arising on contract or ascertained by the decision of the court, and can be pleaded only in an action on contract; *secondly*, "counter-claim," which is a cause of action in favor of the defendants, or *some of them*, against the plaintiffs, or *some of them*, arising out of the contract or transaction set forth in the plaintiff's petition as the foundation of his claim, or connected with the subject of the action; *thirdly*, "cross-demand," which is a statement of *any* new matter constituting *any* cause of action in favor of the defendant, or *all* the defendants, if more than one, against the plaintiff, or *all* the plaintiffs, if more than one, and which the defendant or defendants might have brought when the suit was commenced, or which was then held, whether matured or not, if matured, when pleaded. "The 'cross-demand' is more comprehensive than either the set-off or the counter-claim. A set-off is only pleadable in an action on a contract, and must itself arise on contract. A counter-claim must arise out of the cause of action, or be connected therewith. A 'cross-demand,' however, arises upon any independent cause of action, whether on contract or tort. But a 'cross-demand,' unlike a counter-claim, must exist in favor of *all* the defendants, if there are more than one, and against all the plaintiffs, if there are more than one. This is the plain reading of the statute; so that, when there are several defendants, a 'cross-demand' in favor of one only cannot be pleaded." Applying these principles, the answer in question was held to be wholly bad. The demands were certainly not set-offs, since they arose out of torts: they were not counter-claims, because they did not arise out of, nor were they connected with, the plaintiff's cause of action. If it is said they were "cross-demands," they were inadmissible, because they were in favor of one defendant alone. The claim of damages for the tort to the wife was declared to be one in her own favor, if it existed at all; and the husband could not join with her in enforcing it, whether she brought an action on it as a plaintiff, or pleaded it as a "cross-demand" in an action against her. See also Corbett *v.* Hughes, 75 Iowa, 281.

§ 637. * 761. **Rules Established in most of the States.** By the decisions which have been reviewed in the foregoing paragraphs, certain specific rules are clearly established for all the States whose codes may be classed in either of the two general groups mentioned at the commencement of this section. *First*, when the defendants in an action are *joint* contractors, and are sued as such, no counter-claim can be made available which consists of a demand in favor of one or some of them. *Secondly*, when the defendants in an action are *jointly and severally* liable, although sued jointly, a counter-claim, consisting of a demand in favor of one or some of them, may, if otherwise without objection, be interposed. *Thirdly*, since it is possible, pursuant to express provisions of all the codes, for persons *severally* liable to be sued jointly under certain circumstances in a legal action, — that is, in an action brought to recover a common money judgment, — a counter-claim in favor of one or more of such defendants may be pleaded and proved. *Fourthly*, in all equitable suits wherein persons having different interests, and against whom different reliefs are demanded, may be, and constantly are, united as co-defendants, a counter-claim existing in favor of one or more of such defendants may be interposed, free from any objection based entirely upon the situation of the parties. *Fifthly*, when two or more persons have a *joint* right of action, and unite as plaintiffs to enforce the same, a counter-claim cannot be admitted against one or some of them in favor of any or all the defendants. *Sixthly*, when two or more persons have separate rights of action, and they are properly united as plaintiffs in one action to enforce these rights, a counter-claim may be set up against one or more of them, as the case may be. *Seventhly*, if two or more plaintiffs should bring an action joint in form, and should allege and claim to recover upon a joint cause of action, — even a contract, — but in fact the joinder was improper because as to some, or perhaps all but one, there existed no right of action, a recovery could be had in favor of the one or more who established a cause of action, and the complaint be dismissed as to the others; and it would seem to follow as a necessary corollary that a counter-claim might be interposed against the one or more of the plaintiffs under such circumstances in whose favor a separate judgment could be rendered. *Lastly*, in equitable actions, counter-claim, in favor of one or some of the defendants, and against one or some of the

plaintiffs, must be permissible as a general rule, since in equity the common-law doctrine of joint right and liability does not generally prevail, and separate judgments, or judgments conferring separate relief, among the parties, are almost a matter of course.

§ 638. * 762. **Counter-Claim may fail for Want of Necessary Parties, especially those of an Equitable Character. Illustrative Case.** Counter-claims otherwise proper may be inadmissible or ineffectual for the want of the necessary parties before the court, since the same rules as to parties must apply to them as would be applied if the facts alleged and the relief demanded were stated in a complaint or petition as the basis of a separate action. This objection will more frequently present itself in counter-claims that are equitable in their nature. As the relief *must* be denied to the plaintiff in an equitable action unless he has brought all the *necessary* parties before the court, and *may* be denied unless he has brought in all the *proper* parties, and as the defendant pleading a counter-claim is in the same condition as an ordinary plaintiff, while the plaintiff against whom it is pleaded is in the position of an ordinary defendant, it follows, *first*, that the relief demanded by the counter-claim *must* be refused if all the necessary parties are not present; and, *secondly*, that it *may* be refused if any proper parties have been omitted. These propositions require no argument or citation in their support. They result inevitably from the fact that the counter-claim is in its nature a cross-action, governed by the same rules which control a suit when proceeding in the ordinary and direct manner. Several examples of legal actions in which the counter-claim has failed for want of the necessary parties have already been quoted; namely, those decisions in which counter-claims against the plaintiff in the action, and others jointly liable with him, or in favor of the defendant and others jointly interested with him have been overruled.[1] A single additional authority will suffice to illustrate a principle which really needs no illustration. In an action to foreclose a mortgage, brought by an assignee thereof, the mortgagee not being a party to the record, the defendants alleged, as an equitable counter-claim, facts tending to show that the mortgage and the note secured by it were procured to be executed by the mortgagee's fraud, and that the plaintiff took with notice of

[1] See *supra*, §§ * 754 *et seq.*

the fraud, and prayed that the note and mortgage might be cancelled, and the plaintiff enjoined from enforcing them. The court said: "It is evident that, if the allegations of this answer were in the form of a complaint in a separate action asking that the note and mortgage be surrendered and cancelled, the railroad [the mortgagee] would be a necessary party defendant. The defendant then could not set up the facts alleged in his answer as a counter-claim in this action, for the reason that a new party must be brought before the court." [1] In a few States this difficulty is very properly met and obviated by express provisions of their codes, which authorize the addition of new parties in order that the relief demanded by the counter-claim or set-off may be granted.[2]

III. *The Subject-Matter of Counter-Claims, or the Nature of the Causes of Action which may be pleaded as Counter-Claims.*

§ 639. * 763. **Introductory.** This general subdivision is naturally separated into three heads, which I shall proceed to examine in the order stated. A. Nature of the subject-matter generally, with special reference to the question whether the counter-claim may be an equitable cause of action and may result in the granting of equitable relief, or whether it must be restricted to legal causes of action and reliefs. B. The particular questions which arise under the first clause or branch of the statutory definition. C. Those which arise under the second clause or branch of the same provision.

A. *Whether a Counter-Claim may be an Equitable Cause of Action, and the Means of Obtaining Equitable Relief; or whether it must be restricted to Legal Causes of Action and Reliefs.*

§ 640. * 764. **An Equitable Counter-Claim may be interposed in an Equitable or Legal Action.** From the decisions cited in the foot-note, the following doctrines and rules are clearly and firmly

[1] McConihe *v.* Hollister, 19 Wis. 269. See also Coursen *v.* Hamlin, 2 Duer, 513; Cummings *v.* Morris, 25 N. Y. 625. But see Du Pont *v.* Davis, 35 Wis. 631, 640, 641, which holds that an equitable counter-claim of reformation, and the like, may be sustained, and the relief granted, without the presence of parties collaterally interested; as, for example, the grantor in the deed to be reformed. The case of Hicks *v.* Sheppard, 4 Lans. 335, which holds the contrary, was expressly disapproved. See also Pennoyer *v.* Allen, 50 Wis. 308.

[2] See these sections quoted at large, *supra*, § * 584, note.

established. In an equitable action, a counter-claim consisting of an equitable cause of action, and demanding equitable relief, may be interposed if it possesses all the other elements required by the definition, and may, in many if not most cases, be pleaded by one or more of the defendants less than all against one or more of the plaintiffs. The language of the statute does not confine the use of this affirmative species of defence to legal actions, nor require that it should necessarily be of a legal nature itself. Adapting itself to the character of the action in which it is introduced, in those which are legal it resembles, although much broader and more comprehensive, the former set-off and recoupment, while in those which are equitable it often takes the place of a cross-bill or complaint. In a *legal* action, also, an equitable counter-claim may be set up and affirmative relief may be granted by its means. As the codes in express terms permit equitable defences in such actions, and as in the self-same provision, and by means of the same language, the statute authorizes the joining of as many defences and counter-claims, *whether legal or equitable, or both*, as the defendant may have, to deny the possibility of an equitable counter-claim in a legal action, would make it necessary, if any consistency were preserved, to deny also the possibility of an equitable defence. The courts, as may be seen from the citations made below, have, with a few unimportant exceptions, been unwilling to nullify the language, and defeat the design of the legislature in this manner, and following its plain meaning and import, they have freely admitted and sustained the equitable counter-claim in all actions, whether legal or equitable, where that form of relief was appropriate, and was authorized by the descriptive terms of the statute.[1]

[1] Hicksville & C. S. B. R. Co. *v.* Long Island R. Co., 48 Barb. 355, 360; Fisher *v.* Moolick, 13 Wis. 321; Sample *v.* Rowe, 24 Ind. 208; Lombard *v.* Cowham, 34 Wis. 486, 491, 492, and cases cited, which show that in Wisconsin every equitable defence must be a counter-claim. Vail *v.* Jones, 31 Ind. 467; Charlton *v.* Tardy, 28 Ind. 452; Du Pont *v.* Davis, 35 Wis. 631, 639–641; Spalding *v.* Alexander, 6 Bush, 160; Jarvis *v.* Peck, 19 Wis. 74; Grimes *v.* Duzan, 32 Ind. 361; Woodruff *v.* Garner, 27 Ind. 4; Eastman *v.* Linn, 20 Minn. 433; Andrews *v.* Gillespie, 47 N. Y. 487, 490; Cavalli *v.* Allen, 57 N. Y. 508, 514. See, *per contra*, that the counter-claim must always be a legal cause of action, Jones *v.* Moore, 42 Mo. 413, 419. The following cases furnish additional examples of equitable counter-claims. Lawe *v.* Hyde, 39 Wis. 345 (no *legal* counter-claim possible in an action of ejectment); Stowell *v.* Eldred, 39 id. 614; Perkins *v.* Port Washington, 37 id. 177; Ingles *v.* Patterson, 36 id. 373; Glen & Hall Man. Co. *v.* Hall, 61 N. Y. 226, 236; Cook *v.* Jenkins, 79 id. 575; Winslow *v.* Winslow, 52 Ind. 8; Hinkle *v.* Margerum, 50 id.

§ 641. * 765. **Limitation upon Equitable Relief Granted to Defendant: in Actions of Equitable Character; in Actions of Legal Character. Doctrine Maintained by Supreme Court of New York. Illustrative Case.** Whether all affirmative equitable relief granted to a defendant must be limited to the cases in which a counter-claim is possible, that is, whether a defendant is unable to set up a case for equitable affirmative relief, and obtain a judgment therefor in his favor against the plaintiff, unless he can bring the facts constituting his cause of action within some one of the species of counter-claim defined by the codes, is another question.[1] There

240; McManus *v.* Smith, 53 id. 211; Gossard *v.* Ferguson, 54 id. 519; Teague *v.* Fowler, 56 id. 569; Morrison *v.* Kramer, 58 id. 38; Tabor *v.* Mackee, 58 id. 290; Conaway *v.* Carpenter, 58 id. 477; Jeffersonville, M. & I. R. Co. *v.* Oyler, 60 id. 383; Hampson *v.* Fall, 64 id. 382; Schafer *v.* Schafer, 68 id. 374; Moyle *v.* Porter, 51 Cal. 639; Whedbee *v.* Reddick, 79 N. C. 521; Moser *v.* Cochrane, 13 Daly, 159; Dempsey *v.* Rhodes, 93 N. C. 120; Boyd *v.* Beaudin, 54 Wis. 193.

[Stolze *v.* Torrison (1903), 118 Wis. 315, 95 N. W. 114; Momsen *v.* Noyes (1900), 105 Wis. 565, 81 N. W. 860; Hotaling *v.* Tecumseh Nat. Bank (1898), 55 Neb. 5, 75 N. W. 242; Maffett *v.* Thompson (1898), 32 Ore. 546, 52 Pac. 565; Berthold *v.* O'Hara (1893), 121 Mo. 88, 25 S. W. 845; Willis *v.* Barron (1898), 143 Mo. 450, 45 S. W. 289: "It is the settled law of this court that an unsettled partnership account cannot be pleaded as a counter-claim." Salladin *v.* Mitchell (1894), 42 Neb. 859, 61 N. W. 127; Lahiff *v.* Hennepin County, etc. Ass'n (1895), 61 Minn. 226, 63 N. W. 493; Vaule *v.* Miller (1897), 69 Minn. 440, 72 N. W. 452; Smith *v.* Dickinson (1898), 100 Wis. 574, 76 N. W. 766: meaning of equitable counter-claim.

A debtor of an insolvent bank has an equitable right to set off a claim he holds against the bank against his indebtedness to the bank, whether or not his indebtedness has matured at the time of the bank's insolvency: Mercer *v.* Dyer (1895), 15 Mont. 317, 39 Pac. 314.

Matthews *v.* Weiler (1893), 57 Ark. 606, 22 S. W. 569: Defendant, in order to "get even" with plaintiff for alleged damages due to plaintiff furnishing a second hand instead of a new soda-water generator, ordered certain other goods from plaintiff, and then refused to pay for them. *Held*, that in an action by plaintiff for the price of those goods, defendant could not have an equitable counter-claim for the unliquidated damages connected with the generator, even though the plaintiff was a non-resident and had no property in the State. Equity will not aid fraud.]

[1] [Trester *v.* City of Sheboygan (1894), 87 Wis. 496, 58 N. W. 747; Harden *v.* Lang (1900), 110 Ga. 392, 36 S. E. 100; Bell *v.* Ober & Sons Co. (1900), 111 Ga. 668, 36 S. E. 904; Follendore *v.* Follendore (1896), 99 Ga. 71, 24 S. E. 407; Giles *v.* Bank of Georgia (1897), 102 Ga. 702, 29 S. E. 600; Daly *v.* Brennan (1894), 87 Wis. 36, 57 N. W. 963; Richardson *v.* Doty (1895), 44 Neb. 73, 62 N. W. 254.

See Armstrong *v.* Mayer (1903), — Neb. —, 95 N. W. 51, from which the following quotation is made: "A considerable portion of the plaintiff's argument in this court is devoted to the proposition that the claims for damages set up by the defendants are not available as counter-claims under sections 100, 101, Code Civ. Proc., and were not maintainable in the present cause for that reason. But we think a defendant in an action is not restricted to the counter-claim provided for in said sections, but, in a proper case, may seek affirmative relief either against the plaintiff or against co-defendants. The code of this State contains no provisions with reference to cross-petitions. Nevertheless, the practice of filing them has long obtained in this jurisdiction, and the right to bring a cross-suit auxiliary to and

are decisions which answer this question in the affirmative, and hold that all such relief must be denied unless the defendant's cause of action is a proper counter-claim. This doctrine was recently maintained by the Supreme Court of New York. An action was brought to restrain the defendant from using a trademark alleged to be the sole property of the plaintiff. The answer asserted that the trademark in question belonged in fact exclusively to the defendant, that the plaintiff had no right to it, but was unlawfully and wrongfully using it, and thereby interfering with and injuring the defendant's business, and concluded by praying for an injunction, an account, and judgment for damages. At the trial, the defendant's allegations were fully sustained by the proofs, and he obtained the judgment demanded. This judgment was reversed on appeal, the court saying: "To entitle the defendant to affirmative relief, the answer must set up a counter-

dependent upon the original suit, yet distinct for many purposes, has been recognized, at least, repeatedly."

Peter *v.* Farrel, etc. Co. (1895), 53 Ohio St. 534, 42 N. E. 690: Sec. 5070, R. S., declaring what an answer shall contain, and sec. 5072, declaring that a counter-claim must be one . . . "in favor of a defendant and against a plaintiff between whom a several judgment might be had in an action," do not abridge the former powers of equity. But taking the code as a whole, in view of its spirit and purpose, and in view of sec. 5071, which provides that "The defendant may set forth in his answer as many grounds of defence, counter-claims, and set-offs as he has, whether they are such as have been heretofore denominated legal or equitable, or both," and "he may claim therein relief touching the matters in question in the petition against the plaintiff or any other defendants in the same action," the court must be held to have the right to grant relief whenever a party shows even a contingent right to property or a fund which is the subject of an equitable action, even though his claim is not one which could be made the subject of a several judgment in his favor against a plaintiff.

Stenberg *v.* State (1896), 48 Neb. 299, 67 N. W. 190: "The Code of Civil Procedure relating to set-offs authorizes such defences to be interposed before, but not after judgment. A court of equity, where proper grounds exist therefor, may allow a set-off in cases not provided for by statute."

"The rule is well settled that the insolvency of a party against whose demand a counter-claim is sought to be interposed is a sufficient ground for equitable interference in cases not provided for by statute:" Le Clare *v.* Thibault (1902), 41 Ore. 601, 69 Pac. 552.

"The system of pleading, consisting of complaint, demurrer, answer, and reply, meets the necessities of all parties, in all cases, and in all courts. The answer setting up new matter constituting a counter-claim, where a defendant seeks affirmative relief against a plaintiff, and the answer setting up facts entitling a defendant to such relief against his co-defendant as the court has jurisdiction to grant under sec. 2883 R. S., take the place of the cross-bill of the old practice. The answer of a defendant, seeking relief of his co-defendant, is in the nature of a cross-bill, but is an answer and a code pleading nevertheless:" Kollock *v.* Scribner (1897), 98 Wis. 104, 23 N. W. 776. But see Pendleton *v.* Beyer (1896), 94 Wis. 31, 68 N. W. 415.]

claim.[1] The claim of defendant for relief is not a counter-claim within the meaning of that term as used in the code. It does not arise out of the transaction set forth in the plaintiff's complaint, nor does it arise on contract."[2] The general subject of the affirmative equitable relief which may be obtained by a defendant has been already discussed, and the discussion need not be repeated. Undoubtedly, in the great majority of instances, any equitable affirmative relief properly conferred upon a defendant would fall within some description of a counter-claim; in order that it should not be a counter-claim, it must be a cause of action entirely independent of that set forth by the plaintiff, and not arising from a contract. Under the equity practice and system of pleading which prevailed prior to the codes, the matters which could be set up by a defendant in a cross-bill, as the foundation for affirmative relief to him, must have some connection with the matters originally charged against him by the plaintiff's bill, even if his demand did not directly arise out of such original matters; an entirely distinct and independent cause of action could not be alleged by the defendant in a cross-bill; if he had such a claim, he could only enforce it by a separate suit.[3] The codes do not seem to have, in any express manner, enlarged the scope and operation of the defendant's equitable affirmative relief otherwise than by the provisions relating to the counter-claim. In actions of a legal nature it is very clear that no affirmative relief can be obtained by a defendant, unless his cause of action or demand is a proper counter-claim.

§ 642. * 766. **Additional Instances.** I shall close this branch of the subject by mentioning some special instances, or actions of a particular character, in which it has been held that a counter-claim is not possible, or that the affirmative relief demanded by the defendant could not be the subject of a counter-claim.[4] In an action for a limited divorce on the ground of cruelty, the defendant's answer, charging adultery by the plaintiff and demand-

[1] Wright *v.* Delafield, 25 N. Y. 266; Garvey *v.* Jarvis, 54 Barb. 179.

[2] Glen & Hall Man. Co. *v.* Hall, 6 Lans. 158, 161, 162. This decision was reversed on appeal, and the counter-claim was sustained as valid. Glen & Hall Manuf. Co. *v.* Hall, 61 N. Y. 226, 236.

[3] Daniell's Chan. Pl. and Prac. 1647; Storey's Eq. Pl. §§ 389, 397.

[4] [Meredith *v.* Lyon (1902), — Neb. —, 92 N. W. 122 : " A claim not reduced to judgment, for the statutory penalties for failure to release paid chattel mortgages, does not furnish such a cross-demand as can be used for the basis of an equitable action to cancel another mortgage, between the same parties, which has not been paid."]

ing an absolute divorce, is not a proper counter-claim;[1] nor, in an action for an absolute divorce because of adultery, is an answer alleging cruelty and praying for a judicial separation.[2] In some States a mechanic's lien is enforced, not by any special proceedings, but by an ordinary equitable suit. An answer in an action for such a purpose, alleging that the premises described in the complaint formed the defendant's "homestead," and were therefore, pursuant to statute, free from all lien or charges in favor of creditors, was held not to be a counter-claim, since it stated no cause of action against the plaintiff, and was, in fact, tantamount to a denial.[3]

§ 643. *767. **Is Counter-Claim Possible in Action to recover Possession of Chattels?** It would seem that, in an action to recover the possession of specific chattels, no counter-claim is possible, unless, perhaps, equitable relief may be awarded under some very exceptional circumstances.[4] A judgment for a return to the de-

[1] Henry *v.* Henry, 3 Robt. 614; 17 Abb. Pr. 411.

[But see Woodrick *v.* Woodrick (1894), 141 N. Y. 457, 36 N. E. 395, from which we quote: "This is an appeal from a judgment of the general term of the second department, affirming a judgment in favor of defendant for an absolute divorce, and from an order denying motion for a new trial. The plaintiff sued for a limited divorce, alleging that the defendant was guilty of cruel and inhuman treatment. The defendant denied the charges of the complaint, and set up by way of counter-claim the adultery of plaintiff, and prayed for a judgment of absolute divorce. The jury found against the plaintiff on her own cause of action, and also on the defendant's counter-claim. It is now insisted on behalf of plaintiff that she was entitled to judgment of separation on the evidence; that the finding of the jury that she committed adultery is unsupported by evidence; and that there were errors of law on the trial that must lead to a reversal of the judgment. In view of the very serious consequences to the plaintiff following the affirmance of the judgment and the insistence of her counsel that finding her guilty of adultery was legal error, we have looked into the facts of this case with great care, and are unable to say that either of the findings of the jury is unsupported by evidence. This case was properly submitted to the jury and their verdict is conclusive on the questions of fact." The judgment was affirmed.]

[2] Diddell *v.* Diddell, 3 Abb. Pr. 167; Griffin *v.* Griffin, 23 How. Pr. 183; Terhune *v.* Terhune, 40 How. Pr. 258; but see Armstrong *v.* Armstrong, 27 Ind. 186; McNamara *v.* McNamara, 9 Abb. Pr. 18, in which such relief was granted to the defendants.

[3] Englebrecht *v.* Rickert, 14 Minn. 140.

[4] [Phipps *v.* Wilson (1899), 125 N. C. 106, 34 S. E. 227; Minneapolis Threshing Co. *v.* Darnall (1900), 13 S. D. 279, 83 N. W. 266; Davis *v.* Culver (1899), 58 Neb. 265, 78 N. W. 504; Palmer *v.* Palmer (1894), 90 Ia. 17, 57 N. W. 645; Banning *v.* Marleau (1894), 101 Cal. 238, 35 Pac. 772; Rennebaum *v.* Atkinson (1898), 103 Ky. 555, 45 S. W. 874; Collins *v.* Morrison (1895), 91 Wis. 324, 64 N. W. 1000. See also § *791, and cases cited.

Aultman Co. *v.* McDonough (1901), 110 Wis. 263, 85 N. W. 980: "In an action of replevin brought by a non-resident mortgagee to recover possession of machinery sold to defendant and mortgaged to secure the purchase price, the defendant . . . may counter-claim damages for breach of warranty of the goods sold, and

fendant of the chattels in controversy is not a counter-claim, for it is expressly provided for by the codes, the very issue in the action being, Which party is entitled to the possession? and the court by its judgment awarding the possession, or the value in money if possession cannot be given, to the one who establishes the right; if, therefore, the plaintiff had taken the goods into his own custody by the authorized preliminary proceedings, they or their value must be restored when the action fails.[1] If a counter-claim can be interposed in this suit, it must be either (1) a demand for money, or (2) a demand for the possession of certain other and different chattels, or (3) a demand for some kind of equitable relief. A counter-claim for money could not be admitted under the principle established by the cases, that the relief must have *some* connection with that asked for by the plaintiff, and must tend to diminish or modify it in some manner. A judgment for money obtained by the defendant could not interfere with or be *counter* to a judgment awarding possession of chattels to the plaintiff.[2] The same difficulties attend the second alternative. It seems impossible that when the plaintiff seeks to recover possession of certain specific chattels, the defendant's right to the possession of other and distinct articles could arise out of the same transaction which is the foundation of the plaintiff's claim or could be connected with the subject of the plaintiff's action. The "transactions," which are the foundations of their respective causes of action, must, from the very nature of the case, be different. It is not pretended that the action, or the

also damages in trying to operate machinery returned to the plaintiff, and for which the mortgaged property was in part taken in exchange."]

[1] See De Leyer *v.* Michaels, 5 Abb. Pr. 203, in which this doctrine was affirmed, although it plainly needs no authority in its support.

[2] See Moffat *v.* Van Doren, 4 Bosw. 609; Williams *v.* Irby, 15 S. C. 458; Talbott *v.* Padgett, 30 S. C. 167. It is possible, perhaps, that the plaintiff's right to the possession might depend upon the defendant's failure to pay a stipulated sum of money, as in the case of a conditional sale and delivery, when the property was to remain in the vendor until the price was paid, although possession had been transferred to the vendee. In an action brought to recover the chattels under such circumstances, the defendant might, perhaps, set up as a counter-claim an independent demand due to himself from the plaintiff on contract, and thus diminish or extinguish the unpaid balance of the purchase price. Such a counter-claim would be analogous to the similar one in a suit by a vendor of land against the vendee, which was sustained in Cavalli *v.* Allen, 57 N. Y. 508. The difficulty suggested in the text, that a money judgment does not tend to diminish or modify the relief, recovery of possession, asked for by the plaintiff, was not considered in the cases of Wilson *v.* Hughes, 94 N. C. 182; Walsh *v.* Hall, 66 N. C. 233, in both of which a counter-claim of damages was allowed.

cross-demand, is based upon contract. And, finally, the relief granted to the defendant would be entirely independent of that conferred upon the plaintiff; the two would be complete and entire each by itself, and thus there would be in effect two judgments, not modifying or interfering with each other, and not relating to the same subject-matter. This reasoning, and the conclusion reached by it, have been sustained by judicial decision, and thus seem to be supported alike by principle and by authority.[1] It is possible, perhaps, though hardly probable, that equitable relief may, under certain exceptional circumstances, be recoverable by the defendant in an action similar in its nature and object to the ancient replevin or detinue. Courts of equity, however, very rarely interfered in controversies concerning the title to and possession of chattels.

B. *The Particular Questions which arise under the First Clause or Branch of the Statutory Definition.*

§ 644. * 768. **Language of the First Clause. The Three Subjects Embraced within this Language. Particular Phrases Requiring Construction. Method of Interpretation Adopted by the Courts.** The language of the first clause or branch of the definition, which is found in all the codes except those of Indiana and Iowa, and which is now to be interpreted, is: "A cause of action arising out of a contract or transaction set forth in the complaint [petition] as the foundation of the plaintiff's claim, or connected with the subject of the action." Following the order of this language, it is plain that three different subjects are embraced within it, and the whole discussion must therefore be separated into three corresponding divisions: namely, 1. Cases in which the cause of action alleged as a counter-claim arises out of the *contract* set forth in the complaint; 2. Those cases in which it arises out of the *transaction* set forth in the complaint; 3. Those cases in which it is *connected with* the subject of the action. A complete examination of these three subdivisions requires a construction of certain particular phrases which form a part of the statutory definition. These are (*a*) "foundation of the plaintiff's claim," or when is a contract or transaction the foundation of the

[1] Lovensohn *v.* Ward, 45 Cal. 8. This case expressly holds that a claim to recover the possession of distinct and separate chattels cannot be set up as a counter-claim.

plaintiff's claim? (*b*) "arising out of," or when does a cause of action arise out of a contract or transaction? (*c*) "transaction;" (*d*) "subject of the action;" (*e*) "connected with," or when is a cause of action connected with the subject of the action? Although the signification of all these phrases and terms must be determined, for upon it depends the interpretation to be given to the entire provision, yet it will be impracticable to take them up and examine them separately. Each is so connected with the others, that, in ascertaining their sense, all must be considered together. The courts have invariably pursued this method; and their opinions, from which our interpretation will be taken, have always construed the statutory clause as a whole, and have not attempted to distinguish and analyze its constituent parts. I shall therefore pursue the order already mentioned, and shall discuss the three subdivisions into which the subject has been separated, and in so doing shall incidentally define the legal import of the several phrases and terms above enumerated. The decisions which have given, or have attempted to give, a construction to the clause are numerous and conflicting. I shall freely refer to these cases, citing those which represent all theories and schools of interpretation, and shall endeavor to collect from them such doctrines and practical rules as seem to be correct upon principle and to be supported by the weight of authority. As a preliminary step to the discussion of the three subordinate heads, I shall quote and analyze certain judicial opinions which have treated of the clause as a whole, and have proposed general rules by which its meaning may be determined. Having thus ascertained these general rules, I shall inquire what particular cases or classes of cases do or do not fall within one or the other of the three subdivisions before mentioned.

§ 645. *769. **Illustrative Case. Meaning of Term "Transaction."** The cases now to be cited throw more or less light upon the meaning of the statutory clause as a whole, and also, to a certain extent, upon that of the special phrases and terms which it contains; and from them some general principles of interpretation can be inferred. The lower floor of a building having been leased, the landlord brought an action for rent due. The answer was pleaded as a counter-claim. It alleged that the plaintiff occupied the upper floors of the building; that he wantonly and negligently suffered waterpipes to get out of repair and to leak,

and by this means caused filthy water to come upon the defendant's premises; also that plaintiff wantonly and negligently caused filthy water to be thrown from his rooms upon defendant's premises; that by these acts damages were caused to the defendant in an amount specified, for which judgment was demanded against the plaintiff. A demurrer to this answer having been sustained, the defendant appealed to the New York Court of Appeals, which affirmed the decision below.[1] As already said in a

[1] Edgerton *v.* Page, 20 N. Y. 281, 285. From the opinion of that court the following extracts are taken: "The demand of the defendant set out in the answer does not arise out of the contract set forth in the complaint. That contract is for the payment of rent upon a lease of the demised premises. The defendant's demands arise from the wrongful acts of the plaintiff in permitting water to leak and run into the premises, and in causing it to be thrown upon the premises and property of the defendant. These acts are entirely independent of the contract of hiring, upon which the action is brought. The demands are not connected with the subject of the action; *that is, the rent agreed to be paid for the use of the premises.* The defendant's demands are for a series of injuries to his property deposited upon the premises, and for impairing the value of the possession. It would be a very liberal construction to hold that, in an action for rent, injuries arising from trespasses committed by the lessor upon the demised premises might be interposed as a counter-claim. The acts of the plaintiff in this case are of a similar nature. They are either acts of trespass or of negligence from which the injuries to the defendant accrued. Such a construction could only be supported by the idea that the subject of the action was *the value of the use of the premises.* But where there is an agreement as to the amount of the rent, that value is immaterial. Unless the acts of the plaintiff amount to a breach of the contract of hiring, they are not connected with the subject of the action." The opinion proceeds to show that the acts complained of were not a breach of an implied covenant of quiet enjoyment, and concludes: "There is nothing in the answer in this case tending to show that any of the acts of the plaintiff were done under any claim of right whatever. They did not, therefore, amount to a breach of the contract created by the lease; and the injuries sustained by the defendant do not, therefore, constitute a counter-claim connected with the subject of the action." To the same effect are the decisions and the general interpretation given to the clause in Mayor, etc. of N. Y. *v.* Parker Vein Stp. Co., 12 Abb. Pr. 300, 301; per Woodruff J.; Askins *v.* Hearns, 3 Abb. Pr. 184, 187, per Emott J.; Schnaderbeck *v.* Worth, 8 Abb. Pr. 37, 38, per Ingraham J.; Drake *v.* Cockroft, 4 E. D. Smith, 34, 39, per Woodruff J.; Bogardus *v.* Parker, 7 How. Pr. 303, 305; Barhyte *v.* Hughes, 33 Barb. 320, 321, per Clerke J. These cases all give a very narrow meaning to the term "transaction," and incline to the position that a cause of action on contract, and one for tort, or two causes of action for tort, can never be said to arise out of the same transaction. The last case cited, Barhyte *v.* Hughes, goes so far as to hold that "transaction" and "contract" are synonymous; in other words, that no cause of action can arise out of a "transaction" unless it springs from a contract. The following recent decisions illustrate the questions discussed in the paragraphs of the text (§§ *769–*776): Brady *v.* Brennan, 25 Minn. 210 (in an action on contract, defendant may counter-claim a demand arising out of conversion, by waiving the tort, etc.); People *v.* Dennison, 84 N. Y. 272, 279, citing Smith *v.* Hall, 67 id. 48; Pattison *v.* Richards, 22 Barb. 143 (in an action for a tort — fraud — a counter-claim on contract cannot be set up, since it would not arise out of the same transaction, — a very important case); Smith *v.* Hall, 67 N. Y. 48 (in an action for a conversion, there

former chapter, the difficulty in arriving at the true interpretation of the term "transaction" lies in the fact that it had no strict *legal* meaning before it was used in the statute. Being placed in immediate connection with the word "contract," and separated therefrom by the disjunctive "or," one conclusion is *certain at all events;* namely, that the legislature intended by it something different from and additional to "contract." The most familiar rules of textual interpretation are violated by the assumption that no such signification was intended. The only question at all doubtful is, How far did the law-makers design to go, and how broad a sense did they attach to the word? Is it to be used in its widest popular meaning, or must it be narrowed into some limited and technical meaning, and thus be made a term of legal nomenclature? While in common speech a single assault or slander or lie would not be called a "transaction," yet the whole series of events grouped around such a central fact, and connected with it, would, I think, be so designated in popular language, and a fraudulent scheme, or in other words a cheat, is a most familiar example of the class of events to which the term is usually applied. But taking the word "transaction" in the limited sense of a "negotiation of business," or some other similar expression, it is certainly a mistake to say that torts cannot arise out of it different from and adverse to the plaintiff's cause of action. In the first place, it is certain that a cause of action based upon the plaintiff's *fraud* may arise out of such a "transaction," for it may spring from a contract pure and simple. In the second place, as the "negotiation" or "business" or "conduct of affairs" may be concerned with property, with the title to or possession of land or chattels, it is easily conceivable that a distinct cause of action in

can be no counter-claim, — not the same transaction); Carpenter *v.* Manhattan Life Ins. Co., 22 Hun, 49 (in an action for damages from a tort, defendant *may* counter-claim a demand for tort, if connected with the subject of the action or arising out of the same transaction); on the general subject of arising out of the same transaction, see Bernheimer *v.* Wallis, 11 Hun, 16; Bradhurst *v.* Townsend, 11 id. 104; Gilpin *v.* Wilson, 53 Ind. 443; Teague *v.* Fowler, 56 id. 569; Douthitt *v.* Smith, 69 id. 463; Whedbee *v.* Reddick, 79 N. C. 521; James *v.* Cutter, 53 Cal. 31; Wait *v.* Wheeler & Wilson Manuf. Co. (Ore. 1892), 31 Pac. Rep. 661; Sheehan *v.* Pierce (Supreme, June, 1893), 23 N. Y. Suppl. 1119 (in an action of slander, a slander of the defendant uttered by the plaintiff in the course of the same conversation cannot be counter-claimed). Facts showing that the defendant has been damaged by the bringing of the action do not constitute a valid counter-claim: Kansas Loan & Inv. Co. *v.* Hutto, 48 Kan. 166. A counter-claim cannot be pleaded in an action for a statutory penalty: Woodward *v.* Conder, 33 Mo. App. 147.

favor of the defendant may arise out of a tort to property committed by the plaintiff in the course of the "business" or "negotiation" or "conduct of affairs," such as a claim for the taking or conversion of goods, or for a trespass to or wrongful detention of land. Indeed, the difficulty in conceiving of distinct torts arising from one and the same "transaction" is confined almost entirely to the cases of torts to the person. It may be noticed that most of the decisions already cited, in which the possibility of distinct torts having such a common legal origin is denied, directly relate to personal wrongs alone; and the reasoning of the courts is extended from them to *all* torts, without any discrimination between their different classes, and the different rules which may govern them.[1]

§ 646. *770. **Case of Scheunert v. Kaehler. Criticism.** The cases thus far cited have all been decided by courts of New York; I shall now quote a few which have arisen in other States. A complaint alleged that the plaintiff delivered certain flour to the defendant to be sold on commission, but that the latter had converted the same, or the proceeds thereof, to his own use, and prayed judgment for its value as damages. The answer set up the following facts as a counter-claim: that defendant had leased a flouring-mill to the plaintiff, who covenanted in the lease that he would furnish to defendant constant employment during the continuance of the term for two teams in drawing flour to Milwaukee at a stipulated sum for each load, and further covenanted that all the flour sent from the mill should be delivered to the defendant at Milwaukee, to be sold by him on commission, in pursuance of which agreement the flour mentioned in the complaint was in fact delivered; that the plaintiff had neglected and refused to perform both of his said covenants, by reason of which the defendant had sustained damages to a specified amount, and judgment was demanded for such sum. A demurrer was interposed to this counter-claim, and was sustained by the Supreme Court of Wisconsin.[2] This opinion, quoted at large in the note,

[1] [Blue *v.* Capital Nat. Bank (1896), 145 Ind. 518, 43 N. E. 655; Watts *v.* Gantt (1899), 42 Neb. 869, 61 N. W. 104; Sheibley *v.* Dixon County (1901), 61 Neb. 409, 85 N. W. 399.]

[2] Scheunert *v.* Kaehler, 23 Wis. 523, per Dixon C. J.: "Assuming that a counter-claim may be pleaded to an action of tort, — a question not necessary to be decided, — and assuming also that no objection exists, because the contract for the breach of which the defendant claims damages is not set forth in the complaint, but that the counter-claim would be ad-

necessarily leads to the conclusion that when the plaintiff has an election to adopt one or the other of two forms of remedy, one on the contract for the breach thereof, and the other in tort for a

missible, if at all, under the last clause of the subdivision as being connected with the subject of the action, the question resolves itself into an inquiry as to the origin of the cause of action stated in the complaint, — whether it arises upon the contract set forth in the answer, or originates in facts outside of and disconnected with that contract. If the former, then the counter-claim would seem to be clearly within the statute; but, if the latter, then it would not be." The opinion states that the plaintiff might have sued upon contract for a violation of it, or might have sued in tort for the wrong done him, and that he had chosen the latter form of action, and adds: "The subject of the action is the tort or wrong done in the conversion of the money; that is the foundation, and the sole foundation, of the plaintiff's claim in this form of action; for, unless the money was unlawfully converted, the action cannot be maintained." The counter-claim was therefore held to be inadmissible. See also, Akerly *v.* Vilas, 21 Wis. 88, 109, 110, which holds that the counter-claim must be *directly* connected with the subject of the plaintiff's action, or so connected that a cross-bill would have been sustained, or a recoupment allowed under the former practice, when it is claimed to fall within the last clause of the first subdivision; and Vilas *v.* Mason, 25 Wis. 310, 321, where, in an action brought upon a contract, — on a lease against the tenant, — a counter-claim for the conversion of chattels which the defendant had placed upon the demised premises, was sustained, on the ground that both causes of action arose out of the same transaction; also Ainsworth *v.* Bowen, 9 Wis. 348.

[In the very recent case of Stolze *v.* Torrison (1903), — Wis. —, 95 N. W. 114, the court by Cassoday C. J., said: "As indicated, the 'transaction set forth in the complaint as the foundation of the plaintiff's claim' was the wrongful breaking and entering the close of which the plaintiff was at the time in the quiet and peaceable possession, and malicious prosecution and conspiracy in support of such conduct. The equitable counter-claim sought to be interposed is to establish the title of Torrison to the *locus in quo* under a tax deed and a subsequent conveyance and the statutes of limitation, mentioned in the foregoing statement, and to have the plaintiff's assertion of title adjudged to be unfounded. It is very obvious that such equitable counter-claim did not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim. On the contrary, it arose entirely independent and outside of that transaction, and the trespasses of the defendants alleged are sought to be justified by virtue of it. Nor is it legally 'connected with the subject of the action' set forth in the complaint. It did not arise out of the torts or trespasses alleged in the complaint, nor is it legally connected with such torts or trespasses. 'The subject of the action' is not the land, nor the title to the land, but the torts alleged. Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888. The peaceable possession of the plaintiff was sufficient without actual title to support trespass vi et armis [citing many Wisconsin cases]. Besides, malicious prosecution might be maintained without such possession. 'A counter-claim must be a claim which, if established, will defeat, or in some way qualify, the judgment to which plaintiff is otherwise entitled' [citing Wisconsin cases]. This court has held that, where the complaint stated 'a cause of action in trespass quare clausum, with allegations of the injury, destruction, and carrying away of personal property in aggravation of damages,' the defendant could not interpose an 'equitable counter-claim, as owner in common with the plaintiff of the personal property injured or taken, to have the plaintiff account for the use of defendant's share of the property, and to have the property sold, and the proceeds divided between the parties, such a claim not arising out of the trespass complained of, nor being connected with the subject of the action.'"]

conversion, and the like, the ability of the defendant to plead a counter-claim depends upon the kind of action selected; in other words, the propriety of the counter-claim does not depend upon the actual facts out of which the plaintiff's remedial rights arise, but upon the mere nature of the remedy which he elects to enforce, and of the means which he employs for such enforcement. The result would be, that by changing the kind of action the plaintiff may cut off a counter-claim otherwise admissible. In my opinion, it was not the intention of the legislature, in adopting the reformed procedure, that the essential rights of defendants should be made to rest in this manner upon the form of remedy chosen by the plaintiffs.

§ 647. *771. **Cases in Indiana and Kentucky. Discussion of the Meaning of the Phrases "Arising out of," "Connected with," and "Transaction" in these Cases.** In a case already quoted under a former head, an action brought to set aside a deed of lands on account of the defendant's fraud, to which a counter-claim was pleaded denying the fraud, alleging the validity of the conveyance, the plaintiff's continued possession of the land and pernancy of the rents and profits, and praying a judgment awarding possession, quieting title, and giving damages, the Supreme Court of Indiana sustained the answer, and granted the relief demanded by the defendant.[1] The same court has discussed the legal meaning of the phrases "arising out of" and "connected with," and has arrived at one general principle, at least, which may aid in

[1] Woodruff *v.* Garner, 27 Ind. 4, per Frazer J.: "The plaintiff's cause of action is the alleged fraud of the defendant in procuring the deed sought to be rescinded. The defendant's cause of action averred in the counter-claim does not arise out of the plaintiff's cause of action, for it cannot even exist consistently with it. If the fraud alleged by the plaintiff was perpetrated, then the defendant cannot have any right of action whatever. So the defendant found it necessary to deny the fraud. But the deed sought to be set aside constitutes part of the transaction upon which the plaintiff and the defendant both rely for a recovery. It is the link which forms the direct connection between the two diverse causes of action. So the counter-claim for possession is connected with the cause of action of the plaintiff directly, and is therefore authorized by the statute." The "transaction" set forth in the complaint was not simply the alleged fraud: it was the entire business or matter of agreeing to sell and purchase the land, and of executing and delivering the deed in pursuance of such agreement. The plaintiff averred that the defendant was guilty of fraud; and such fraud was therefore a *part* of the transaction, according to the plaintiff's version. The defendant's cause of action arose out of the same transaction, — in fact it *was* the entire transaction, except the element of fraud, which he asserted did not exist. No plainer illustration of a cause of action arising out of the transaction which was also the foundation of the plaintiff's claim could be imagined.

determining their application to all particular cases. The action was to recover money deposited with the defendant who had refused to deliver it when demanded. The defendant pleaded by way of counter-claim that the plaintiff had falsely charged him with stealing the money deposited, and had slandered him by uttering such charge in the presence of others, and prayed judgment for damages. In sustaining a demurrer to this answer the court suggested a rule of construction which may be followed in all cases.[1] The High Court of Appeals in Kentucky has construed the phrases "arising out of the transaction" and "connected with the subject of the action" in a very liberal and broad manner. An action was brought on an injunction bond given by T. and sureties. The plaintiff had originally commenced proceedings to obtain possession of a farm in the occupancy of T. T. had thereupon brought an equitable suit to restrain these proceedings, had obtained a preliminary injunction, and had given the bond in question. The suit being dismissed, this action was brought on the bond, the plaintiff therein claiming damages for being kept out of possession of the farm by means of the injunction during the continuance of the suit. The defendant T. pleaded a counter-claim, alleging that notwithstanding the injunction, and before it was dissolved, the plaintiff — the defendant in the injunction suit — wrongfully took possession of the land and seized the crops thereon, and converted the same to his own use, and demanding judgment for the damages thus caused. At the trial the defendant had a verdict which was sustained on appeal.[2]

[1] Conner *v.* Winton, 7 Ind. 523. "The question is, What is the legal effect of the words 'arising out of' or 'connected with'? Do they refer to those matters which have an immediate connection with the transaction? or do they include also those which have a remote relation with it by a chain of circumstances which were not had in view at its inception? Suppose C. [the defendant] had beaten W. [the plaintiff] for uttering the slander, could W. have replied the damages occasioned by the battery to those resulting from the slander? and could the parties have settled all their quarrels in the action to recover the money? We do not think that the statute contemplates any such practice. A counter-claim is that which might have arisen out of, or could have had some connection with, the original transaction *in the view of the parties*, and which, at the time the contract was made, they could have intended might, in some event, give one party a claim against the other for compliance or non-compliance with its provisions. We refer in this connection, of course, to actions *ex contractu* only. About actions for tort it is not necessary to say anything at present."

[2] Tinsley *v.* Tinsley, 15 B. Mon. 454, 459, per Marshall J. "It is not required that the counter-claim itself shall be founded in contract, or arise out of the contract set forth in the petition; but it is sufficient that it arise out of the transaction set forth in the petition, or be connected with the subject of the action. As

§ 648. * 772. **Cannot defeat Counter-Claim by Choice of Form of Action. Thompson v. Kessel.** The New York Court of Appeals has passed upon the question, How far the form of the action chosen by the plaintiff, when he has an election to sue for a tort or on a contract, can affect the defendant's right to interpose a counter-claim, and has declared that it can produce no effect; if the defendant would have been able to plead a counter-claim to a cause of action upon an implied promise, growing out of a certain state of facts, the plaintiff cannot, by adopting an action in form for a tort under the same circumstances, cut off or abridge this substantial privilege; the chief design of the new procedure was to subordinate form to substance and not substance to form. An action was brought to compel the delivery of certain bills of lading, the plaintiffs alleging that the shipment was on their account, and that the goods and the bills of lading thereof belonged to themselves, and were wrongfully detained by the defendants. The answer put these averments in issue, and also set up by way of counter-claim that, since the commencement of the action, the plaintiffs had wrongfully taken possession of the goods, and had converted the same to their own use, and prayed judgment for the value thereof. The court pronounced the defendants' demand to be a cause of action plainly arising out of the transaction set forth in the complaint, or at least connected with the subject of the action, being, as it was, for the value of the very goods which the plaintiffs sought to reach, and added the following: "I do not think it lies with the plaintiffs to allege that their taking was a mere tort for the purpose of defeating the counter-claim. And, even if an action sounding in tort might be maintained by the defendants for the taking, I am still of opinion that the cause of action for the value of the goods would constitute a good counter-claim in such a case as this." [1]

the petition states the occupation of the land by Mrs. T. [the present defendant and the plaintiff in the equity suit] during the pendency of the injunction, and claims damages therefor, any interference by the plaintiff which rendered such occupation less profitable or less valuable to the occupant constituted a cause of action arising out of the transaction set forth in the petition, and is connected with the plaintiff's cause of action; and although it amount to a trespass or other tort, it may constitute the ground of a counter-claim." In Wadley *v.* Davis, 63 Barb. 500, the same principle was approved and followed; and a demand arising from tort to property was held to be a proper counter-claim in an action on contract.

[1] Thompson *v.* Kessel, 30 N. Y. 383, 389, per Johnson J. The same doctrine has been recently approved and enforced, after an exhaustive examination of the authorities, by the Supreme Court of Missouri, in Gordon *v.* Bruner, 49 Mo. 570,

§ 649. * 773. **Xenia Branch Bank v. Lee.** I shall end this particular branch of the subject by quoting from a very able and instructive decision made by the Superior Court of New York City, in which the statutory definition was fully analyzed as to all its parts, and an attempt was made to reach the basis of a true interpretation. The action was brought to recover damages for the wrongful conversion of certain bills of exchange. The plaintiffs had been the owners of the bills, which were drawn by divers persons on different payees; they indorsed the same and delivered them to the Ohio Life Insurance and Trust Company, for the purpose of collection only; this company transferred them to the defendants, who now retain them; it was alleged that the defendants took the bills with notice of all these facts, and were not holders in good faith for value. The complaint stated a demand and refusal, an unlawful detention and conversion, and demanded judgment for the value of the securities as damages; it was strictly for an alleged tort. The answer was pleaded as a counter-claim. It set up the drawing of the bills, their indorsement by the plaintiffs, their delivery to the Ohio Trust Company, their transfer to the defendants for full value and without notice, demand of payment, nonpayment and notice thereof to the plaintiffs, and prayed judgment against the plaintiffs as indorsers for the amount due on the drafts. In other words, it was like an ordinary complaint in an action by the indorsees against the indorsers to

571, per Bliss J., *supra*, § * 569 n. And see Brady *v.* Brennan, 25 Minn. 210; Ritchie *v.* Hayward, 71 Mo. 560; Kamerick *v.* Castleman, 23 Mo. App. 481. Ritchie *v.* Hayward was an action for the wrongful conversion of certain sacks. The defendant answered that the plaintiff had contracted with him for the sale and delivery of a quantity of potatoes of a given quality, to be delivered in sacks; that plaintiffs sent him potatoes in the sacks in controversy, but the potatoes were of an inferior quality, and asked damages, by way of counter-claim, for the breach of contract. The court, through Hough J., said: "If the facts stated by the defendant be true, he certainly has a cause of action against the plaintiff. It is not, however, a cause of action arising out of any contract set forth in the petition, for no contract is therein set forth. The facts set forth in the petition are, that the defendants came into the possession of certain sacks of the plaintiff, and wrongfully converted them to their own use. The details of the transaction, the evidential facts, are not stated, but the ultimate facts only, those which will entitle the plaintiff to relief, when established by other facts at the trial. . . . It (the transaction) must be held to include all the facts and circumstances out of which the injury complained of by him arose, and if these facts and circumstances also furnished to the defendant a ground of action against the plaintiff, the defendant will be entitled to present such cause of action as a counter-claim, showing by proper averments that it is a part of the same transaction which is made the foundation of the plaintiff's claim. In this view of the case, it is immaterial what form of action is adopted by the plaintiff."

recover the sum due on a bill or note. A motion to strike out this counter-claim was denied at the special term, and the plaintiffs appealed to the general term, which, after stating the facts and the questions presented by the record, and reciting the two subdivisions of § 150 of the New York Code, pronounced the opinion found in the note.[1]

[1] Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372, 389, per Woodruff J.: "This division of the section shows that there may be a counter-claim *when the action itself does not arise on contract;* for the second clause is expressly confined to actions arising on contract, and allows counter-claims in such cases of any other causes of action also arising on contract; and this may embrace, probably, all cases heretofore denominated 'set-off,' legal or equitable, and any other legal or equitable demand liquidated or unliquidated, whether within the proper definition of set-off or not, if it arise on contract. Gleason *v.* Moen, 2 Duer, 642. The first subdivision would therefore be unmeaning as a separate definition, if it neither contemplated cases in which the action was not brought on the contract itself in the sense in which these words are ordinarily used, nor counter-claims which did not themselves arise on contract. The first subdivision, by its terms, assumes that the plaintiffs' complaint may set forth, as the foundation of the action, a 'contract' or a 'transaction.' The legislature, in using both words, must be assumed to have designed that each should have a meaning; and, in our judgment, their construction should be *according to the natural and ordinary signification of the terms.* In this sense, every contract may be said to be a transaction; but every transaction is not a contract. Again, the second subdivision having provided for all counter-claims arising on contract, and all actions arising on contract, no cases can be supposed to which the first subdivision can be applied, unless it be one of three classes; viz., 1st. In actions in which a contract is stated as the foundation of the plaintiffs' claim, counter-claims which arise out of the same contract; or, 2d. In actions in which some transaction, not being a contract, is set forth as the foundation of the plaintiffs' claim, counter-claims which arise out of the same transaction; or, 3d. In actions in which either a contract, or a transaction which is not a contract, is set forth as the foundation of the plaintiffs' claim, counter-claims which neither arise out of the same contract nor out of the same transaction, but which are connected with the subject of the action." After some discussion upon the difference between the provision in the first subdivision and that in the second subdivision in reference to actions and counter-claims based upon contract, in which he points out that, in the former, the language is "contract which is the *foundation* of the plaintiff's claim," and, in the latter, "actions *arising on* contract," and that this language appropriately applies, in the first subdivision to certain classes of actions in which a contract is the foundation of the plaintiff's claim, although the action does not strictly *arise on* the contract, and, in the second subdivision, to all those actions which are strictly *brought on* the contract, — the learned judge proceeds with the main subject: "But, secondly, the subdivision authorizes in actions in which a transaction, not being a contract, is set forth as the foundation of the plaintiff's claim, counter-claims which arise out of the same transaction. This, we think, includes the case before us. The 'transaction' here in question may either include the history of the bills, so far as the title of the plaintiffs or defendants depends upon that history; or the 'transaction' may, perhaps, be confined to the manner and circumstances of the transfer to the defendants." The opinion recapitulates the facts of the case, and shows that, giving to the term "transaction" the first of these two meanings, the defendants' cause of action arose out of it, and adds a very important suggestion which had been overlooked in some of the decisions heretofore cited: "Some facts enter into the plaintiffs' case which do

§ 650. * 774. **Meaning of Term "Transaction." Differences of Opinion as to the Import of Statutory Terms.** While the foregoing decisions do not furnish any general formulas for determining in all cases what is the "transaction" set forth in the plaintiff's petition or complaint, or what is the "subject of the action," or when the defendant's cause of action "arises out of the transaction set forth in the complaint," or when it is "connected with the subject of the action," they do throw some light upon the true intent of the legislature in using these phrases, and they settle some *principles* which, when properly applied, may assist in constructing the universal rules so much needed by the profession and the bench. It is very evident that there has existed in the minds of judges a radical difference of opinion in respect to the import of the controlling terms of the statutory definition, and especially in respect to the word "transaction." One school would narrow its meaning so as to deprive it of all separate significance in the clause where it is found. They would make it either synonymous with "contract," or would regard it as being merely the very cause of action which the plaintiff has alleged in his pleading as the ground of recovery.[1] The other school give to the word a broader and more comprehensive meaning.[2] *Ex vi termini* it imports something different from "contract," and is to be taken in its ordinary and popular sense. It is more extensive than

not enter into the defendants' case, and *vice versa*. But, from the nature of the subject, *this must always be so*. The legislature were not so absurd as to mean that the defendant might counter-claim when the very facts alleged by him, with all their particulars, were identical with those alleged by the plaintiff. . . . So, if the transaction set forth as the foundation of the plaintiffs' claim be regarded as more narrow, and as being the transfer of the bills by the Ohio Trust Company to the defendants, then, as before, the defendants' counter-claim arises out of the same transaction; to wit, the transfer. The circumstances that the defendants have to superadd an allegation of demand, protest, and notice to the plaintiffs as indorsers, does not alter the case. This added fact is only a means of showing *how* the defendants' cause of action arises out of the transaction relied upon, and is made complete." Finally, Mr. Justice Wood-ruff reaches the conclusion that, even if the defendants' cause of action does not arise out of the "transaction" set forth in the complaint, it "is directly and immediately connected with the subject of the action. The subject of the action is either the right to the possession of the bills of exchange, or it is the bills themselves. The defendants' counter-claim is not only connected with, but is inseparable from, either or both. The *object* of the action is *damages;* but the *subject* is the bills of exchange, or the right to their possession."

[1] See, for example, Mulberger *v.* Koenig, 62 Wis. 558.

[2] [Stolze *v.* Torrison (1903), 118 Wis. 315, 95 N. W. 114; Blue *v.* Capital Nat. Bank (1896), 145 Ind. 518, 43 N. E. 655; Watts *v.* Gantt (1894), 42 Neb. 869, 61 N. W. 104; Gilbert *v.* Loberg (1894), 86 Wis. 661, 57 N. W. 982; Story & Isham Co. *v.* Story (1893), 100 Cal. 30, 34 Pac. 671, quoting the text.]

"cause of action" or "subject of the action;" for out of it the defendant's "cause of action" is said to "arise," and it is also to be set forth in the complaint or petition, not as the "cause of action," but as the "foundation" of the plaintiff's claim. It must, therefore, be something — *that combination of acts and events, circumstances and defaults — which, viewed in one aspect, results in the plaintiff's right of action and, viewed in another aspect, results in the defendant's right of action.* As these two opposing rights cannot be exactly the same, it follows that there may be, and generally must be, acts, facts, events, and defaults in the transaction as a whole, which do not enter into each cause of action, but are confined to one of them alone.[1]

§ 651. * 775. **Meaning of "Subject of Action." No Agreement in Judicial Opinions. Construction Proposed by Author.** In regard to what constitutes the "*subject* of the action," there is no agreement whatever in the judicial opinions. Some of them have treated it as identical with the "cause of action," which is plainly incorrect. As I have already shown, the "cause of action" consists in, 1st, the primary right, and the facts from which it flows; and, 2d, the breach of that right, and the facts constituting such breach. These taken together create a remedial right, and *are the cause of action.* The remedy itself is certainly the "object" of the action. The "subject" is certainly not the cause of action; but when we have reached this conclusion we find very little judicial aid in arriving at any other and more affirmative one. Some judges have said that in all possessory actions, and all actions to establish property, the "subject of the action" denotes the *things* to assert a right over which, or to obtain the possession of which, the action is brought, as the land in ejectment and in many equity suits, or the chattels in replevin. Some have said that the "subject" denotes the same in other classes of actions, not brought to recover possession or expressly

[1] The reader should consult the analysis of cases, and the discussion in relation to the same word given in a former chapter (Chap. III., Sec. 2). The language of the clause there under examination is almost identical with that of the present passage; and the same meaning must, of course, be attributed to the words "transaction" and "subject of the action" in both sections of the statute. I do not repeat in the text the former full discussion; but it is plain that the decisions there cited, and the results there reached, apply with equal force to the questions now under consideration. There is an evident connection between the subject of uniting causes of action in one complaint, and the uniting them in one controversy, although they are set forth in the adverse pleadings.

to establish title, but in which, nevertheless, the plaintiff's right to recover is based upon his property in a specific thing, as for the conversion of chattels, or for trespass to lands or chattels; while some have applied the same principle to actions not based upon any alleged *property* of the plaintiff in a specific thing, and have gone to the extent of holding that, in actions upon contract to recover the debt due or damages for the non-performance thereof, the "subject" is the very contract itself, — the instrument in suit, as, for example, in an action upon a bill or note, the "subject," according to this view, would be the bill or note sued upon. Other judges have said that the "subject" is the *right* which is sought to be enforced in the action; meaning thereby the *primary* right, which has been infringed upon as distinguished from the remedial right, and from the delict and the remedy. Thus in the case last quoted, which was an action for the conversion of bills, Mr. Justice Woodruff declared that the subject was either the bills themselves, or the plaintiff's original right to their possession. It would, as it seems to me, be correct to say in all cases, legal or equitable, that the "subject of the action" is the plaintiff's main *primary right*, which has been broken, and by means of whose breach a remedial right arises. Thus, the right of property and possession in ejectment and replevin, the right of possession in trover or trespass, the right to the money in all cases of debt, and the like, would be the "subject" of the respective actions. Although in a certain sense, and in some classes of suits, the things themselves, the land or chattels, may be regarded as the "subject," and are sometimes spoken of as such, yet this cannot be true in all cases; for in many actions there is no such specific thing in controversy over which a right of property exists. The primary right, however, always exists, and is always the very central element of the controversy around which all the other elements are grouped, and to which they are subordinate. In possessory and proprietary actions, this right, which will then be always one of property or of possession, will be intimately associated with the specific thing itself which is the *object* of the right; but this relation is not and cannot be universal. It seems, therefore, more in accordance with the nature of actions and more in harmony with the language of the statute to regard the "subject of the action" as denoting the plaintiff's *principal primary right* to enforce or maintain which the action is brought, than to

regard it as denoting the specific thing in regard to which the legal controversy is carried on.[1] In this manner alone can we arrive at a *general* rule applicable to all possible cases, and the rule thus reached fully satisfies all the requirements of the legislative language, and can be invoked in all classes of actions. While I suggest and adopt this meaning of the term "subject," I freely concede that no decision, so far as I have discovered, pronounces this interpretation to be the only one admissible; many cases sanction it, none directly reject it; but none, on the other hand, have gone so far as to declare in its favor to the exclusion of all other meanings. The construction proposed, as it has been judicially approved in many instances, would remove all doubt and conflict of opinion, and would furnish a simple and practical rule of universal application.[2]

§ 652. *776. **The Phrase "Connected with." Connection must be Immediate and Direct.** In respect to the phrase "connected with" the subject of the action, one rule may be regarded as settled by the decisions, and it is recommended by its good sense, and its convenience in practice. The connection must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute.[3] The criterion proposed by the Supreme Court of Indiana in one of the cases cited is as certain and practical as the nature of the subject admits, and only needs to be known to be universally accepted. It is, that the connection must be such that the parties could be supposed to have foreseen and contemplated it in their mutual acts; in other words, that the parties must be assumed to have had this connection and its consequences in view when they dealt with each other. I now pass, according to the order already stated, to the three branches into which the subject-matter is naturally separated.

I. *Cases in which the Cause of Action alleged as a Counter-Claim arises out of the Contract Set forth in the Complaint or Petition as the Foundation of the Plaintiff's Claim.*

§ 653. *777. **First and Second Subdivisions of Statute overlap to a Certain Extent.** Mr. Justice Woodruff, in the opinion last

[1] Sharp *v.* Kinsman, 18 S. C. 108.

[2] [Stolze *v.* Torrison (1903), 118 Wis. 315, 95 N. W. 114.]

[3] [Watts *v.* Gantt (1894), 42 Neb. 869, 61 N. W. 104; Hays *v.* McLain (1899), 66 Ark. 400, 50 S. W. 1006; Gurske *v.* Kelpin (1901), 61 Neb. 517, 85 N. W. 557; Walser *v.* Wear (1897), 141 Mo. 443, 42 S. W. 928.]

quoted, declares that the second subdivision of the definition was intended to embrace all cases in which the plaintiff's cause of action arises on contract, and the defendant's counter-claim also arises on contract, either the same or another, and that the clause of the first subdivision above mentioned was designed to include only those cases in which the contract is set forth by the plaintiff as the *foundation* of his action, although the action itself is not *on* the contract. This is, I think, attributing too much nicety and precision of thought to the legislature, and assumes that it would never enact any duplicate provisions. The first subdivision no doubt covers the cases mentioned by Judge Woodruff, but it also embraces many others. Undoubtedly, the codifiers and the legislature in drawing and adopting the first subdivision had in mind the doctrine of recoupment, and so framed the language that it should include cases of recoupment and all others, legal and equitable, analogous to it, — that is, all cases in which the right of action of the plaintiff and that of the defendant arise *from the same contract.* It describes, therefore, not only the special and infrequent classes of instances in which the plaintiff's claim is not technically *on* the contract, although a contract is set forth as its foundation, but also all other instances in which the plaintiff's action is strictly brought *on* the contract, while the defendant's counter-claim in both cases arises from the same contract. The central idea of this subdivision then is, that one and the same contract is the basis of both parties' demand for relief.[1] Passing to the second subdivision, the central thought is equally plain, viz., that the plaintiff's cause of action, and that of the defendant, spring from different contracts ; in other words, the codifiers and the legislature had in mind the familiar case of set-off, both legal and equitable. But, in framing the clause, the language was made broader than was necessary, and it actually covers all cases in which the plaintiff's cause of action is on contract, and the defendant's counter-claim is also on contract the same or another. The law-makers have thus in fact given us two provisions author-

[1] [Brosnan *v.* Kramer (1901), 135 Cal. 36, 66 Pac. 979 : Where a lease is entered into between two parties, and on the same date the lessee loans money to the lessor secured by a mortgage on the leased premises, and an action of foreclosure is subsequently brought by the lessee, a demand for unpaid rent existing in favor of the lessor against the lessee at the time of the foreclosure suit is not a claim arising "out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action," which is barred by failure to set it up. Citing the text. Richardson *v.* Penny (1900), 10 Okla. 32, 61 Pac. 584.]

izing a counter-claim arising from the same contract as that from which the plaintiff's cause of action results, but only one authorizing a counter-claim springing from another contract than the one upon which the plaintiff's demand is based. The same case may therefore be often referred to both of these subdivisions; but I shall, following what seems to be the plain design of the statute, consider under the first all those instances in which the demands of both parties arise from the same contract, and postpone to the second all those in which each demand arises from a separate contract. That this is the correct construction of the whole provision is made certain, when we turn to the form which it assumes in all the codes which constitute the second group according to the classification stated at the commencement of this section.[1]

§ 654. * 778. **General Proposition Stated. Illustrative Examples.** It may be stated as a general proposition that in all actions to recover a money judgment, debt or damages, upon a contract, or where a contract is set forth as the foundation of the plaintiff's claim, a counter-claim of a money judgment against the plaintiff for his breach or non-performance of any stipulations of the same agreement, or for his fraud in procuring the same to be entered into, is admissible. The following examples will illustrate this proposition.[2] In an action for rent brought by the lessor or by

[1] The following recent decisions give examples and illustrations of counter-claims arising out of the contract, etc.: More *v.* Rand, 60 N. Y. 208, 214; King *v.* Knapp, 59 id. 460; Boyd *v.* Schlesinger, 59 id. 301, 305 (action to cancel a contract for the sale of land by plaintiff to defendant, as a cloud upon plaintiff's title, counter-claim for the specific performance of the contract); Howard *v.* Johnston, 82 id. 271; Nat. Bk. of Auburn *v.* Lewis, 81 id. 15; Cook *v.* Jenkins, 79 id. 575; Levy *v.* Loeb, 85 id. 365; Read *v.* Decker, 5 Hun, 646; Morgan *v.* Smith, 5 id. 220; Elwell *v.* Skiddy, 8 id. 73; Nichols *v.* Townsend, 7 id. 375; Griffin *v.* Moore, 52 Ind. 295; McMahan *v.* Spinning, 51 id. 187; Hinkle *v.* Margerum, 50 id. 240; Black *v.* Elmer, 54 id. 544; Morrison *v.* Kramer, 58 id. 38; Howe Machine Co. *v.* Reber, 66 id. 489; Merrill *v.* Nightingale, 39 Wis. 247; Bonnell *v.* Jacobs, 36 id. 59; Croumger *v.* Parze, 48 id. 229; Caleb *v.* Morgan, 83 N. C. 211; Craig *v.* Heis, 30 Ohio St. 550; Hade *v.* McVay, 31 id. 231; Fraker *v.* Callum, 24 Kan. 679.

[2] [Mack *v.* Snell (1893), 140 N. Y. 193, 35 N. E. 493; Rood *v.* Taft (1896), 94 Wis. 380, 69 N. W. 183; Smith *v.* Building Ass'n (1896), 119 N. C. 257, 26 S. E. 401; Kuhn *v.* Sol. Heavenrich Co. (1902), 115 Wis. 447, 91 N. W. 994.

Where lessees enter into and retain possession of the rented premises under a covenant in the lease that the landlord will make improvements, which he fails to do, the lessees, when sued for the rent, may recoup the damages resulting from such breach of the covenant, or set up the resulting damages as a counter-claim. Such counter-claim arises out of the contract sued upon as the foundation of the landlord's claim, and is connected with the subject of the action: Pioneer Press Co. *v.* Hutchinson (1896), 63 Minn. 481, 65 N. W. 938.

Matney *v.* Ferrill (1897), 100 Ky. 361, 38 S. W. 494: Where a wife, through her

the grantee of the reversion against the lessee or an assignee of the term, where the lease contains a covenant to repair on the part of the landlord, damages sustained by the defendant from a breach of this covenant may be alleged, and recovered as a counter-claim. The damages in one such case, where the demised premises were a hotel, were held to be the sum paid by the defendant for making the necessary repairs, together with the amount of loss occasioned by the inability to use certain rooms in the hotel while they were out of repair.[1] In an action by the buyer against the seller to recover damages for the non-delivery of goods bargained and sold, the latter may counter-claim the unpaid price of that part of the goods already delivered under the contract.[2] When sued for the price of two articles sold under one agreement, the defendant may set up and recover damages resulting from the fraudulent representations of the plaintiff in respect to one of them, even though such damages exceed in amount the whole price agreed to be paid for both.[3] A person having sold his business and good-will at a certain price, and having covenanted in the same agreement not to engage therein at the same place, and the damages for a breach of this covenant having been liquidated and fixed at a specified sum, in an action brought by the vendee to recover this amount of liquidated dam-

husband as agent, made false and fraudulent representations in the sale of a tract of land with reference to a vein of coal thereon, and its location, thickness and quality, which induced the purchaser to buy the land, and the wife caused such false representations to be made and knew they were untrue, in an action to enforce a vendor's lien for deferred payments, the defendant may set off the damage he has sustained by reason of such false representations against the purchase price.

Driver *v.* Salt Lake Gas Co. (1900), 22 Utah, 143, 61 Pac. 733 : The suing out and serving of an injunction prohibiting defendant from exercising a right under the contract sued on by plaintiff, is a breach of the contract by plaintiff sufficient to form a basis for a counter-claim by defendant, and a counter-claim setting up such facts states a cause of action.]

[1] Myers *v.* Burns, 35 N. Y. 269 ; Cook *v.* Soule, 56 N. Y. 420 ; 1 N. Y. S. C. 116 ; Benkard *v.* Babcock, 2 Robt. 175.

[Hanley *v.* Banks (1897), 6 Okla. 79, 51 Pac. 664 : A tenant may set up a counter-claim for breach of the implied covenant for quiet enjoyment, in an action brought by the landlord for rent, where the landlord has disturbed the tenant in his possession. See also Hunter *v.* Hathaway (1900), 108 Wis. 620, 84 N. W. 996 ; Illsly *v.* Grayson (1898), 105 Ia. 685, 75 N. W. 518 ; Frederick *v.* Daniels (1902), 74 Conn. 710, 52 Atl. 414.]

[2] Leavenworth *v.* Packer, 52 Barb. 132, 136.

[3] Rawley *v.* Woodruff, 2 Lans. 419, and see Hoffa *v.* Hoffman, 33 Ind. 172, where damages from fraud were counter-claimed in a foreclosure suit. When, in an action on a contract, the defendant set up a counter-claim of damages from the plaintiff's fraud, he cannot, at the trial, rely upon a mistake in making the agreement : fraud and mistake are distinct grounds of recovery or defence ; and proof of one cannot be given when the other alone is pleaded : Dudley *v.* Scranton, 57 N. Y. 424, 427.

ages on the ground that the vendor had violated his agreement, the defendant was permitted to recover the unpaid portion of the purchase price as a counter-claim.[1]

§ 655. * 779. **Examples Continued.** It is settled by numerous decisions, although there were at first some expressions of a contrary opinion, that in an action to recover the price of goods sold and delivered, or bargained and sold, the purchaser's demand of damages for the plaintiff's breach of his warranty of the quality of the goods may be pleaded as a counter-claim; in fact, there can be no simpler and plainer illustration of a counter-claim arising out of the very contract set up by the plaintiff as the basis of his recovery.[2] When the plaintiff, who had been employed as a superintendent of the defendants' manufactory under a written agreement stipulating for his services in that capacity at a specified salary for a year, brought an action for his wages, alleging that he had been wrongfully discharged, a counter-claim of damages sustained by the defendants in their business, through the negligent and unskilful conduct of the plaintiff in violation of the provisions of the same contract, was pleaded, and was fully upheld by the court.[3]

[1] Baker *v.* Connell, 1 Daly, 469; and see Ainsworth *v.* Bowen, 9 Wis. 348; Snow *v.* Holmes, 71 Cal. 142.

[2] Lemon *v.* Trull, 13 How. Pr. 248; Warren *v.* Van Pelt, 4 E. D. Smith, 202; Dounce *v.* Dow, 57 N. Y. 16; Love *v.* Oldham, 22 Ind. 51; French *v.* Saile, Stanton's Code (Ky.), 96; Morehead *v.* Halsell, id. 96; Earle *v.* Bull, 15 Cal. 421; Hoffa *v.* Hoffman, 33 Ind. 172. See *contra*, Nichols *v.* Boerum, 6 Abb. Pr. 290. This case has been expressly overruled. See also Nichols *v.* Townsend, 7 Hun, 375, citing Gurney *v.* Atlantic, etc. R. Co., 58 N. Y. 358; Dounce *v.* Dow, 57 id. 16; Day *v.* Pool, 52 id. 416; and see Merrill *v.* Nightingale, 39 Wis. 247; Bonnell *v.* Jacobs, 36 id. 59; Giffert *v.* West, 33 id. 617; Schurmeier *v.* English, 46 Minn. 306; Rugland *v.* Thompson, 48 Minn. 539; Mass. Loan & T. Co. *v.* Welch, 47 Minn. 183; Maders *v.* Lawrence, 49 Hun, 360.

[Heebner *v.* Shepard (1895), 5 N. D. 56, 63 N. W. 892.

Laney *v.* Ingalls (1894), 5 S. D. 183, 58 N. W. 572: Where an action is brought on a promissory note given for the purchase price of a warranted article of merchandise, the defendant may plead the damages resulting from a breach of warranty in recoupment. Haygood *v.* Boney (1894), 43 S. C. 63, 20 S. E. 803: Where suit is brought to recover wages for services rendered as a farm hand, the defendant may set up as a counter-claim the damages he has sustained by reason of plaintiff's careless and negligent use of a horse while working under said contract.]

[3] Lancaster, etc. Man. Co. *v.* Colgate, 12 Ohio St. 344; Stoddard *v.* Treadwell, 26 Cal. 294. But see Barker *v.* Knickerbocker Life Ins. Co., 24 Wis. 630, in which, under exactly similar circumstances, the defendant's claim that the contract should be cancelled was refused, on the ground that the facts made out a perfect defence at law; but no counter-claim of damages was pleaded. It is the rule in Wisconsin that, in general, where the invalidity of the plaintiff's claim appears in an action at law, the court will not interfere upon a counter-claim to set it aside or enjoin it: S. L. Sheldon Co. *v.* Mayers, 81 Wis. 627; Commercial Bk. of Milw. *v.* Fire Ins. Co. of Phil. (Wis. 1893), 54 N. W. Rep. 109.

Counter-claim of damages for negligence in carrying out the provisions of the contract sued upon: Whitelegge *v.*

§ 656. * 780. **Examples Continued.** I have collected and placed in the foot-note a number of additional cases in which the answers were sustained as valid counter-claims on the ground that they arose out of the contract set forth in the complaint or petition; in some of them, however, the court merely said that they arose either from the "contract or transaction set forth" by the plaintiff, and did not distinctly determine which of these expressions was strictly the proper one to be used.[1]

II. *Cases in which the Cause of Action Alleged as a Counter-Claim arises out of the Transaction Set forth in the Complaint or Petition as the Foundation of the Plaintiff's Claim.*

§ 657. * 781. **Plan of Discussing this Subdivision.** I shall in this subdivision pursue the same plan as in the last, and collect

De Witt, 12 Daly, 319 (action for services by attorney); Schweickhart *v.* Stuewe, 71 Wis. 1; Muth *v.* Frost, 75 Wis. 166; Black Riv. Imp. Co. *v.* Holway (Wis. 1893), 55 N. W. Rep. 418; Aultman *v.* Case, 68 Wis. 612; McGregor *v.* Auld (Wis. 1892), 53 N. W. Rep. 845; Harlan *v.* St. Paul, M. & M. R. Co., 31 Minn. 427; Zigler *v.* McClellan, 15 Ore. 499; Empire Transp. Co. *v.* Boggiano, 52 Mo. 294.

[Punteney-Mitchell Mfg. Co. *v.* Northwall Co. (1902), — Neb. —, 91 N. W. 863; McCormick Harvesting Mach. Co. *v.* Gustafson (1898), 54 Neb. 276, 74 N. W. 576; Parry Mfg. Co. *v.* Tobin (1900), 106 Wis. 286, 82 N. W. 154; Mallory Commission Co. *v.* Elwood (1903), 120 Ia. 632, 95 N. W. 176; Hobbs *v.* Bland (1899), 124 N. C. 284, 32 S. E. 683.]

[1] Racine Cy. Bk. *v.* Keep, 13 Wis. 209; Butler *v.* Titus, 13 Wis. 429; Koempel *v.* Shaw, 13 Minn. 488; Gleadell *v.* Thomson, 56 N. Y. 194, 198; Isham *v.* Davidson, 52 N. Y. 237; Whalon *v.* Aldrich, 8 Minn. 346; Mason *v.* Heyward, 3 Minn. 182; Dale *v.* Masters, Stanton's Code (Ky.), 97; Dennis *v.* Belt, 30 Cal. 247; Wilder *v.* Boynton, 63 Barb. 547; Burton *v.* Wilkes, 66 N. C. 604, 610; Hay *v.* Short, 49 Mo. 139; Scott *v.* Menasha (Wis. 1893), 54 N. W. Rep. 263 (action on coupons, counter-claim for cancellation of the bonds to which they were attached); Church *v.* Spiegelberg, 31 Fed. Rep. 601; Moser *v.* Cochrane, 107 N. Y. 35 (action to recover earnest money paid on a contract for purchase of land, counter-claim for specific performance); King *v.* Knapp, 59 N. Y. 462 (same); Patton *v.* Royal Baking Powder Co., 114 N. Y. 1; Smith *v.* Wall, 12 Col. 363; Seaman *v.* Slater, 49 Fed. Rep. 37; Thomson *v.* Sanders, 118 N. Y. 252 (counter-claim of damages for plaintiff's fraud in procuring the contract); More *v.* Rand, 60 N. Y. 208 (same). See McKegney *v.* Widekind, 6 Bush, 107, as to the extent of the relief which may be granted to the defendant in a legal action, and when the contract must be reformed by an equitable proceeding. For examples of valid counter-claims where the defendant had an election to sue for a tort or on contract, see Gordon *v.* Bruner, 49 Mo. 570; Tinsley *v.* Tinsley, 15 B. Mon. 454; Norden *v.* Jones, 33 Wis. 600, 604; but, *per contra*, see Slayback *v.* Jones, 9 Ind. 470. Damages resulting to the defendant from a wrongful issue of an attachment in the action may be counter-claimed, if such act of the plaintiff was a breach of the contract sued on, Waugenheim *v.* Graham, 39 Cal. 169, 176; but such damages cannot generally be recovered by way of a counter-claim, Hembrock *v.* Stark, 53 Mo. 588; Nolle *v.* Thompson, 3 Metc. (Ky.) 121. A counter-claim of damages from a personal tort, as *e. g.*, a slander, is impossible. Conner *v.* Winton, 7 Ind. 523; Merritt Milling Co. *v.* Finlay, 110 N. C. 411.

the various classes of cases in which counter-claims, legal or equitable, have been sustained as properly arising out of the transaction set forth in the complaint, and also those in which such attempted counter-claims have been overruled; and I shall add whatever comments, or extracts from judicial opinions, seem necessary to the clear inference and statement of the general principles and practical rules established by the courts. The import of the term "transaction," and of the phrase "arising out of," has been already discussed with some fulness. Without repeating this discussion, the cases cited will illustrate and complete it.

§ 658. * 782. **Classification and Arrangement of Cases to be cited.** The cases cited will be classified and arranged into groups according to their nature; that is, according to the relief demanded by the respective litigants. The *first* of these classes will contain cases in which the actions are legal, and both parties seek to recover a judgment for money alone. This will be subdivided into (1) Those in which the plaintiff's cause of action and the defendant's counter-claim are *in form* for debt or damages upon contract express or implied; (2) Those in which the plaintiff's cause of action is *in form* for debt or damages upon contract express or implied, and the defendant's counter-claim is for damages arising from a tort, either (*a*) for conversion of goods, or (*b*) for trespasses or injuries to property or to person, or (*c*) for fraud; (3) Those in which the plaintiff's cause of action is in form for damages arising from a tort, and the defendant's counter-claim is for debt or damages upon contract; and (4) Those in which the demands of both parties are for damages arising from a tort. The *second* will contain legal actions in which the judgment is other than for money; and the *third* will embrace equitable actions.

§ 659. * 783. **First Class. (1) Where the Plaintiff's Cause of Action and the Defendant's Counter-Claim are in Form Debt or Damages upon Contract Express or Implied.** A complaint alleged that the defendant had in his possession $115, of which two thirds belonged to the plaintiff, and was received by the defendant to his use, and demanded judgment therefor; the answer, besides a defence of denial, stated by way of counter-claim that the plaintiff had himself in fact received all the money in question ($115): that one third thereof belonged to the defendant, and was received by the plaintiff to the defendant's use, and prayed judgment for

such sum. This answer was adjudged to be a proper counter-claim arising out of the transaction set forth in the complaint; and the plaintiff having failed to reply, the allegations thereof were admitted.[1] Several of the decisions quoted in the last preceding subdivision may also be regarded as examples of the class described under the present head; the contract set forth by the plaintiff might be considered a "transaction." Their facts need not be repeated, and their titles will be found in the foot-note.[2]

§ 660. *784. (2) **Cases in which the Plaintiff's Cause of Action is upon Contract, and the Defendant's Counter-Claim is for Damages Arising from a Tort.** No little conflict will be found among the decisions which are embraced within this group. The judges have been constantly influenced by the established doctrine of the former procedure, which excluded without exception any set-off or recoupment or cross-demand that did not spring from contract.[3] Some have gone to the length of holding that a cause of

[1] Clinton *v.* Eddy, 1 Lans. 61. In an action upon a note, the defendant was not permitted to recover back usurious interest paid by him to the plaintiff on former loans as a counter-claim, because the demand did not arise out of the same transaction; nor as a set-off, because it did not arise on contract, Smead *v.* Chrisfield, 1 Disney, 18; but it seems a demand to recover back usurious interest paid for the very loan which is the basis of the action would be a valid counter-claim, Martin *v.* Pugh, 23 Wis. 184. A claim for the loss, by the negligence of the holder of the note, of certain collateral security for its payment, is a proper counter-claim, First Nat. Bk. of Ft. Dodge *v.* O'Connell (Iowa, 1892), 51 N. W. Rep. 162.

[Punteney-Mitchell Mfg. Co. *v.* Northwall Co. (1902), — Neb. —, 91 N. W. 863; Dowdell *v.* Carpy (1902), 137 Cal. 333, 70 Pac. 167; Adams *v.* Warren (1900), 27 Col. 293, 61 Pac. 609; Wintringham *v.* Hayes (1894), 144 N. Y. 1, 38 N. E. 999. In an action by an administrator to recover the price of articles purchased by defendant at the administrator's sale, debts due the defendant from the intestate could not constitute a counter-claim as they did not grow out of the same transaction, nor a set-off because not mutual: Hancock *v.* Hancock's Adm'r (1902), — Ky. —, 69 S. W. 757. See also Griswold *v.* Pieratt (1895), 110 Cal. 259, 42 Pac. 821.]

[2] Racine Cy. Bank *v.* Keep, 13 Wis. 209; Butler *v.* Titus, 13 Wis. 429; Koempel *v.* Shaw, 13 Minn. 488; Whalon *v.* Aldrich, 8 Minn. 346; Mason *v.* Heyward, 3 Minn. 182; Dale *v.* Masters, Stanton's Code (Ky.), 97; McKegney *v.* Widekind, 6 Bush, 107; Stoddard *v.* Treadwell, 26 Cal. 294; Dennis *v.* Belt, 30 Cal. 247; Hay *v.* Short, 49 Mo. 139; Gordon *v.* Bruner, 49 Mo. 570; Wilder *v.* Boynton, 63 Barb. 547; McKinnon *v.* Morrison, 104 N. C. 354.

[3] [Rood *v.* Taft (1896), 94 Wis. 380, 69 N. W. 183; Hunter *v.* Hathaway (1900), 108 Wis. 620, 84 N. W. 996; Loomer *v.* Thomas (1893), 38 Neb. 277, 56 N. W. 973; President, etc. of Ins. Co. *v.* Parker (1902), 64 Neb. 411, 89 N. W. 1040; Young *v.* Borzone (1901), 26 Wash. 4, 66 Pac. 135; McHard *v.* Williams (1896), 8 S. D. 381, 66 N. W. 930.

In an action for the value of goods, wares, and merchandise sold and delivered, and for services rendered, defendant cannot plead as counter-claim a cause of action for wilfully and maliciously causing a writ of attachment to issue against him, where the facts on which the alleged counter-claim rests arose subsequent to and were wholly independent of those alleged in the complaint: Jones *v.* Swank (1893), 54 Minn. 259, 55 N. W. 1126.]

action in favor of the defendant resulting from a tort cannot possibly arise from the "transaction" set forth by the plaintiff as the foundation of his claim; others, however, have given a more liberal and comprehensive interpretation of the term.[1] Their differing views can best be seen by a comparison of their judicial opinions. In an action for the price of a safe sold and delivered, the defendant pleaded a counter-claim, that the plaintiff had converted to his own use a safe, the property of the defendant, for the value of which he demanded judgment.[2] The Common Pleas of New York City held that this answer was based upon tort;

[1] [Waring *v.* Gaskill (1895), 95 Ga. 731, 22 S. E. 659: A note was given to plaintiff by the defendant as drawer, with certain shares of stock as collateral, under the agreement that the collateral should not be sold unless ten days' notice was given to the defendant. The stock was sold without the required notice being given, and did not bring the amount of the note. In an action on the note the court held that defendant might plead in recoupment the damages occasioned by the conversion. Yet the Georgia statute defines recoupment as based only upon cross-obligations or independent covenants arising under the same contract. But see Mashburn *v.* Inman (1895), 97 Ga. 396, where the court said: "This case falls within the general rule, that, to an action sounding in contract, the defendant cannot plead as a set-off a claim arising *ex delicto*."

In Hecht *v.* Snook (1902), 114 Ga. 921, 41 S. E. 74, the court said: "There is nothing in the statutes of this State which authorizes a defendant in a suit at law to set off, as a matter of legal defence to a suit on a contract, damages arising from a tort committed by the plaintiff; or to set off, in a suit for damages arising from the commission of a tort by the defendant, a claim growing out of a contract between the plaintiff and the defendant."

Blue *v.* Capital Nat. Bank (1896), 145 Ind. 518, 43 N. E. 655:] "Can slander be the subject of a counter-claim in an action upon a promissory note for borrowed money? In our judgment it cannot. . . . 'A counter-claim is that which might have arisen out of, or could have some connection with, the original transaction, in view of the parties, and which, at the time the contract was made, they could have intended might, in some event, give one party a claim against the other for compliance or non-compliance with its provisions.' Conner *v.* Winton, 7 Ind. 523. A tort cannot be regarded as growing out of or connected with contract, within the meaning of the statute, simply because the contract had suggested it, or was remotely an incident to it."

[2] [Carson's Executors *v.* Buckstaff (1898), 57 Neb. 262, 77 N. W. 670: "A debtor, when sued by his creditor, may plead as a counter-claim or set-off, the actual value of any collateral security which the creditor has converted to his own use or the value of any collateral security which he has released, dissipated, or diverted from the purpose for which he held it."

Braithwaite *v.* Akin (1893), 3 N. D. 365, 56 N. W. 133: Plaintiffs [intervenors] owned certain claims in a steamboat, which was about to be sold under judicial order so as to deprive them of their claims. To protect themselves they arranged with defendant that they would furnish part of the funds necessary to purchase the boat at the judicial sale, that defendant should attend the sale and buy the boat, that the claims of plaintiffs and their advancements should be paid out of the earnings of the boat, the boat being managed by defendant. *Held* that a counter-claim based on the conversion of the boat by plaintiffs, in an action for an accounting, was improper and did not arise out of the contract or transaction set forth in the intervenor's complaint.]

that the defendant had not so framed it as to waive the wrong and sue upon an implied promise for the price, and that the pleading was not a proper counter-claim. Having thus fully disposed of the issues, the court went on to declare that if the defendant might waive the tort and bring suit in form for the price, the demand would not be a valid counter-claim, because the cause of action would not arise upon contract;[1] and upon a complaint for the price of goods sold and delivered, the Superior Court of New York City rejected a counter-claim for the wrongful conversion by the plaintiff of other goods belonging to the defendant.[2] No allusion was made in the latter decision to the doctrine of election of remedies between an action for the tort, and one in form upon contract; and in neither of the cases could it be pretended that the defendant's demand, in whatever shape it might be put, arose out of the transaction stated by the plaintiff. On the other hand, when, in a suit upon a promissory note, the defendant pleaded as a counter-claim that he had pledged certain stocks with the plaintiff as security for the debt; that the latter had wrongfully sold them, and prayed judgment for their value, — the Supreme Court of Wisconsin, in reversing a judgment for the plaintiff rendered on the trial, assumed that the facts constituted a good counter-claim.[3]

§ 661. *785. **Damages from Trespasses, Nuisances, Negligences, and the Like.** In an action by the lessor for rent, an answer, which stated that during the continuance of the term the plaintiff erected an oven, furnace, and other apparatus for a bakery under the store demised to and occupied by the defendant, and by the use thereof had filled the premises with smoke, soot, and steam, and had injured the defendant's goods, and demanded judgment for the damages so caused, was treated as a valid counter-claim by the New York Superior Court.[4] But in a similar action the

[1] Piser *v.* Stearns, 1 Hilt. 86.

[2] Kurtz *v.* McGuire, 5 Duer, 660. See also Steinhart *v.* Pitcher, 20 Minn. 102; Street *v.* Bryan, 65 N. C. 619, actions on contracts in which counter-claims of damages arising from unconnected torts were rejected.

[3] Ainsworth *v.* Bowen, 9 Wis. 348; s. p., Cass *v.* Higenbotam, 100 N. Y. 248; Weston *v.* Turver (Supr. Ct., Gen. Term, 1888), 17 N. Y. St. Rep. 502.

[4] Ayres *v.* O'Farrell, 4 Robt. 668; 10 Bosw. 143. When the cause was first before it, the court held that by replying the plaintiff had waived all objection; on the second appeal, the counter-claim was more definitely approved.

[Kuhn *v.* Sol. Heavenrich Co. (1902), 115 Wis. 447, 91 N. W. 994; Hawley Bros. Hardware Co. *v.* Brownstone (1899), 123 Cal. 643, 56 Pac. 468.]

New York Common Pleas rejected a counter-claim which alleged that at the time of the letting mentioned in the complaint the plaintiff leased other premises to the defendant, and that he had before the commencement of this suit wrongfully broken into said premises and taken therefrom certain chattels of the defendant, which he had injured, destroyed, or lost, and prayed judgment for the value of the goods so taken. The court declared that this cause of action clearly did not arise out of the contract or transaction set forth in the complaint, nor was it connected with the subject of the action: it was a naked and independent act of trespass.[1]

§ 662. * 786. **Same Subject.** Similar decisions have been made in other actions than those for the recovery of rent. In a suit upon a note given for the purchase price of land conveyed to the defendants, they were not permitted to counter-claim damages for the plaintiff's wrongful entry upon the land so conveyed, and cutting and carrying away a growing crop the title to which had passed by the deed.[2] It has, however, been recently held by the Supreme Court in New York, that a cause of action for a tort *may* arise out of the transaction set forth by the plaintiff; and such a counter-claim was fully sustained in an action on contract.[3]

[1] Drake *v.* Cockroft, 4 E. D. Smith, 34, 39. See also Gallup *v.* Albany R. Co., 7 Lans. 471; Edgerton *v.* Page, 20 N. Y. 281, 285; Mayor, etc. of N. Y. *v.* Parker Vein Stp. Co., 12 Abb. Pr. 300; McKensie *v.* Farrell, 4 Bosw. 192, 202; Avery *v.* Dougherty, 102 Ind. 443; Thorp *v.* Philbin, 15 Daly, 155; Brugman *v.* Burr, 30 Neb. 406; which were all actions for rent in which counter-claims for damages from torts of the lessor were rejected. In Littman *v.* Coulter, 23 Abb. N. Cas. 60, however, an action for rent, the defendant was allowed to counter-claim damages for the conversion by the plaintiff of the defendant's goods, under a claim of lien thereon for the rent.

[2] Slayback *v.* Jones, 9 Ind. 470; and see Humbert *v.* Brisbane, 25 S. C. 506; *per contra*, see Gordon *v.* Bruner, 49 Mo. 570, 571 (which was decided on the doctrine of election); Tinsley *v.* Tinsley, 15 B. Mon. 454, 459; Smith *v.* Fife, 2 Neb. 10, 13; Apperson's Adm. *v.* Triplett (Ky. 1890), 13 S. W. 791; in all which, counter-claims of damages from trespasses to land were sustained; but a counter-claim of damages arising from a personal tort cannot be sustained, Conner *v.* Winton, 7 Ind. 523; Merritt Milling Co. *v.* Finlay, 110 N. C. 411 [Anderson *v.* Johnson (1900), 106 Wis. 218, 82 N. W. 177].

[3] Wadley *v.* Davis, 63 Barb. 500. The discussions of the text are further illustrated by the following recent cases: Brady *v.* Brennan, 25 Minn. 210 (action on contract, counter-claim for conversion by waiving the tort); Goebel *v.* Hough, 26 id. 252 (action by a lessor for rent, counter-claim of damages for plaintiff's wrongful trespass on the premises); Devries *v.* Warren, 82 N. C. 356 (plaintiff and defendants were co-tenants of land; plaintiff sold his share to defendant and took defendant's bond for the price; in an action on the bond, defendant could not counter-claim damages done to the land by the plaintiff before the sale); Harris *v.* Rivers, 53 Ind. 216 (in action on a promissory note, no set-off for tort

§ 663. *787. **Damages Arising from Fraud.** Cross-demands for damages resulting from fraud will naturally occur, and, it would seem, might be easily sustained. But there have been decisions which reject even such counter-claims. In an action on two promissory notes, the defendants — the makers — alleged that they executed a trust deed of land as security for their notes, and proceeded to state acts of fraud committed by the plaintiff in collusion with the trustee in the deed, by which the land was sacrificed and bought in by the plaintiff at far less than its value, and prayed judgment for the damages resulting from the fraud. The Supreme Court of Missouri overruled this counter-claim in an opinion which contains many palpable errors, and which has been disregarded by subsequent decisions of the same tribunal.[1] The Supreme Court of Indiana, however, sustained a counter-claim in every way analogous to the one just described.[2] It would seem that little or no difficulty would be met in giving such a construction to the statutory definition as will embrace the cases of damages resulting from the plaintiff's frauds. If the action was on contract, such damages formed a most familiar example of the former "recoupment;" and it is only necessary to extend that doctrine to analogous cases in which a "transaction" is to be substituted in place of a contract.

§ 664. *788. (3) **Cases in which the Plaintiff's Cause of Action is for a Tort and the Defendant's Counter-Claim is in Form upon Contract.** The examples of this class of controversies have generally been actions for the wrongful conversion of goods in which the counter-claim of debt or damages upon contract was interposed, and rested either upon the theory that both demands arose out of the one transaction set forth by the plaintiff, or upon the notion that the plaintiff's cause of action might be regarded as founded upon an implied contract, the tort being waived. Such an action having been brought in form for the conversion of goods, the answer contained a counter-claim setting up a liability of the plain-

possible); Collier *v.* Ervin, 3 Mont. 142 (action on contract, no counter-claim for a tort unless it arose out of the same transaction, etc.).

[1] Jones *v.* Moore, 42 Mo. 413, per Holmes J.

[2] Vail *v.* Jones, 31 Ind. 467.

[Harris *v.* Randolph County Bank (1901), 157 Ind. 120, 60 N. E. 1025: The rule is well settled in this State that a claim or demand arising out of tort cannot be pleaded as a set-off against a cause of action arising out of contract. Abrahamson *v.* Lamberson (1898), 72 Minn. 308, 75 N. W. 226.]

tiff as a stockholder in a certain manufacturing corporation, averring all the facts required by the statute to create a personal responsibility in him for a debt of the company. This attempted counter-claim was of course overruled, as it had not the least connection with the transaction stated in the complaint, nor with the subject of the action.[1] I submit the following doctrine as correct on *principle*, and as derived from a true interpretation of the statute. Whenever the facts are such that an election is given to the plaintiff to sue in form either for a tort or on contract, and if he sues on contract the defendant may counter-claim damages for the breach of that contract, the same counter-claim may also be interposed when the suit is in form for the tort: the facts being exactly the same in both phases of the action, the counter-claim would clearly arise out of the *real transaction* which was the foundation of the plaintiff's demand.[2] The term "transaction" refers to the actual facts and circumstances from which the rights result and which are averred, and not to the *mere form and manner* in which these facts are averred. Although there are decisions which repudiate this interpretation of the codes, and reject the liberal rule drawn from it, I think the doctrine thus stated is now approved and supported by the decided weight of judicial opinion as expressed in the more recent authorities.[3]

[1] Chambers *v.* Lewis, 28 N. Y. 454; 11 Abb. Pr. 210. See also Allen *v.* Randolph, 48 Ind. 496. In Scheunert *v.* Kaehler, 23 Wis. 523, which was an action for the conversion of goods, a counter-claim of damages from the breach of the contract between the parties out of which the plaintiff's cause of action arose was rejected, the court adding that it must also have been rejected even had the plaintiff brought his suit *in form* on the contract, which he might have done, because the right of action would still in fact be for a tort. The following recent cases show that the courts are strongly inclined to hold that a counter-claim on contract is impossible in an action for tort, since the two could not in the nature of things arise out of the same transaction: People *v.* Denison, 84 N. Y. 372, 379; Smith *v.* Hall, 67 id. 48; Humphrey *v.* Merritt, 51 Ind. 197; Hess *v.* Young, 59 id. 379; Boil *v.* Simms, 60 id. 162; Manney *v.* Ingram, 78 N. C. 96; Holliday *v.* McMillan, 83 id. 270; Ring *v.* Ogden, 44 Wis. 303; Ferris *v.* Armstrong Manuf. Co. (Supreme, 1890), 10 N. Y. Suppl. 750; Loewenberg *v.* Rosenthal, 18 Ore. 178; but Spousenberger *v.* Lemert, 23 Kans. 55, held that in an action against a constable for his failure or neglect to serve process properly, the defendant's fees in the same case were a good set-off or counter-claim.

[Harden *v.* Lang (1900), 110 Ga. 392, 36 S. E. 100; Bell *v.* Ober & Sons Co. (1900), 111 Ga. 668, 36 S. E. 904; Follendore *v.* Follendore (1896), 99 Ga. 71, 24 S. E. 407; Giles *v.* Bank of Georgia (1897), 102 Ga. 702, 29 S. E. 600; Britton *v.* Ferrin (1902), 171 N. Y. 235, 63 N. E. 954; ~~Hecht *v.* Snook (1902), 114 Ga. 921, 41~~ S. E. 74.]

[2] Ritchie *v.* Hayward, 71 Mo. 560; Kamerick *v.* Castleman, 23 Mo. App. 481.

[3] [Story & Isham Co. *v.* Story (1893), 100 Cal. 30, 34 Pac. 671; Wimmer *v.* Simon (1894), 9 Utah, 378, 35 Pac. 507;

§ 665. *789. **Same Subject.** The tort complained of by the plaintiff may not be a conversion of chattels. The fact that a cause of action upon contract in favor of the defendant may arise out of the transaction set forth in the complaint or petition in an action in form for damages resulting from a tort, was distinctly recognized, and the doctrine that a counter-claim setting up such a demand should be admitted, and should not be rejected in deference to notions which the new procedure was designed to supplant, was clearly and cogently enforced by the Supreme Court of Indiana in an opinion from which I make a quotation.[1]

Warren *v.* Hall (1895), 20 Col. 508, 38 Pac. 767.

"In replevin by a lessor to obtain possession of his lessee's furniture, under a provision of the lease authorizing it to be taken and sold to satisfy unpaid rent, the lessee may counter-claim for damages for breach of the lessor's covenant, in the same lease, to keep the demised premises in repair," citing § *788 of the text: Collins *v.* Morrison (1895), 91 Wis. 324, 64 N. W. 1000.]

[1] Judah *v.* Vincennes Univ. Trs., 16 Ind. 56, 60. The plaintiffs — trustees of the Vincennes University — sue to recover the value of certain bonds belonging to the corporation, received by the defendant as its attorney, and converted by him to his own use. He admits the receipt and detention of the securities, and alleges, by way of counter-claim, that the University was indebted to him for certain professional services, particularly described, including his services in procuring these very bonds, among others, to be issued to it by the State, and prays judgment for the amount of such indebtedness. In pronouncing upon the validity of this answer as a counter-claim, the court say: "The point is, that the action is in form trover, — an action *ex delicto*, — and that, under such action, the defendant cannot avail himself of any claim which he may have against the plaintiffs for services rendered, or money expended, on their behalf, even if it was in the recovery of the identical property which is the subject of the present action. We are clear that it was the intention of those who initiated and inaugurated the present Code of Procedure that parties litigant might, and perhaps should, determine in each suit all matters in controversy between them which could legitimately be included therein, keeping in view their substantial rights. As proceedings so distinct as those were at law and in equity are no longer required to be separated, but are now blended in one action, we are unable to see any reason for requiring two actions to determine a controversy in which the rights of each party are so dependent upon the rights of the other as in the case at bar. There is most surely an equitable view of this question, as presented in the case at bar, which renders it distinct and different from an ordinary case in which one should convert the property of another, and then set up as a defence that the owner was indebted to him for some other and distinct transaction." See also Birch *v.* Hall (Supreme, 1888), 3 N. Y. Suppl. 747. The Supreme Court of North Carolina has recently approved this doctrine in the most emphatic and general manner, holding that opposing demands on contract and for tort may arise out of the same transaction, Bitting *v.* Thaxton, 72 N. C. 541, 549. In St. Louis, F. & W. R. Co. *v.* Chenault, 36 Kans. 51, the treasurer of the plaintiff, a railroad company, who was sued for the conversion of the company's funds, was allowed to counter-claim demands against the plaintiff, in payment of which he had appropriated the money. In Cow Run Co. *v.* Lehmer, 41 Ohio St. 384, an action for the conversion of oil delivered to the defendant for storage, the allowance for evaporation, and the charges for storage, both provided for by the contract, were held to be proper subjects for counter-

§ 666. * 790. (4) **Cases in which the Demands of both Parties are for Damages Arising from Tort.** Counter-claims of damages from torts, when attempted to be enforced against causes of action for damages also arising from other torts, have, with few exceptions, been rejected. The courts have been inclined to adopt, or at least to assume, a general principle that such a cross-demand can never arise from the transaction set forth by the plaintiff as the foundation of his claim. It will be seen, however, that this doctrine has not been universally accepted.[1] In all the cases placed in the foot-note, the proposed counter-claims were over-ruled on the ground that the cross-demands were for unconnected torts.[2] Opposed to this array of authorities, all announcing the same general doctrine, there are a few cases which sustain a counter-claim of tort against a tort under special circumstances.[3] The

claim. For a case in which such a counter-claim was rejected because it did not "arise out of the same transaction," etc., see Pattison *v.* Richards, 22 Barb. 143. See the additional cases cited *ante* under § * 788.

[Smith *v.* Building Ass'n (1896), 119 N. C. 257, 26 S. E. 40; Lovell *v.* Hammond Co. (1895), 66 Conn. 500, 34 Atl. 511.]

[1] [Gilbert *v.* Loberg (1894), 86 Wis. 661, 57 N. W. 982: "In an action by a landlord against tenants for waste the defendants may counter-claim for the value of personal property placed by them on the premises during their tenancy, and which the landlord has converted by preventing its removal."

Renaker *v.* Smith (1901), 109 Ky. 643, 60 S. W. 407: In an action to recover damages for trespass and destruction of crops by defendant's cattle, defendant cannot plead as a counter-claim the damages which he has suffered from trespasses by plaintiff's cattle, though they resulted from plaintiff's breach of his agreement to keep up a portion of the division fence, as the claim of defendant did not arise out of the same transaction stated in the petition.]

[2] Askins *v.* Hearns, 3 Abb. Pr. 184, 187; Schnaderbeck *v.* Worth, 8 Abb. Pr. 37; Barhyte *v.* Hughes, 33 Barb. 320; Henry *v.* Henry, 3 Robt. 614, 17 Abb. Pr. 411; Murden *v.* Priment, 1 Hilt. 75; Shelly *v.* Vanarsdoll, 23 Ind. 543; Lovejoy *v.* Robinson, 8 Ind. 399; Macdougall *v.* Maguire, 35 Cal. 274, 280; the last case holding that the objection is not removed by replying and going to trial instead of demurring. See, further, Ward *v.* Blackwood, 48 Ark. 396; Rothschild *v.* Whitman, 132 N. Y. 472; Allen *v.* Coates, 29 Minn. 46; Heckman *v.* Swartz, 55 Wis. 173; Terre Haute & I. R. Co. *v.* Pierce, 95 Ind. 496; Keller *v.* B. F. Goodrich Co., 117 Ind. 556; Lake Shore & M. S. Ry. Co. *v.* Van Auken, 1 Ind. App. 492; Rothschild *v.* Whitman, 57 Hun, 135; Sheehan *v.* Pierce (Supreme, June, 1893), 23 N. Y. Suppl. 1119 (in an action of slander, a counter-claim for slander not allowed).

[3] Tarwater *v.* Hannibal & St. Jo. R. R., 42 Mo. 193. In McArthur *v.* Green Bay, etc. Canal Co., 34 Wis. 139, 146, the action was brought for injuries done to the plaintiff's boat while passing through the canal, caused by a break in the canal alleged to have resulted from defendant's negligence; the defendant set up, as a counter-claim, that the break itself was caused by the plaintiff's negligence, and prayed a judgment for the damages. This counter claim was sustained, the court saying: "If it does not arise out of the transaction set forth in the complaint, it certainly is connected with the subject of the action." See also Walsh *v.* Hall, 66 N. C. 233, 237, in which the plaintiff sued to recover possession of a horse which defend-

court of last resort in Kentucky has even gone to the extent of holding that, in an action for an assault and battery, a counter-claim of damages for an assault and battery committed by the plaintiff at the same time, and as a part of the same affray, can be interposed, because it arises out of the same transaction, thus giving to that word a very broad and liberal meaning.[1]

§ 667. * 791. **Second Class. Legal Actions in which the Judgment is other than for Money.** I pass now to the consideration of legal actions in which the judgment is other than for money; that is, for the recovery of chattels or of lands. In all instances of this class, the question would present itself, and would be the controlling one, whether the counter-claim has such a relation to the plaintiff's cause of action that a recovery upon it would defeat, lessen, or modify the relief which would otherwise be obtained by him.[2] The practical question therefore is, When, if ever, may there be a counter-claim of money in an action brought to recover possession of chattels? In some exceptional cases such counter-claims have been allowed, and in my opinion properly allowed. For example, an answer stating the circumstances under which the goods demanded by the action came into the defendant's possession, that the plaintiff was indebted to him in a specified

ant had sold him in exchange for a tract of land, and the defendant counter-claimed damages arising from the plaintiff's fraudulent representations in reference to the land so exchanged. This case certainly carries the doctrine of counter-claim to its extreme limits.

[1] Slone *v.* Slone, 2 Metc. (Ky.) 339. In Heigel *v.* Willis (Supreme, 1889), 3 N. Y. Suppl. 497, an action for damages caused by the defendant's driving his wagon against the wagon of the plaintiff, a counter-claim for injuries resulting to the person and property of the defendant from the same collision was held proper. *Contra* to these decisions, see several recent cases presenting similar facts, cited in last note but one.

[Gutzman *v.* Clancy (1902), 114 Wis. 589, 90 N. W. 1081: Holding "that the word 'transaction' in the statute is broad enough to include an entire, continuous physical encounter, and that, upon counter-claim, defendant may have recovery for his damages resulting from any assault committed upon him by plaintiff in the course of those events which must, of necessity, be fully established and considered in the trial of plaintiff's demand." See also Pelton *v.* Powell (1897), 96 Wis. 473, 71 N. W. 887. See Stolze *v.* Torrison (1903), — Wis. —, 95 N. W. 114, distinguishing these two cases and saying of the former that it is "an extreme case." Horton *v.* Pintchunck (1900), 110 Ga. 355, 35 S. E. 663: In an action for malicious prosecution defendant may set off a cause of action for assault and battery, and if the damages for the latter exceed in amount those for the former, the defendant may enter up judgment for the excess. Savage *v.* Davis (1902), 131 N. C. 159, 42 S. E. 571: Defendant had plaintiff arrested and brought before a justice of the peace on a charge of having obtained five tons of guano from him, the defendant, by false pretences. Plaintiff sued defendant for malicious prosecution, and defendant pleaded the value of the guano as a set-off. Held proper.]

[2] See *ante*, § * 767.

amount, that the chattels were delivered to him as a security for such debt, and that he held them by virtue of the lien thus created by the pledge, and demanding judgment for the debt itself, was adjudged a proper counter-claim.[1] The New York Court of Appeals has also sustained the counter-claim under circumstances involving the same principle.[2] The result of these authorities is, that a cause of action on contract for money may so arise out of the transaction which is the foundation of the plaintiff's claim that it can be interposed as a counter-claim in an action brought to recover the possession of chattels.[3] The case

[1] Brown *v.* Buckingham, 11 Abb. Pr. 387 (Sp. Term). See also Walsh *v.* Hall, 66 N. C. 233, 237; Wilson *v.* Hughes, 94 N. C. 182; but see *per contra*, Gottler *v.* Babcock, 7 Abb. Pr. 392 (n.). It should be noted that in neither of the North Carolina cases was the objection considered, that the counter-claim does not tend to defeat or modify the plaintiff's recovery.

[2] Thompson *v.* Kessel, 30 N. Y. 383, 389; *per contra*, see Moffat *v.* Van Doren, 4 Bosw. 609. If the plaintiff sues for damages, as well as to recover possession, the counter-claim is, of course, proper, although the claim of damages was not allowed by the jury; see *ante*, § * 739; Lapham *v.* Osborne, 20 Nev. 168. By express provision of the Iowa Code, § 3226, there can be no counter-claim in an action for the recovery of specific personal property. With respect to *legal* counter-claims in the action of ejectment, see Lawe *v.* Hyde, 39 Wis. 345; Reed *v.* Newton, 22 Minn. 541; Haggin *v.* Clark, 51 Cal. 112; Moyle *v.* Porter, 51 id. 639; Whitlock *v.* Redford, 82 Ky. 390; Carpenter *v.* Hewel, 67 Cal. 589.

[3] [Rennebaum *v.* Atkinson (1898), 103 Ky. 555, 45 S. W. 874; Banning *v.* Marleau (1894), 101 Cal. 238, 35 Pac. 772.

Plaintiff sold defendant a threshing outfit, and took back a chattel mortgage for a portion of the purchase price. Plaintiff subsequently also required defendant to insure the property, and agreed that it would procure the insurance. The property was subsequently damaged by fire, but no insurance had been taken out. Plaintiff brought replevin, and defendant pleaded as a counter-claim the loss he had sustained by reason of plaintiff's failure to procure the insurance. Held proper, as arising out of the contract or transaction set forth by plaintiff: Minneapolis Threshing Co. *v.* Darnall (1900), 13 S. D. 279, 83 N. W. 266.

"In an action of replevin, brought by a non-resident mortgagee, to recover possession of machinery sold to defendant and mortgaged to secure the purchase price, the defendant . . . may counter-claim damages for breach of warranty of the goods sold, and also damages in trying to operate machinery returned to the plaintiff and for which the mortgaged property was in part taken in exchange:" Aultman Co. *v.* McDonough (1901), 110 Wis. 263, 85 N. W. 980.

Sections 3226 and 3245 of the Code forbid the allowance of counter-claims in actions to recover personal property: Palmer *v.* Palmer (1894), 90 Ia. 17, 57 N. W. 645.

Plaintiff brought an action for the possession of personal property, and defendant sought to set up a counter-claim for damages sustained by reason of the unlawful seizure of said property. Held not a proper counter-claim, as it did not arise out of the same cause of action and did not exist at the commencement of the action. Phipps *v.* Wilson (1899), 125 N. C. 106, 34 S. E. 227.

"In a replevin action for property covered by a chattel mortgage given to secure the payment of a note owned by plaintiff, the defendant, under a general denial, may show that plaintiff at the commencement of the suit was, and still is, indebted to him for labor in an amount equal to the amount due on the note:" Davis *v.* Culver (1899), 58 Neb. 265, 78 N. W. 504.]

of a pecuniary counter-claim in an action to recover possession of lands has already been fully discussed.[1]

§ 668. *792. **Third Class. Cases in which the Plaintiff's Cause of Action or the Defendant's Counter-Claim, or both, are Equitable in their Nature.** The general subject of equitable counter-claims has already been examined, and illustrated by numerous examples. It is thoroughly settled as a fundamental doctrine of the new procedure in relation to pleading, that an equitable counter-claim may be interposed to a legal cause of action, and *a fortiori* to one which is itself equitable. I shall not repeat the discussion to be found in a former part of this section, but shall simply collect in the note a few examples which will illustrate the modes by which such species of cross-demands may arise out of the transactions set forth by the plaintiff in his complaint or petition.[2]

[1] [Dinan *v.* Coneys (1894), 143 N. Y. 544, 38 N. E. 715; Wigmore *v.* Buell (1897), 116 Cal. 94, 47 Pac. 927; Wilkins *v.* Suttles (1894), 114 N. C. 550, 19 S. E. 606; Newland *v.* Morris (1902), 115 Wis. 207, 91 N. W. 664.

In ejectment a defendant cannot set off a demand for improvements to an amount greater than the claim for mesne profits, and obtain affirmative relief for the difference. The set-off can be used defensively only: Dudley *v.* Johnson (1897), 102 Ga. 1, 29 S. E. 50. But see Mills *v.* Geer (1900), 111 Ga. 275, 36 S. E. 673, where it was held that under the act of December 21, 1897, in a suit to recover land, the defendant who has *bonâ fide* possession of such land under adverse claim of title may plead as a set-off the value of all permanent improvements *bonâ fide* placed thereon by himself or other *bonâ fide* claimants under whom he asserts title.

Falck *v.* Marsh (1894), 88 Wis. 680, 61 N. W. 287: "In ejectment the grantee of a life tenant by quitclaim deed cannot counter-claim for the value of improvements made and taxes paid by him while holding under such deed, as against the owner of the fee. Such a deed cannot be made the basis of an adverse holding of the fee in remainder."

"Comp. Laws Dak. 1887, § 5455, declares that, in an action for the recovery of real property upon which permanent improvements have been made by a defendant claiming to hold under color of title in good faith, the value of such improvements must be allowed as a counter-claim:" Skelly *v.* Warren (1903), — S. D. —, 94 N. W. 408 (Syllabus).]

[2] Sandford *v.* Travers, 40 N. Y. 140, 143; Akerly *v.* Vilas, 15 Wis. 401; Allen *v.* Shackelton, 15 Ohio St. 145, 147; Moberly *v.* Alexander, 19 Iowa, 162; Hill *v.* Butler, 6 Ohio St. 207, 216; Foss *v.* Newbury, 20 Ore. 257. The foregoing were foreclosure suits of purchase-money mortgages, in which the mortgagor counter-claimed damages for the breach of the covenants of title in the plaintiff's deeds, or for the breach of some other collateral agreement, or for the plaintiff's fraud; but in such an action a counter-claim for a slander of title in respect to the land cannot be sustained: Akerly *v.* Vilas, 21 Wis. 88, 109; Briggs *v.* Seymour, 17 Wis. 255. It has been intimated that in a mortgage foreclosure suit a counter-claim of debt or damages on any contract is proper: Briggs *v.* Seymour, 17 Wis. 255. The following were actions for other kinds of equitable relief: Grimes *v.* Duzan, 32 Ind. 361; Woodruff *v.* Garner, 27 Ind. 4 (actions to set aside a deed of land); Eastman *v.* Linn, 20 Minn. 433 (to quiet title); Vail *v.* Jones, 31 Ind. 467; Powder *v.* Bowdle (N. Dak. 1893), 54 N. W. Rep. 404 (to quiet title); Grignon *v.* Black, 76 Wis. 674 (action to enjoin waste,

III. *Cases in which the Cause of Action Alleged by the Defendant as a Counter-Claim is or is not connected with the Subject of the Action.*

§ 669. *793. **References to Cases already Cited.** Little need be added under this particular head to what has been already said in the foregoing subdivisions. The cases cited in the preliminary general discussion contain all the most important attempts to give a judicial construction to the phrase "connected with the subject of the action:" many of those which have been quoted to explain and illustrate the clause "arising out of the transaction," etc., were also referred by the courts which decided them to the language of the statutory definition now under consideration, — that is, the counter-claims were held valid because they were "connected with the subject of the action," as well as because they "arose out of the transaction set forth in the complaint." Finally, it may be said that each one of the cases in which the counter-claim was overruled is an illustration of a demand in favor of the defendant *not* connected with the subject of the action.[1]

counter-claim to quiet title to the premises); but if the cross-demand does not arise out of the transaction which is the foundation of the plaintiff's cause of action, and is not connected with the subject of his action, it cannot be a counter-claim, Town of Venice *v.* Breed, 65 Barb. 597, 605; Tallman *v.* Barnes, 54 Wis. 181. See recent cases cited *ante* under § *764; also in last note under § *824. [Rensberger *v.* Britton (1903), — Col. —, 71 Pac. 379.]

[1] [President, etc. of Ins. Co. *v.* Parker (1902), 64 Neb 411, 89 N. W. 1040; McHard *v.* Williams (1896), 8 S. D. 381, 66 N. W. 930; Aultman Co. *v.* McDonough (1901), 110 Wis. 263, 85 N. W. 980; Pioneer Press Co. *v.* Hutchinson (1896), 63 Minn. 481, 65 N. W. 938; Sheibley *v.* Dixon County (1901), 61 Neb. 409, 85 N. W. 399; Stolze *v.* Torrison (1903), — Wis. —, 95 N. W. 114; Kuhn *v.* Sol. Heavenrich Co. (1902), 115 Wis. 447, 91 N. W. 994; Dugger *v.* Dempsey (1895), 13 Wash. 396, 43 Pac. 357; Barr *v.* Post (1898), 56 Neb. 698, 77 N. W. 123; Wilcke *v.* Wilcke (1897), 102 Ia. 173, 71 N. W. 201.

Stillwell *v.* Duncan (1898), 103 Ky. 59, 44 S. W. 357: In an action of *quare clausum fregit*, based on the bare possession of the plaintiff, defendant may plead title and also maintain a counter-claim for damages to the property during the time that plaintiff was in possession. Such counter-claim is connected with the subject of the action, which is the land in controversy.

To an action for work and labor in cutting timber trees, defendant filed a counter-claim for damages by reason of plaintiff negligently permitting fire to escape while engaged in the work for which he sues. Held a proper matter for a counter-claim as connected with the subject-matter of the action: Branch *v.* Chappell (1896), 119 N. C. 81, 25 S. E. 783.

Plaintiff sued defendant for a libel published in defendant's paper. Just previous to the libel the plaintiff, a stockholder of defendant company, maliciously and without probable cause, as defendant alleged, commenced a suit for dissolution of the company, to the defendant's damage, and these facts defendant pleaded as a counter-claim. Held that the action for malicious prosecution was connected with the subject of the action and hence a proper matter for counter-claim: Cincin-

§ 670. * 794. **Construction of the Phrases "Subject of the Action," "Connected with," and "Arising out of."** The language of the phrase is exceedingly general and vague. To construe it requires

nati Daily Tribune Co. *v.* Bruck (1900), 61 Ohio St. 489, 56 N. E. 198.

In an action on a judgment the defendant may, by way of counter-claim, set up facts which would justify a court of equity in cancelling the judgment on the ground that no summons was ever served on him, such cause of action being connected with the subject of the plaintiff's action; that is, the judgment: Vaule *v.* Miller (1897), 69 Minn. 440, 72 N. W. 452. In an action to quiet title to real property, a cross-complaint alleging ownership and demanding possession and damages pleads matters "connected with the cause of action" in the complaint and constitutes a proper counter-claim: Gillenwaters *v.* Campbell (1895), 142 Ind. 529, 41 N. E. 1041.

Plaintiff brought an action to have a mortgage upon certain land reformed. Defendant, the mortgagee, admitted the mistake in the mortgage, and by way of counter-claim asked to have the mortgage, as reformed, foreclosed. As a second counter-claim defendant asked to have a second mortgage upon the same land, between the same parties, reformed and foreclosed. Held, both counter-claims were proper, the first as a cause of action arising out of the contract or transaction set forth in plaintiff's complaint, the second as connected with the subject of the action: Lahiff *v.* Hennepin County, etc. Ass'n (1895), 61 Minn. 226, 63 N. W. 493.

A tenant in common, who had control of the renting of premises held in common, was sued by his co-tenant for his share of the rents, and the defendant counter-claimed for damages sustained by him because the plaintiff wrongfully induced lessees of such premises to leave before their leases expired, thereby causing him to lose his share of rents which would have accrued but for such interference. The court sustained the counter-claim on the ground that it was a demand connected with the subject of the action, entering into a somewhat full discussion of the phrase "subject of the action," and holding it to be the *rent of the lots:* Dale *v.* Hall (1897), 64 Ark. 221, 41 S. W. 761.

In a suit to compel specific performance of a contract to convey land, a defendant cannot, by way of counter-claim, ask foreclosure of a mortgage on the same land given by plaintiff to defendant. The decision turned upon the question whether the two demands were connected with the subject of the action. The court said, "Is it [the counter-claim asking for foreclosure] connected with the subject of the action? It is sometimes difficult to determine when a cause of action set forth in a counter-claim is connected with the subject of the action. We think, however, in this case that the cause of action set up in the counter-claim is a separate and independent cause of action, not connected with the cause of action set forth in the original complaint. The original action was to enforce specific performance of a contract to convey land. The cross complaint asked a decree to foreclose a mortgage upon the land. It seems clear that there was no connection between the causes of action." The opinion proceeds upon the assumption that the terms "cause of action" and "subject of the action" are exactly synonymous, which is clearly erroneous. Wood J., in his dissenting opinion, is more discriminating, and considering the land itself as the subject of the action he finds no reason to reject the counter-claim: Hays *v.* McLain (1899), 66 Ark. 400, 50 S. W. 1006.

A suit was brought by a grantor to set aside a deed to city lots on the ground of fraud, and defendant pleaded a prior fraud of plaintiff practised upon him in the purchase by defendant from a third person of farm lands, for which defendant conveyed these city lots. Held, not a proper counter-claim: Rensberger *v.* Britton (1903), — Col. —, 71 Pac. 379.

Smith *v.* Building Ass'n (1896), 119 N. C. 257, 26 S. E. 40: In an action to recover twice the amount of usurious interest paid, the defendant may set up a counter-claim for the debt on which the interest was paid, whether the original

a satisfactory interpretation of the terms "subject of the action" and "connected with." It may, I think, be regarded as settled

action be considered in tort or contract, since such counter-claim arises "out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or is connected with the subject of the action."

First Nat'l Bank *v.* Renn (1901), 63 Kan. 334, 65 Pac. 698: In an action to foreclose a mortgage by one holding it by assignment in trust for certain outstanding obligations, said mortgage having been left in the hands of the mortgagee to be cared for and renewed if necessary, the assignee of property (*i. e.* vendee) may counter-claim loss resulting from failure of mortgagee or trustee to notify insurance company of transfer of property.

Dowdell *v.* Carpy (1902), 137 Cal. 333, 70 Pac. 167: Where a decree of foreclosure was reversed only as to certain property included in the mortgage, and was finally affirmed as to all other property included therein, the mortgagee, in an action for restitution by the mortgagor, may counter-claim the amount of the deficiency judgment against them. Such judgment arose out of the same transaction and was connected with the subject of the action.

See First Nat. Bank of Snohomish *v.* Parker (1902), 28 Wash. 234, 68 Pac. 756: An action to foreclose a mortgage on real estate, the complaint being in the usual form. The counter-claim was "that plaintiff, through its cashier Snyder, brought an action in 1896 for the possession of the mortgaged premises against the defendant, and in said action had a writ of restitution issued; that plaintiff thereupon went into possession of the premises, and retained such possession until the final determination of the action, when defendant was restored to the possession of the premises; that by reason of plaintiff's retention of the possession of the mortgaged premises defendant was damaged in the sum of $1970, and the specification of the damages is made. Plaintiff demurred to the affirmative defences and counter-claim. The demurrer of the defence was sustained and that to the counter-claim overruled. A jury was called to assess the damages alleged in the counter-claim. The court, after reducing the assessment of damages to some extent, affirmed the finding of the jury, and allowed $1,000 counter-claim, and decreed foreclosure for the remainder due upon the mortgage. Both parties appealed. "Plaintiff assigns as error the overruling of the demurrer to the counter-claim, and the reduction of the amount due upon the mortgage in the amount of the counter-claim. It is maintained by counsel for plaintiff that the demurrer to the counter-claim should have been sustained, that the allowance of any counter-claim in the action was error, and that the damages specified were not the subject of counter-claim within Bal. Code, § 4913." In disposing of the question, the court by Reavis C. J. said: "Subd. I. of the section permits a counter-claim 'in an action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.' The construction of this section and similar language in other codes has not been uniform or clear. See Pomeroy, Remedies & Remedial Rights, § 775 [*775]; Collier *v.* Ervin, 3 Mont. 142. The general rule is that the statute authorizing a counter-claim should be liberally construed. It is said in 22 Am. & Eng. Enc. Law, p. 396: 'In actions in which either a contract or a transaction which is not a contract, is set forth as the foundation of the plaintiff's claim, counter-claims may be interposed which neither arise out of the same contract nor out of the same transaction, if they are connected with the subject of the action. The subject of an action is either the property which is thereby sought to be recovered or alleged to be injured, or a violated right or the right to enforce or maintain which the action is brought.'

"It would seem in the present action that virtually the same parties are in controversy as were in the case of Snyder, who is the cashier of plaintiff, against Parker and reported in 19 Wash. 276 (53 Pac. 59, 67 Am. St. Rep. 726). In that case the plaintiff claimed the premises under a deed

that the connection here spoken of must be direct and immediate. At the same time it must be considered as something different from "arising out of;" in other words, the defendant's cause of action may be sufficiently "*connected with* the subject of the action," although it do not "*arise out* of the transaction." It can hardly be said, however, that the courts have definitely settled what is a sufficient connection of itself, when not so complete that the defendant's cause of action could also be said to arise out of the transaction set forth by the plaintiff; unfortunately, in nearly all the cases where the judges have held that the counter-claim was connected with the subject of the action according to the true meaning of the statute, they have also said that it arose out of the transaction stated in the complaint. The most that can be asserted with any degree of assurance is, that the connection must be immediate and direct, and something that the parties can be assumed to have contemplated in their dealings with each other.[1] I shall merely cite in the note a few cases which contain a discussion of the clause, and serve to illustrate and explain its scope and operation.[2]

absolute in form, which, however, was adjudged to be a mortgage and only a lien on the premises. In the case at bar the action is to foreclose a lien upon the same property. It would seem that, by the acts authorized by the plaintiff in taking and holding possession of the premises, and which were found to be injurious, the subject-matter of the lien was damaged, and that the defendant is entitled to such damages, and we think in this case that the realty may properly be held as connected with the subject of the action. Metropolitan T. Co. *v.* Tonawanda, etc. R. R. Co., 43 Hun, 521; Tinsley *v.* Tinsley, 15 B. Mon. 454. Upon the record here we are not disposed to disturb the finding of the amount of the counter-claim."]

[1] [Sheibley *v.* Dixon County (1901), 61 Neb. 409, 85 N. W. 399. "The phrase 'connected with the subject of the action' should be construed liberally to prevent a multiplicity of actions." Le Clare *v.* Thibault (1902), 41 Ore. 601, 69 Pac. 552: "The connection of the counter-claim with the subject of the suit, to render it available, must be direct and immediate, and such as it is reasonable to assume that the parties had in contemplation when dealing with each other." Text § * 794 cited.]

[2] Ashley *v.* Marshall, 29 N. Y. 494; Vose *v.* Galpen, 18 Abb. Pr. 96; Xenia Branch Bk. *v.* Lee, 7 Abb. Pr. 372; 2 Bosw. 694; McAdow *v.* Ross, 53 Mo. 199, 207; Jones *v.* Moore, 42 Mo. 413; McArthur *v.* Green Bay & Miss. Canal Co., 34 Wis. 139, 146; Eastman *v.* Linn, 20 Minn. 433; Walsh *v.* Hall, 66 N. C. 233, 237; Bitting *v.* Thaxton, 72 N. C. 541, 549; Thompson *v.* Kessel, 30 N. Y. 383, 389; Vilas *v.* Mason, 25 Wis. 310, 319; Judah *v.* Vincennes Univ. Trs., 16 Ind. 56, 60; Wadley *v.* Davis, 63 Barb. 500; Waugenheim *v.* Graham, 39 Cal. 169, 176; Nolle *v.* Thompson, 3 Metc. (Ky.) 121. See Glen & Hall Manuf. Co. *v.* Hall, 61 N. Y. 226, 236, where it was held that the subject of the action was the device constituting the trade-mark. See also Powder *v.* Bowdle (N. Dak. 1893), 54 N. W. Rep. 404; Grange *v.* Gilbert, 44 Hun, 9; Mulberger *v.* Koenig, 62 Wis. 558 (the "subject of the action" is identical with the facts constituting the plaintiffs' cause of action); Lehmair *v.* Griswold, 40 N. Y.

C. *Counter-Claims Embraced within the Second Subdivision of the Statutory Definition and Set-offs.*

§ 671. * 795. **Statutory Provision. Limitation upon the Discussion herein.** The form of this provision, as found in the codes which make up the first group, as originally classified at the commencement of this section, is, "2. In an action arising on contract, any other cause of action also arising on contract, and existing at the commencement of the action." This is substantially the definition of "set-off" given in the codes of the second group. The language of this clause plainly includes all cases of counter-claim based on contract when the plaintiff's cause of action is also on contract. Since, however, the first branch of the definition covers all those instances where the counter-claim and the plaintiff's right of action both spring from the same contract, the discussion of this second subdivision will be confined to the instances in which, the cause of action being on contract, the counter-claim arises from a different contract.[1] For the reasons before given, and which need not therefore be repeated, this construction of the two parts into which the entire definition is divided seems to me to be in conformity with the plain intent of the legislature and the evident design of the statute.

§ 672. * 796. **Statute enlarges Former Legal "Set-off" and is Broader in its Operation than "Equitable Set-off." Difficult Questions herein. Order of Treatment.** In reference to the most important and controlling requisite of this provision and that defining set-off, no questions of difficulty can arise, since the language itself is so simple and direct that no room is left for

Super. Ct. 100 (same); Carpenter *v.* Manhattan L. Ins. Co., 93 N. Y. 552 (in conversion, the "subject of the action" is the chattel converted); Adams *v.* Loomis (Supreme, 1889), 8 N. Y. Suppl. 17 (same); Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa, 508 (in an action to cancel an insurance policy, the "subject of the action" is the policy itself, and a cause of action thereon for loss of the property insured is a proper counter-claim); Cornelius *v.* Kessel, 58 Wis. 237 (in ejectment, the "subject of the action" is the land in controversy); Lapham *v.* Osborne, 20 Nev. 168 (in replevin, the "subject of the action" is the chattel in controversy); Humbert *v.* Brisbane, 25 S. C. 506; Sharp *v.* Kinsman, 18 S. C. 108 ("subject of the action" denotes the plaintiff's main primary right, to support or enforce which the action is brought). [Watts *v.* Gantt (1894), 42 Neb. 869, 61 N. W. 104; Hays *v.* McLain (1899), 66 Ark. 400, 50 S. W. 1006; Gurske *v.* Kelpin (1901), 61 Neb. 517, 85 N. W. 557; Walser *v.* Wear (1897), 141 Mo. 443, 42 S. W. 928.]

[1] [Harden *v.* Lang (1900), 110 Ga. 392, 36 S. E. 100; Bell *v.* Oben & Sons Co. (1900), 111 Ga. 668, 36 S. E. 904; Jones *v.* Swank (1893), 54 Minn. 259, — N. W. —; Conner *v.* Scott (1897), 16 Wash. 371, 47 Pac. 761; Richardson *v.* Penny (1900), 10 Okla. 32, 61 Pac. 584.]

doubt as to the construction. If the plaintiff's cause of action arises on contract, any counter-claim, legal or equitable, or set-off, also arising on contract, is admissible, provided the general rule heretofore stated is complied with, that the relief granted to the defendant shall in some manner interfere with, lessen, or modify, if not destroy, that otherwise obtained by the plaintiff. This clause greatly enlarges the scope of the former legal "set-off," for it admits demands for unliquidated damages as well as for debts or amounts ascertained and fixed by the stipulations of the parties.[1] It is also much broader in its operation than the "equitable set-off," which was permitted by courts of chancery, for affirmative equitable relief may be obtained by the defendant which would come within no description of an "equitable set-off," as the term was formerly understood. So far as relates to the *subject-matter*, therefore, in all actions to recover money, either debt or damages arising on contract, any counter-claim of debt or damages arising on another contract is valid. When the relief asked for by the plaintiff, or that demanded by the defendant, is equitable, whether the counter-claim is proper must depend upon the nature of these reliefs; that is, upon the fact of their interfering with each other so that one tends to destroy, or at least to modify, the other. While there can be little or no difficulty, therefore, in applying this provision, so far as the subject-matter of the counter-claim is concerned, certain collateral questions are presented, either expressly or impliedly, by the clause, which are not always so easy of solution. One of these is involved in the requirement that the cause of action constituting the counter-claim must be "existing at the commencement of the action." Another is implied in the phrase "arising on contract." Can a cause of action be said to "arise on contract" when it results from facts which amount to a tort, and would enable the injured party to bring an action in form *ex delicto?* In other words, can either party resort to an election between two kinds of proceedings, and thus make his suit or counter-claim in form "arising on contract" so as to satisfy the requisites of the statute? In treating of the topics thus suggested, I shall, *first*, consider the general requirement that the cause of action constituting the

[1] [Shelton *v.* Conant (1894), 10 Wash. 193, 38 Pac. 1013; Niver *v.* Nash (1893), 7 Wash. 558, 35 Pac. 380; Burge *v.* Gandy (1894), 41 Neb. 149, 59 N. W. 359; Boyer *v.* Robinson (1901), 26 Wash. 117, 66 Pac. 119.]

counter-claim must be existing at the commencement of the action; and shall, *secondly*, collect and classify the various cases which have been determined by the courts, and which furnish examples of counter-claims arising from different contracts. In this review the question how far a party may, for the purposes of complying with this statute, elect between an action for a tort and an action on contract, will be answered.[1]

§ 673. * 797. **Requisites of Counter-Claim under this Clause of the Statute.** The codes do not require that the contract out of which the counter-claim arises should have been originally made with the defendant. The demand may have once been in favor of some third person, and by him assigned to the defendant. When this is the case, the provision under review, as found in most of the codes, makes it necessary that the assignment should be fully completed before the action is commenced, or else the cause of action could not be "existing" in the defendant at the "commencement of the action."[2] In the second place, the right of action, which is the basis of the counter-claim, must have accrued before the commencement of the action; the debt or damages must be both due and payable, or the claim for equi-

[1] The following are recent decisions illustrating this class of counter-claims: Bathgate *v.* Haskin, 59 N. Y. 533, 539, 540; Patterson *v.* Patterson, 59 id. 574, 1 Hun, 323; Taylor *v.* The Mayor, etc., 82 N. Y. 10; Westervelt *v.* Ackley, 62 id. 505; 2 Hun, 258; 4 T. & C. 444; Van Brunt *v.* Day, 81 N. Y. 251; 17 Hun, 166; Clapp *v.* Wright, 21 Hun, 240; Wilson *v.* Runkel, 38 Wis. 526; Chapman *v.* Plummer, 36 id. 262; Foulks *v.* Rhodes, 12 Nev. 225; Carver *v.* Shelly, 17 Kan. 472; Greer *v.* Greer, 24 id. 102; Quinn *v.* Smith, 49 Cal. 163; Wheelock *v.* Pacific Pneumatic Gas Co., 51 id. 223; Humphrey *v.* Merritt, 51 Ind. 197; Hart *v.* Housten, 50 id. 327; Grover & B. Sewing Mach. Co. *v.* Newby, 58 id. 570; Town *v.* Bringolf, 47 Iowa, 133; Tolman *v.* Johnson, 43 id. 127.

[First Nat. Bank *v.* Riggins (1899), 124 N. C. 534, 32 S. E. 801; Helms *v.* Harclerode (1902), 65 Kan. 736, 70 Pac. 866; Mercer *v.* Dyer (1895), 15 Mont. 317, 39 Pac. 314; Walters *v.* Eaves (1898), 105 Ga. 584, 32 S. E. 609; St. Paul, etc. Trust Co. *v.* Leck (1894), 57 Minn. 87, 58 N. W. 826; Sweetser *v.* People's Bank (1897), 69 Minn. 196, 71 N. W. 934.

Thomas *v.* Exchange Bank (1896), 99 Ia. 202, 68 N. W. 780: One Pearson was indebted to a bank in the sum of $1000. He had on deposit in said bank $1044.50. He then drew drafts upon the bank to the amount of $1195, and immediately thereafter made a general assignment for the benefit of creditors. The bank learned of the assignment before the drafts were presented, and refused payment for the reason that it wished to set off its claim against the deposit, although its claim was evidenced by a note not due. *Held*, that when the debtor is insolvent a bank may offset as against a debt not due any sum which it may be owing to the debtor, unless the account which it owes has been pledged to some specific purpose or impressed with a trust.]

[2] Reynolds *v.* Smith, 28 Kan. 810; Enter *v.* Quesse, 30 S. C. 126; Skaggs *v.* Given, 29 Mo. App. 612; Todd *v.* Crutsinger, 30 Mo. App. 145; Russell *v.* Koonce, 104 N. C. 237. [Jack *v.* Hosmer (1896), 97 Ia. 17, 65 N. W. 1009.]

table relief must be perfect, so that a suit to enforce it could be maintained, or else the cause of action would not be "existing" in the defendant at the time specified in the statute.[1] If, then, an existing right of action is assigned to the defendant after the action against him is commenced; or if a claim on contract is transferred to him before that time, but does not become due and payable or enforceable until after the suit is begun; or, lastly, if a claim is existing in favor of the defendant at the time the action is commenced by virtue of a contract originally made with him, but does not become payable or enforceable until after that time, — in none of these cases can the demand be set up by him as a counter-claim in the action. The answer must also allege that the demand was existing in favor of the defendant when the action was commenced.[2] These positions are fully sustained by the decisions.[3]

[1] Russell *v.* Koonce, 104 N. C. 237; Mayo *v.* Davidge, 44 Hun, 342. In one or two of the codes, however, it is sufficient that the demand is due and payable when pleaded, if it was held by the defendant at the time the action was commenced. Shannon *v.* Wilson, 19 Ind. 112. See also Chapman *v.* Plummer, 36 Wis. 262.

[2] McGuire *v.* Lamb (Idaho, 1888), 17 Pac. Rep. 749.

[3] Rice *v.* O'Connor, 10 Abb. Pr. 362; Van Valen *v.* Lapham, 5 Duer, 689; Gannon *v.* Dougherty, 41 Cal. 661; Rickard *v.* Kohl, 22 Wis. 506; Newkirk *v.* Neild, 19 Ind. 194. If the demand had been actually transferred to the defendant by an absolute verbal assignment before the commencement of the action, although the written assignment of the same was executed after that date, it can be used as a counter-claim, West *v.* Moody, 33 Iowa, 137, 139; Cottle *v.* Cole, 20 Iowa, 485; Conyngham *v.* Smith, 16 Iowa, 471. It is held, in North Carolina, that, if the counter-claim is not barred by the statute of limitations at the time the suit is commenced, it is good, although the statutory time may have elapsed when it is actually pleaded. Brumble *v.* Brown, 71 N. C. 513, 516.

[Lawrence *v.* Congregational Church (1900), 164 N. Y. 115, 58 N. E. 24: "An owner who after the termination of the original building contract without the fault of the builder, and after the latter had commenced an action to foreclose his mechanic's lien and had assigned the lien and cause of action, but without knowledge of the assignment, entered into a new contract with the assignor with reference to the same subject-matter, is not entitled to set off against the assignee any damages arising out of the assignor's failure to perform the new contract, but is entitled to set off whatever he actually paid to the assignor upon the assigned claim, after the assignment, in good faith, and without notice."

"A judgment which has been superseded and is pending for review in an appellate court cannot be pleaded as a set-off in another action between the same parties." "In the absence of equitable considerations a defendant can only plead as a set-off a claim or judgment upon which, at the commencement of the action, he might have maintained an independent suit against the plaintiff:" Spencer *v.* Johnston (1899), 58 Neb. 44, 78 N. W. 482. See also Shabata *v.* Johnston (1897) 53 Neb. 12, 73 N. W. 278; Jones *v.* Driscoll (1895), 46 Neb. 575, 65 N. W. 194; Burge *v.* Gandy (1894), 41 Neb. 149, 59 N. W. 359; Momsen *v.* Noyes (1900), 105 Wis. 565, 81 N. W. 860; Jones *v.* Swank (1893), 54 Minn. 259, 55 N. W. 1126; Bank of Arkansas City *v.* Hasie (1897), 57 Kan.

§ 674. * 798. **May, but need not, counter-claim Unliquidated Damages. Claim for Contribution by Surety. Pleading.** I now proceed to inquire, What causes of action on contract may be counter-claimed under this second branch of the definition? It may be stated as the universal rule that, in an action on contract to recover debt or unliquidated damages, the defendant may counter-claim debt or damages arising on another contract, whether such damages are unliquidated or ascertained.[1] But in the absence of statutory requirement he is not obliged to do so; he may refrain from urging his demand in this manner, and may enforce it in a separate action.[2] A few early cases lay down a

754, 48 Pac. 22; St. Louis Nat. Bank *v.* Gay (1894), 101 Cal. 286, 35 Pac. 876; Rood *v.* Taft (1896), 94 Wis. 380, 69 N. W. 183.

"Under Code Proc. Sec. 195, subd. 2, a cause of action which can be pleaded as a counter-claim, where it does not arise out of the contract or transaction set forth in the complaint, must exist at the commencement of the action:" Conner *v.* Scott (1897), 16 Wash. 371, 47 Pac. 761.

Kirby *v.* Jameson (1896), 9 S. D. 8, 67 N. W. 854: In an action on a due bill, defendant set up a so-called counter-claim consisting of an account bearing date subsequent to the commencement of the action, and there was no affirmative proof that it existed at the time the suit was brought. Held not a proper counter-claim.]

[1] [Hancock *v.* Hancock's Adm'r (1902), Ky., 69 S. W. 757; Niver *v.* Nash (1893), 7 Wash. 558, 35 Pac. 380; Shelton *v.* Conant (1894), 10 Wash. 193, 38 Pac. 1013, citing the text; Waller *v.* Deranleau (1903), —Neb. —, 94 N. W. 1038; Little's Adm'r *v.* City Nat. Bank (1903), — Ky. —, 74 S. W. 699.]

[2] Lignot *v.* Redding, 4 E. D. Smith, 285; Schubart *v.* Harteau, 34 Barb. 447, per Ingraham J.; Atwater *v.* Schenck, 9 Wis. 160, 164, per Cole J., an action on a note, counter-claim of the amount due for the price of land sold; Conway *v.* Smith, 13 Wis. 125, 139, per Paine J., counter-claim of damages for non-performance of a building contract by the builder; Bidwell *v.* Madison, 10 Min. 13, action by a bank on a note, counter-claim of damages from the negligence of the bank in not collecting another note left with it for collection; Louisville, etc. R. Co. *v.* Thompson, 18 B. Mon. 735, 742, action by a railroad to recover stock-subscription, counter-claim of damages from a breach of an agreement to pay for land taken by the railroad; Williams *v* Weiting, 3 N. Y. Sup. Ct. 439, 440, action by a veterinary surgeon to recover for professional services; counter-claim, that defendant bought a span of horses, relying upon plaintiff's knowledge and recommendation, *and promise to pay for them* if they were not good, etc., — breach, and damages. Held, a good counter-claim; that plaintiff's promise was binding, the defendant's *prejudice* in buying them being a sufficient consideration. The defendant need not set up his cross-demand as a counter-claim: see Douglas *v.* First Nat. Bk. of Hastings, 17 Minn. 35; Emerson's Adm. *v.* Herriford, 8 Bush, 229, and cases cited; Woody *v.* Jordan, 69 N. C. 189, 197; Uppfalt *v.* Woermann, 30 Neb. 189. For an example of this species of counter-claim or set-off, see Mullendore *v.* Scott, 45 Ind. 113; Curtis *v.* Barnes, 30 Barb. 225, action for goods sold, counter-claim of damages from the breach of an arbitration bond; Wilkerson *v.* Farnham, 82 Mo. 672, action for rent, counter-claim for improvements under express promise of plaintiff to pay for them; Midland Co. *v.* Broat (Minn. 1892), 52 N. W. Rep. 972 (counter-claim on a statutory bond given on the issue of a writ of *ne exeat*). An action on an undertaking to obtain an attachment is an "action on

different doctrine, and require the damages to be liquidated so that they would constitute a good set-off under the ancient rules; but these decisions are palpably erroneous, and are completely overruled.[1] The right of action must of course arise out of contract, or be on contract; and it has been doubted whether the claim for contribution by one surety against a co-surety so arises from contract that it may be counter-claimed in an action brought upon another contract.[2] This doubt, in my opinion, is altogether too refined. Whatever may have been the equitable origin of the claim of one surety against another, it is very well settled that he could maintain a common law action of assumpsit to recover his contributory share. This shows that the *law* treated the liability as one arising from an implied promise. In presenting his counter-claim the defendant must conform to all the requirements of pleading by plaintiffs in stating their causes of action. All the facts constituting the cause of action must be averred in the same manner and with the same degree of particularity as would be requisite were the pleading a complaint or petition.[3]

contract;" Wickham *v.* Weil (Com. Pl. 1892), 17 N. Y. Suppl. 518. It was held, however, by the New York Supreme Court, General Term, in Furber *v.* McCarthy (Supreme, 1889), 7 N. Y. Suppl. 613, that an undertaking to obtain an order of arrest is a statutory indemnity in the nature of penalty, and not a contract; *contra*, see Cornell *v.* Donovan, 14 Daly, 295. An action to collect taxes is not an action on contract; Kansas City *v.* Ridenour, 84 Mo. 253; Gatling *v.* Carteret Cy. Com'rs, 92 N. C. 536; Anderson *v.* Mayfield (Ky. 1892), 19 S. W. Rep. 598. That the counter-claim or set-off may be of unliquidated damages, see also Parsons *v.* Sutton, 66 N. Y. 92; Mills *v.* Carrier, 30 S. C. 617; Empire Transp. Co. *v.* Boggiano, 52 Mo. 294; Morrison *v.* Lovejoy, 6 Minn. 319, 352; Gardner *v.* Risher, 35 Kan. 93; Wheelock *v.* Pacific Pneumatic Gas Co., 51 Cal. 223.

[1] See, *e. g.*, Evens *v.* Hall (Cinc. Super. Ct., Sp. T.), 1 Handy, 434. This construction is given to the provision in Nebraska; it is held that a claim for unliquidated damages even on contract cannot be set off under a clause identical with the second subdivision in the codes of the first group. Boyer *v.* Clark, 3 Neb. 161, 168, 169. The provision is similarly construed in Arkansas; Mathews *v.* Weiler (Ark. 1893), 22 S. W. Rep. 569; and in Kentucky; Shropshire *v.* Conrad, 2 Metc. 143; but the unliquidated claim may be used defensively, when the plaintiff is insolvent or a non-resident; Taylor *v.* Stowell, 4 Metc. (Ky.) 175; Forbes *v.* Cooper, 88 Ky. 285; and see Garner *v.* Jones (Ky. 1893), 21 S. W. Rep. 647; but not, when to allow it to be used would be to aid the defendant in the execution of a fraudulent design; Mathews *v.* Weiler (Ark. 1893), 22 S. W. Rep. 569. See also Frick *v.* White, 57 N. Y. 103, *ante*, in note to § * 163.

[Beaty *v.* Johnston (1899), 66 Ark. 529, 52 S. W. 129; Garner *v.* Jones (1893), 94 Ky. 135, 21 S. W. 647; Huber *v.* Egner (1901), Ky., 61 S. W. 353; Virginia Chemical Co. *v.* Moore (1901), 61 S. C. 166, 39 S. E. 346.]

[2] Schmidt *v.* Coulter, 3 Minn. 492.

[3] Holgate *v.* Broome, 8 Minn. 243, a counter-claim held bad because defendant did not state his cause of action for goods sold and delivered with sufficient fulness. [See §§ * 738, * 748.]

§ 675. * 799. **May set up as a Counter-Claim the Following: A Judgment against the Plaintiff; Rights of Actions Allowed only by Statute and Regarded as Arising on an Implied Promise; Demand Growing out of Unsettled Partnership Transactions.** In an action on an ordinary contract the defendant may set up as a counter-claim a judgment which he has recovered against the plaintiff, and this without leave first obtained from the court, where such leave is necessary in order to *sue* on the judgment.[1] The doctrine also applies to those rights of action which, although allowed only by statute, are regarded as arising on an implied promise, and under the old system would have been enforced by an action *ex contractu*. As, for example, where the plaintiff sued to recover back money lost by a wager and paid to the defendant, a counter-claim of a similar demand against the plaintiff, originally in favor of a third person and duly assigned to the defendant, was sustained by the New York Supreme Court.[2] It is now established in opposition to some of the earlier decisions which have been expressly overruled, that a demand growing out of the unsettled partnership transactions between the plaintiff and defendant may be pleaded as a counter-claim. It is necessary, however, that the defendant should not only aver the existence of such unsettled transactions and ask an accounting, but allege that upon such accounting a balance will be found due him from the plaintiff, and he must demand judgment therefor. Without the averment of such a balance, the counter-claim will be bad on demurrer.[3]

[1] Wells *v.* Henshaw, 3 Bosw. 625; Clark *v.* Story, 29 Barb. 295; Cornell *v.* Donovan, 14 Daly, 295; Taylor *v.* Root, 4 Keyes, 335 (judgment in an action of slander).

[Sweeney *v.* Bailey (1895), 7 S. D. 404, 64 N. W. 188; Adams *v.* Baker (1898), 24 Nev. 162, 55 Pac. 362; Dunn *v.* Uvalde Asphalt Paving (1903), 175 N. Y. 214, 67 N. E. 439; De Camp *v.* Thomson (1899), 159 N. Y. 444, 54 N. E. 11; Pendleton *v.* Beyer (1896), 94 Wis. 31, 68 N. W. 415; Spencer *v.* Johnston (1899), 58 Neb. 44, 78 N. W. 482; City of Somerset *v.* Banking Co. (1900), 109 Ky. 549, 60 S. W. 5; Powell *v.* Nolan (1902), 27 Wash. 318, 67 Pac. 712; Northwestern, etc. Bank *v.* Rauch (1901), Idaho, 66 Pac. 807; Cleveland *v.* McCanna (1898), 7 N. D. 455, 75 N. W. 908; Long *v.* Collins (1901), 15 S. D. 259, 88 N. W. 571; Colcord *v.* Conger (1900), 10 Okla. 458, 62 Pac. 276; Keifer *v.* Summers (1893), 137 Ind. 106, 35 N. E. 1103; Lundberg *v.* Davidson (1897), 68 Minn. 328, 71 N. W. 71, 395; Lindholm *v.* Itasca Lumber Co. (1896), 64 Minn. 46, 65 N. W. 931; Pray *v.* Life Indemnity Co. (1897), 104 Ia. 114, 73 N. W. 485; Hier *v.* Anheuser-Busch Brewing Ass'n (1900), 60 Neb. 320, 83 N. W. 77; Welsher *v.* Libby, McNeil & Libby (1900), 107 Wis. 47, 82 N. W. 693; Richmond *v.* Bloch (1900), 38 Ore. 317, 60 Pac. 388.]

[2] McDougall *v.* Walling, 48 Barb. 364.

[3] Hendry *v.* Hendry, 32 Ind. 349; Waddell *v.* Darling, 51 N. Y. 327, 330; Clift *v.* Northrup, 6 Lans. 330; *per contra*, Ham-

§ 676. * 800. **Counter-Claim against an Executor de son tort. In an Action by a Pledgor.** An executor *de son tort* becomes liable to those interested in the estate to the extent of the value of the property which he appropriated; this is not the liability of a mere tort-feasor towards the owner of the thing injured: it is the same liability which flows from the ordinary trust relation of executor towards the creditors and legatees, enforceable by actions of accounting, etc. It has been held, therefore, that such responsibility of the plaintiff may be interposed as a counter-claim by a defendant sued on contract, when he is a creditor of the estate with which the plaintiff has wrongfully intermeddled.[1] An action by a pledgor of stocks against the pledgee, to recover damages for their wrongful sale at private sale and without notice, has been said to be on contract and not for conversion, and for that assigned reason a counter-claim based upon another contract was held admissible.[2]

mond *v.* Terry, 3 Lans. 186; Ives *v.* Miller, 19 Barb. 196; Iliff *v.* Brazill, 27 Iowa, 131; Haskell *v.* Moore, 29 Cal. 437.

[1] McKenzie *v.* Pendleton's Adm., 1 Bush, 164. The cause of action accruing to a bank against its cashier for wrongfully permitting an overdraft, is a cause of action on contract, namely, the contract of employment as cashier; or may be treated as a cause of action for a breach of his bond given for the faithful performance of his duties as cashier; and hence is a valid set-off: Board, etc. of St. Louis Pub. Schools *v.* Broadway Sav. Bk. Est., 12 Mo. App. 104, affirmed 84 Mo. 56. As a general rule, when a receiver, executor, administrator, or trustee sues to recover a debt due to the estate in his hands, a demand of the defendant for services rendered on the employment of the plaintiff beneficial to the estate is a good counter-claim, Davis *v.* Stover, 58 N. Y. 473.

[2] Seaman *v.* Reeve, 15 Barb. 454. The following cases give a construction to the language of the clause defining "set-off" as it is found in the second group of codes: Evens *v.* Hall, 1 Handy, 434; Smead *v.* Christfield, 1 Disney, 18; Anthony *v.* Stinson, 4 Kan. 211; Collins *v.* Groseclose, 40 Ind. 414, 416; Curran *v.* Curran, 40 Ind. 473, 480–484, and cases cited; West *v.* Moody, 33 Iowa, 137, 139; Remington *v.* King, 11 Abb. Pr. 278; Williams *v.* Brown, 2 Keyes, 486; Schieffelin *v.* Hawkins, 1 Daly, 289; Berry *v.* Brett, 6 Bosw. 627; Roberts *v.* Carter, 38 N. Y. 107; Miller *v.* Florer, 15 Ohio St. 149; Stanberry *v.* Smythe, 13 Ohio St. 495; Ross *v.* Johnson, 1 Handy, 388; McCullough *v.* Lewis, 1 Disney, 564; Mortland *v.* Holton, 44 Mo. 58; Jones *v.* Moore, 42 Mo. 413; Lamb *v.* Brolaski, 38 Mo. 51; Kent *v.* Rogers, 24 Mo. 306; Brake *v.* Corning, 19 Mo. 125; Mahan *v.* Ross, 18 Mo. 121; Pratt *v.* Menkens, 18 Mo. 158; House *v.* Marshall, 18 Mo. 368; Smith *v.* Steinkamper, 16 Mo. 150; Griffin *v.* Cox, 30 Ind. 242; Blew *v.* Hoover, 30 Ind. 450; Stilwell *v.* Chappell, 39 Ind. 72; Grossman *v.* Lauber, 29 Ind. 618; Lewis *v.* Sheaman, 28 Ind. 427; Dayhuff *v.* Dayhuff's Adm., 27 Ind. 158; Sayres *v.* Linkart, 25 Ind. 145; King *v.* Conn, 25 Ind. 425; Keightley *v.* Walls, 24 Ind. 205; Durbon *v.* Kelley's Adm., 22 Ind. 183; Indianapolis & Cinc. R. Co. *v.* Ballard, 22 Ind. 448; Fankboner *v.* Fankboner, 20 Ind. 62; Shannon *v.* Wilson, 19 Ind. 112; Schoonover *v.* Quick, 17 Ind. 196; Irish *v.* Snelson, 16 Ind. 365; Reilly *v.* Rucker, 16 Ind. 303; Knouer *v.* Dick, 14 Ind. 20; Fox *v.* Barker, 14 Ind. 309; Bool *v.* Watson, 13 Ind. 387; Turner *v.* Simpson, 12 Ind. 413; Blankenship *v.*

§ 677. * 801. **Statement of Established Doctrine. Question of Doubt herein.** It may be regarded as a doctrine established by the overwhelming weight of authority, that, whenever by the principles of the law, independent of the new procedure, a cause of action may be treated as arising either from tort or on contract, and the party holding the right may elect between the two kinds of remedial proceeding, and does in fact elect to sue on contract, the demand thus determined to be upon contract may be counter-claimed against a plaintiff's cause of action arising on *another* contract, or when itself set up by a plaintiff, it may be opposed by a counter-claim arising out of another contract.[1] The only question of doubt in the practical application of this doctrine relates to the necessity of indicating the election in the pleading itself; or, in other words, whether the demand may not be thus used as a counter-claim, or against a counter-claim, even though the pleading contains no averments showing the election to have been actually made. While the courts have generally sustained this doctrine, they are not absolutely unanimous. The Supreme Court of Minnesota holds that the code has abolished this rule and the right of electing between the different forms of action *ex contractu* and *ex delicto;* or, rather, has destroyed all possibility of the advantage which could once have been derived under the circumstances above mentioned from such an election.[2] This opinion is based upon a close

Rogers, 10 Ind. 333; Johnson *v.* Kent, 9 Ind. 252; Lovejoy *v.* Robinson, 8 Ind. 399; Woodward *v.* Laverty, 14 Iowa, 381; Cook *v.* Lovell, 11 Iowa, 81; Campbell *v.* Fox, 11 Iowa, 318; Eyre *v.* Cook, 10 Iowa, 586; Stadler *v.* Parmelee, 10 Iowa, 23; Donahue *v.* Prosser, 10 Iowa, 276; Reed *v.* Chubb, 9 Iowa, 178; Sample *v.* Griffith, 5 Iowa, 376; Davis *v.* Milburn, 3 Iowa, 163; Dorsey *v.* Reese, 14 B. Mon. 157; Lansdale *v.* Mitchell, 14 B. Mon. 350; Clark *v.* Finnell, 16 B. Mon. 337; Graham *v.* Tilford, Stanton's Code, 98; Thatcher *v.* Cannon, 6 Bush, 541; Eversole *v.* Moore, 3 Bush, 49; Haddix *v.* Wilson, 3 Bush, 523; Miller *v.* Gaither, 3 Bush, 152; Brown *v.* Phillips, 3 Bush, 656; Taylor *v.* Stowell, 4 Metc. (Ky.) 175; Shropshire *v.* Conrad, 2 id. 143; Geoghegan *v.* Ditto, 2 id. 433; Finnell *v.* Nesbitt, 16 B. Mon. 354; Naglee *v.* Palmer, 7 Cal. 543; Hobbs *v.* Duff, 23 Cal. 596; Russell *v.* Conway, 11 Cal. 93; Naglee *v.* Minturn, 8 Cal. 540; Marye *v.* Jones, 9 Cal. 335; Howard *v.* Shores, 20 Cal. 277; Collins *v.* Butler, 14 Cal. 223; Lubert *v.* Chauviteau, 3 Cal. 458; Ricketson *v.* Richardson, 19 Cal. 330; Corwin *v.* Ward, 35 Cal. 195.

[Central Nat. Bank *v.* Haseltine (1900), 155 Mo. 58, 55 S. W. 1015; Momsen *v.* Atkins (1900), 105 Wis. 557, 81 N. W. 647.]

[1] See Norden *v.* Jones, 33 Wis. 600, 604. See Ogilvie *v.* Lightstone, 1 Daly, 129; Starr Cash Car Co. *v.* Reinhardt (Com. Pl. 1892), 20 N. Y. Suppl. 872; Barnes *v.* McMullins, 78 Mo. 260; Green *v.* Conrad (Mo. 1893), 21 S. W. Rep. 839; Challiss *v.* Wylie, 35 Kan. 506; Smith *v.* McCarthy, 39 Kan. 308; Smith *v.* Young, 109 N. C. 224 (counter-claim not allowed, as plaintiff did not elect to waive the tort).

[2] Folsom *v.* Carli, 6 Minn. 420. The rule in Indiana is the same: Richey *v.* Bly, 115 Ind. 232.

and logical adherence to the letter and to the spirit of the code, which require that the *facts* constituting the cause of action should be averred in a pleading, and abolish all forms of action.

§ 678. * 802. **Illustrative Examples in Equitable Actions.** In all the foregoing examples the actions were legal. Some illustrations will now be given of those that are equitable. Many species of equitable actions may arise on contract within the meaning of the statute, and equitable remedies may thus be obtained as counter-claims under the second branch of the definition. A suit was brought to compel the conveyance of land alleged to be held by the defendant in trust for the plaintiff. The defendant was a lawyer, and the plaintiff had been his client. As such attorney, he had agreed, it was said, to bid in the land at a public sale, and to hold it for the plaintiff: he did, in fact, purchase it in his own name, but retained it for himself, and refused to convey. In his answer to these allegations, the defendant, besides denials, pleaded, as a counter-claim, a debt due from the plaintiff for professional services in relation to this and other matters. Evidence to sustain this counter-claim was rejected at the trial, for the reason that the defendant had forfeited all claim to compensation on account of his fraudulent practices. The Superior Court of New York City, in reversing this decision, held, that, as the action was on contract, the counter-claim was admissible, and, even if the defendant had been guilty of wrong in one matter, his right to compensation in respect of other matters was not affected; also, that, on the facts as proved, he had committed no fraud or breach of his fiduciary duty in the instances charged against him.[1] In an action to foreclose a purchase-money mortgage, it is well settled that the mortgagor may interpose a counter-claim for the damages sustained by him from the breach of covenants in the plaintiff's deed of conveyance. Both causes of action arise from contract, though from different contracts.[2]

§ 679. * 803. **Counter-Claim of Money Demand on Independent Contract Interposed in Action to foreclose Mortgage.** The counter-

[1] Currie *v.* Cowles, 6 Bosw. 452. See also Judah *v.* Vincennes Univ. Trs., 16 Ind. 56.

[2] Eaton *v.* Talmadge, 22 Wis. 526, 528; Akerly *v.* Vilas, 21 Wis. 88, 109; Hall *v.* Gale, 14 Wis. 54; Walker *v.* Wilson, 13 Wis. 522; Lowry *v.* Hurd, 7 Minn. 356, 363; Coy *v.* Downie, 14 Fla. 544, 562. See also § * 792, note, *ante;* Merritt *v.* Gouley, 58 Hun, 372.

claim of a money demand on an independent and separate contract may be interposed in the action to foreclose *any* mortgage of land, purchase-money, or other, by the mortgagor or defendant personally liable for the mortgage-debt, and against whom a decree for a deficiency could be rendered: in respect to such defendants, both causes of action arise on contract, and the recovery on the counter-claim directly interferes with that on the complaint. In respect to other defendants who are not parties nor privies to the contract of mortgage, but whose liens, or encumbrances, or rights of property in the land are simply cut off by the decree, it may well be doubted whether the cause of action in the foreclosure suit can be said to arise on contract. This question was recently passed upon by the New York Court of Appeals; and the doctrine above stated was fully sustained, and made the basis of decision.[1]

IV. *Some Miscellaneous Provisions in Relation to Counter-Claims.*

§ 680. * 804. **Opportunity to interpose Counter-Claim not a Bar to another Suit thereon. Provision of Code herein in few States.** As a counter-claim is always a separate and independent cause of action, which the defendant may enforce against the plaintiff, is he obliged to avail himself of it when sued? Or may he omit to set up the demand in his answer, and make it the subject of another action brought by himself? In other words, is the opportunity thus furnished by the codes to try and determine his own claim in the prior suit against himself a bar to his subsequently maintaining a second suit for the purpose of determining the issues which might have been so disposed of in the former one? In the absence of statutory prohibition, no such effect is produced by the provisions of the codes which authorize the counter-claim. The defendant has an election.[2] He may set

[1] Hunt *v.* Chapman, 51 N. Y. 555, 557. See also Charlton *v.* Tardy, 28 Ind. 452; Bathgate *v.* Haskin, 59 N. Y. 533, 539, 540; Richmond *v.* Lattin, 64 Cal. 273. In Oregon, a legal counter-claim to a suit in equity is not allowed, unless it be connected with the subject of the suit. See Ore. Code, § 393; Sears *v.* Martin (Ore. 1892), 29 Pac. Rep. 890; Burrage *v.* Bonanza G. & Q. Min. Co., 12 Ore. 169.

[2] [Jones *v.* Witousek (1901) 114 Ia. 14, 86 N. W. 59: J. sued defendant in 1898 on defendant's guaranty that a heating apparatus constructed in J.'s house by defendant would give satisfaction, and defendant pleaded in bar that in 1897 he sued J. in a justice's court for a balance due on the price of the apparatus, and that J. set up the breach of guaranty, and that, on appeal to the district court, J. had judgment. Held that since no counter-claim had been pleaded, the judgment of the district court

up his cause of action as a counter-claim, and have both opposing demands adjudicated; or he may withhold it, and prosecute it in a separate action brought for that purpose.[1] The codes of a few States expressly require the defendant's cross-right to be interposed as a counter-claim, if a proper one for that purpose; and, if he fails to do so, he cannot enforce it by a direct action.[2]

was no bar to the action for damages for breach of guaranty, since J. was not obliged to plead the counter-claim in the former action. "It is well settled that a set-off or counter-claim may or may not be pleaded, as the defendant shall elect; and unless it is pleaded, the right to sue upon it as an independent cause of action, or to rely upon it in defence of another action by the same plaintiff, is in no wise affected or impaired by a judgment for or against the defendant. In other words, if the matter of set-off or counter-claim is presented and passed upon in a suit, it is barred by the judgment; if not, the defendant may make it the subject of a separate and distinct action: Hunt *v.* Brown, 146 Mass. 253; Roach *v.* Privett, 90 Ala. 391; Minnaugh *v.* Partlin, 67 Mich. 391." *Contra*, Bellinger *v.* Craigue, 31 Barb. 534; Mauney *v.* Hamilton (1903), 132 N. C. 295, 303, 43 S. E. 903: A defendant is not bound to make use of a counter-claim as such, but may make it the basis of a separate suit.

Murphy *v.* Russell (1901), Idaho, 67 Pac. 427: The statute relative to counter-claims was intended to prevent a multiplicity of suits, and "a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim or connected therewith, in favor of the defendant, must be set forth in the answer as a counter-claim, and could not be made the basis of another suit." Stevens *v.* Home Savings Ass'n (1897), Idaho, 51 Pac. 779; Beaty *v.* Johnston (1899), 66 Ark. 529, 52 S. W. 129.] Lowry *v.* Hurd, 7 Minn. 356, 363; Ricker *v.* Pratt, 48 Ind. 73.

[1] Welch *v.* Hazelton, 14 How. Pr. 97; Lignot *v.* Redding, 4 E. D. Smith, 285; Gillespie *v.* Torrance, 25 N. Y. 306, 308, 310, per Selden J.; Bellinger *v.* Craigue, 31 Barb. 534, 539. See also Giles *v.* Austin, 62 N. Y. 486; Brown *v.* Gallaudet, 80 id. 413; Inslee *v.* Hampton, 8 Hun, 230; Swenson *v.* Cresop, 28 Ohio St. 668; Uppfalt *v.* Woermann, 30 Neb. 189.

[2] [*California*: "If the defendant omits to set up a counter-claim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." Code Civ. Pro., § 439; *Idaho*: Same provision as in California. Code Civ. Pro., 1901, § 3213; *Indiana*: "If any defendant personally served with notice omit to set up a counter-claim arising out of the contract, or transaction set forth in the complaint as the ground of the plaintiff's claims, or any of them, he cannot afterward maintain an action against the plaintiff therefor, except at his own costs." Burns' St., 1901, § 354; *Iowa*: "Judgment obtained in an action by ordinary proceedings shall not be annulled or modified by any order in an action by equitable proceedings, except for a defence which has arisen or been discovered since the judgment was rendered. But such judgment does not prevent the recovery of any claim, though such claim might have been used by way of counter-claim in the action on which the judgment was recovered." Code, 1897, § 3440; *Kansas*: "If the defendant omit to set up a counter-claim or set-off, he cannot recover costs against the plaintiff in any subsequent action thereon; but this section shall not apply to causes of action which are stricken out of or withdrawn from the answer, as in sections ninety-seven and one hundred and twenty." Code, 1901, § 96; *Minnesota*: "The pleading of a set-off or counter-claim by a defendant in any action, in any of the courts of this State, shall not be held or construed to be an admission of any cause of action on the part of plaintiff against such defendant." St., 1894, § 5238; *Montana*: Same as the California statute. Code, 1895, § 697; *Nebraska*: Same as the Kansas statute. Code, 1901, § 102; *Ohio*:

§ 681. * 805. **Form of Verdict, Finding, and Judgment.** When the plaintiff's demand is proved and found by the jury or court, and the amount of the counter-claim as proved and found equals it, the verdict must be for the defendant, and a judgment rendered dismissing the action; if the counter-claim as found be less than the plaintiff's demand as found, a verdict should be given for the plaintiff for the excess of his recovery over that of the defendant; finally, if the counter-claim as found is greater than the plaintiff's demand as found, a verdict should be given for the defendant for the excess.[1] If the plaintiff should fail entirely to prove his cause of action as alleged, the defendant would be entitled to a verdict for the whole amount of his counter-claim as established by his proofs. The foregoing rules presuppose that both demands are for the recovery of money, either debt or damages. If the plaintiff's cause of action, or the counter-claim, is for the recovery of some special relief, legal or equitable, the judgment rendered must be according to the circumstances of the case. As has been shown in the foregoing citations, there may be instances in which it would be impossible for the defendant to take anything by his counter-claim, unless the plaintiff's cause of action should be entirely defeated. There is a *dictum* in an Indiana case to the effect that, where the action is for the recovery of money, a pecuniary counter-claim, less in amount than the sum demanded by the plaintiff, is inadmissible, because, as was said, it was not a complete bar or answer to the action.[2] This *dictum* was founded upon an entire misconception of the object and uses of the counter-claim. It is not, in any true sense, a defence in bar of the plaintiff's cause of action. It may be pleaded when the plaintiff's claim and right to recover

Same as Kansas statute. Bates' St., 1904, § 5348; *Oklahoma:* Same as Kansas statute, St., 1893, § 3974; *Utah:* Same as California statute. Rev. St., 1898, § 2970; *Wyoming:* Same as Kansas statute. Rev. St., 1899, § 3546.]

[1] Moore *v.* Caruthers, 17 B. Mon. 669, 681; Hay *v.* Short, 49 Mo. 139, 142; Hogan *v.* Shuart, 11 Mont. 498; Hitchcock *v.* Baughan, 44 Mo. App. 42. With respect to the recovery and judgment, see Grove *v.* Schweitzer, 36 Wis. 554; Westervelt *v.* Ackley, 62 N. Y. 505; 2 Hun, 258; Heine *v.* Meyer, 61 N. Y. 171; Derr *v.* Stubbs, 83 N. C. 539; Hall *v.* Clayton, 42 Iowa, 526; Inslee *v.* Hampton, 11 Hun, 156. When a counter-claim is pleaded the plaintiff cannot dismiss or discontinue the whole action without defendant's consent, so as to prevent the counter-claim from being tried. Purnell *v.* Vaughan, 80 N. C. 46; Amos *v.* Humboldt Loan Ass., 21 Kan. 474; Sale *v.* Bugher, 24 id. 432; Gwathney *v.* Cheatham, 21 Hun, 576; Tabor *v.* Mackkee, 58 Ind. 290; Whedbee *v.* Leggett, 92 N. C. 469; Francis *v.* Edwards, 77 N. C. 271.

[2] McClintic's Adm. *v.* Cory, 22 Ind. 170, 173, per Worden J.

thereon are admitted; but, at the same time, it is alleged that the defendant has also a right on his side to recover a sum from the plaintiff upon an independent cause of action, which will equal, and so destroy, or exceed, or diminish the amount which would otherwise be the plaintiff's due. Undoubtedly, when the plaintiff's complaint shows that he is entitled to a certain sum, — say $500, — and the defendant, not controverting these allegations by any defence in bar, simply interposes a distinct cross-demand for a less amount, — say $300, — the plaintiff's right to a judgment for the difference is at once admitted; and the pleadings may be so framed, by the express provisions of some, if not all, of the codes, that he is immediately able to recover the sum so admitted upon the record, while the issues as to the remainder are left to be tried. To say that a defendant shall not avail himself of a smaller demand, and thus lessen the amount of the plaintiff's recovery, because he cannot allege facts which would defeat that recovery altogether, is palpably unjust, and is warranted by no requirements of the statute.

§ 682. * 806. **Cross-Complaints. Provisions of the Codes. Difference in Practice. Illustrative Cases.** The practice in a few of the States admits a "cross-complaint" by a defendant, not only against the plaintiff, but against other defendants.[1] Although there is a general similarity, if not substantial identity, in the provisions of the various codes concerning the granting of relief to defendants against the plaintiffs or against each other, yet a very great difference in the actual practice founded upon these

[1] [See § *585 (n.), where the statutory provisions are set out at length.

"It is said that the counter-claim of the code was intended to preserve to a defendant all remedies he formerly had, either in an action at law or by a bill in equity or a cross-bill on similar facts. 2 Wait, Pr. 476, and cases cited. Said Bosworth J. in Gleason *v.* Moen, 2 Duer, 639: 'The counter-claim secures to the defendant full relief, which a separate action at law, or a bill in chancery, or a cross-bill, could have secured to him on an allegation or proof of the same facts, but it relates to only such causes of action as exist against the plaintiff, and might, in their nature, be the basis of an action against him at the suit of the defendant.' Van Santvoord, in his work on Pleading (p. 574), after discussing generally the purpose of the cross-bill under the old practice, says: 'All these various matters which, under the equity practice, were proper subjects for a cross-bill, where the object was for relief and not for discovery, are supposed to be within the term "counter-claim," as used in the Code, and may be set up by the defendant in the action:'" Kollock *v.* Scribner (1897), 98 Wis. 104, 73 N. W. 776. See also Trester *v.* City of Sheboygan (1894), 87 Wis. 496, 58 N. W. 747; Gillenwaters *v.* Campbell (1895), 142 Ind. 529, 41 N. E. 1041; Peter *v.* Farrel, etc. Co. (1895), 53 Ohio St. 534, 42 N. E. 690. See also § *765 and notes.]

provisions has grown up in the several States. In most of them, the clauses of the statute referred to are practically a dead letter; while in a few they have been accepted and acted upon according to their evident intent.[1] A wide departure has thus been made in the latter commonwealths from the methods which prevailed before the introduction of the reformed procedure. This practice, in respect to cross-complaints against plaintiffs and against other defendants, will be best illustrated by a reference to the facts and decisions of a few prominent cases taken as examples.[2] In an action brought by Joanna Morris against

[1] In some of these States the cross-complaint or petition is used in cases where, under the equity practice, the defendant would be entitled to file a cross-bill, but which do not fall under the statutory definition of a "counter-claim," or where new parties must be brought in. In a few of these States, however, it would seem that the cross-complaint or petition is used in all cases where the defendant seeks to obtain affirmative relief, so that the "counter-claim" is actually enforced by means of such a cross-pleading. The following are some of the most important recent decisions illustrating its use in various States: Marr *v.* Lewis, 31 Ark. 203; Trapnall *v.* Hill, 31 id. 346; Earle *v.* Hale, 31 id. 473; Abbott *v.* Monti, 3 Call, 56; Monti *v.* Bishop, 3 id. 605; Mills *v.* Buttrick, 4 id. 53; Tucker *v.* McCoy, 3 id. 284; Hatcher *v.* Briggs, 6 Ore. 31; Scheland *v.* Erpelding, 6 id. 258; Pond *v.* Waterloo Agric. Works, 50 Iowa, 596; Kellogg *v.* Aherin, 48 id. 299; Hervey *v.* Savery, 48 id. 313; Wright *v.* Bacheller, 16 Kan. 259; Hopkins *v.* Gilman, 47 Wis. 581; Tippecanoe Cy. Com'rs *v.* Lafayette, etc. R. Co., 50 Ind. 85, 116, 117; Ewing *v.* Patterson, 35 id. 326; Winslow *v.* Winslow, 52 id. 8; Daly *v.* Nat. Life Ins. Co., 64 id. 1; Joyce *v.* Whitney, 57 id. 550; Shoemaker *v.* Smith, 74 id. 71; Williams *v.* Boyd, 75 id. 286; Wilson *v.* Madison, 55 Cal. 5; O'Connor *v.* Frasher, 53 id. 435; Kreichbaum *v.* Melton, 49 id. 50. See also Pillow *v.* Sentelle, 49 Ark. 430; Marriott *v.* Clise, 12 Col. 561; Mahaska Cy. State Bank *v.* Christ, 82 Iowa, 56; Grimes *v.* Grimes, 88 Ky. 20; Demartin *v.* Albert, 68 Cal. 277; Harrison *v.* McCormick, 69 Cal. 616; Shain *v.* Belvin, 79 Cal. 262; Goldman *v.* Bashore, 80 Cal. 146; Heilbron *v.* Kings River & F. Canal Co., 76 Cal. 11; Wadsworth *v.* Wadsworth, 81 Cal. 182; Mott *v.* Mott, 82 Cal. 413; Van Bibber *v.* Hilton, 84 Cal. 585; Winter *v.* McMillan, 87 Cal. 256; Blakely *v.* Blakely, 89 Cal. 324; Clark *v.* Taylor, 91 Cal. 552.

[2] [Powell *v.* Nolan (1902), 27 Wash. 318, 67 Pac. 712; Zarrs *v.* Keck (1894), 40 Neb. 456, 58 N. W. 933; Patrick Land Co. *v.* Leavenworth (1894), 42 Neb. 715, 60 N. W. 954; Smith *v.* Allen (1901), 63 Neb. 74, 88 N. W. 155; Berdolt *v.* Berdolt (1898), 56 Neb. 792, 77 N. W. 399; Putt *v.* Putt (1897), 149 Ind. 30, 48 N. E. 356; Fleishman *v.* Woods (1901), 135 Cal. 256, 67 Pac. 276; Barnacle *v.* Henderson (1894), 42 Neb. 169, 60 N. W. 382; Haslam *v.* Haslam (1899), 19 Utah, 1, 56 Pac. 243; Am. Exch. Bank *v.* Davidson (1897), 69 Minn. 319, 72 N. W. 129; Maxwell *v.* Northern Trust Co. (1897), 70 Minn. 334, 73 N. W. 173; Wheeler, etc. Mfg. Co. *v.* Bjelland (1896), 97 Ia. 637, 66 N. W. 885; Nevada Ditch Co. *v.* Bennett (1896), 30 Ore. 59, 45 Pac. 472; Hill *v.* Frink (1895), 11 Wash. 562, 40 Pac. 128; Armstrong *v.* Mayer (1903), — Neb. —, 95 N. W. 51; Kollock *v.* Scribner (1897), 98 Wis. 104, 73 N. W. 776; Ballin *v.* Merchants' Exch. Bank (1895), 89 Wis. 278, 61 N. W. 1118.

"While the code makes no express provisions for cross-complaints or bills, they are yet recognized by our practice. . . . The answer in such a case must contain all the allegations required in a complaint to justify the granting of a temporary injunction, for the only real difference between a complaint and a cross-complaint is that the former is made by the plaintiff

Thompson and Dice, the complaint alleged that the plaintiff, as widow of C. Morris, deceased, was owner in fee of certain land, namely, one undivided third of land, of which her husband died seized; that she was induced by the frauds of Thompson, in a manner particularly described, to execute to him a deed of all her said lands: a second paragraph states the same deed to have been made to Thompson by mistake; that the heirs of her husband also conveyed all their interest in the same land to T. at the same time, who thus held the title to the entire tract; that therefore T. conveyed five-sevenths of said tract to the defendant Dice, who took with knowledge of the plaintiff's claim; prayer, that her deed to Thompson might be declared void, that T.'s deed to D. might be set aside, so far as it conveyed her land, that her title might be established, etc. Dice answered, first, denials; and, second, that he took from T. in good faith, without notice, and for a full consideration. Thompson, as an answer, interposed a cross-complaint against Dice, in which, after denying any fraud, he alleged that he took a conveyance from the heirs of C. Morris, deceased, of all their interest, which was an undivided two-thirds of the tract; that by mistake his own deed to D. conveyed a greater interest in the land than that which the heirs of C. M. had owned, and which was all that he had intended to convey to D.; prayer, that his deed to D. might be reformed by correcting the mistake. Dice answered this cross-complaint, denying its averments. On the trial, D. moved for a separate trial of the issues between himself and T., which was

and the latter by the defendant:" Pine Tree Lumber Co. *v.* McKinley (1901), 83 Minn. 419, 86 N. W. 414.

Joyce *v.* Growney (1900), 154 Mo. 253, 55 S. W. 466: "The statute limits the new matter that may be pleaded in the answer to that which is a defence to the plaintiff's suit or else a counter-claim against *him;* it does not authorize a counter-claim or an equitable cross-action of one defendant against another, except as one defendant may be entitled to such relief against another as will enable him to make good his defence to the plaintiff's suit."

Southward *v.* Jamison (1902), 66 Ohio St. 290, 64 N. E. 135: So long as a cross-petition in an action is strictly confined to "matters in question in the petition," the summons issued on the petition would be sufficient notice to sustain a judgment rendered on the cross-petition; but where the cross-petition sets up matters which are not drawn "in question in the petition," and seeks affirmative relief against a co-defendant, of a nature different from that sought in the petition, a summons to the party to be charged, issued on the petition, will not confer jurisdiction to render judgment on the cross-petition, especially when the cross-petition is filed after the defendant thereto is in default for answer to the petition, and a summons on the cross-petition in such case is necessary.]

refused. The court found from the evidence that the plaintiff's deed to T. was a mistake; that T. had reconveyed to her by quitclaim; that on the same day T. conveyed to D., and in that deed also there was a mistake, namely, that it conveyed five-sevenths of the whole tract instead of five-sevenths of an undivided two-thirds, which was the amount intended to be conveyed; and a judgment was rendered reforming this deed from T. to D. On an appeal by D. from this judgment, the court held that the matters averred in the cross-complaint, and the relief sought by it, were so intimately connected with the subject of the principal suit by Mrs. Morris, that the whole might be properly litigated together; that the cross-complaint stated a good cause of action against D., and that the latter was not entitled to a separate trial of the issues raised by his answer to it.[1] It is plain, from the facts as they were found by the trial court, that the real object of the suit by Mrs. Morris was to get rid of Thompson's deed to Dice. Thompson's deed back to herself had purported to reconvey the title to her, but was partially inoperative by reason of the outstanding deed from Thompson to Dice, which was at least a cloud upon her title. By making both of these persons defendants, she forced Thompson to attack his own deed to Dice. As the matters of difference between Thompson and Dice were closely blended with her own claims against both, and as her remedy so directly depended upon the result of the contest between these two parties, it seems eminently proper that this triangular legal duel should be fought in one contest, as was done.

§ 683. * 807. **Illustrative Cases Continued.** Another decision by the same court shows when a cross-complaint by defendants against other defendants will not be sustained. Gasharie and Davis sue one hundred and seven defendants, partners trading under the name of "Farmers' Home Store," and seek to recover the amount of certain notes given by the firm for the price of goods sold on credit, amounting to several thousand dollars. The firm was an association having a president, directors, and members. The business was conducted by a managing agent, and overseen by the directors. One of the articles of association forbade the purchase or sale of goods on credit. The notes in suit were given by the managing agent for goods bought on

[1] Dice *v.* Morris, 32 Ind. 283.

credit. Twenty-eight of the defendants put in an answer by way of a cross-complaint against the directors and managing agent, who were also defendants. This pleading stated the articles of association, alleged a violation of them by the directors and managing agent in the said purchase upon credit, and prayed that the judgment in favor of the plaintiffs might be rendered against said directors and agent in the first instance, and enforced out of their property. The plaintiffs, and the directors and agent defendants, demurred to this cross-complaint. The court held that it stated no defence to the plaintiff's action, and presented no case for relief against the directors and agent. While the code provides that "judgment may be rendered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves," and while the court has thus the power to settle disputes between the defendants, it will not do so to the detriment of the plaintiff.[1]

§ 684. * 808. **Code Provision in Indiana. Procedure. Iowa and California.** The Code of Indiana expressly authorizes the court to determine the rights of the parties as between themselves on each side, when the justice of the case demands it. The mode of procedure is not pointed out, and therefore the general methods of chancery must be adopted, modified by the spirit of the code. When a defendant seeks relief against a defendant as to matters not appearing on the face of the original complaint, he must file a cross-complaint setting up the matters on which he relies, making as defendants thereto such of his co-defendants and others as are proper; and process is necessary to bring them in. It is plain that there must be notice and process to the persons against whom relief is sought on the cross-complaint.[2] "The only real difference between a complaint and a cross-complaint is, that the first is filed by the plaintiff, and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. In the making up the issues and the trial of questions of fact, the court is governed by the same principles of law and rules of

[1] Manning *v.* Gasharie, 27 Ind. 399. See Indiana Code (2 G & H. 218), § 368.

[2] Fletcher *v.* Holmes, 25 Ind. 458, 465, per Frazer C. J.; Meredith *v.* Lackey, 16 Ind. 1.

practice in the one case as in the other. When a defendant files a cross-complaint, and seeks affirmative relief, he becomes a plaintiff, and the plaintiff in the original action becomes the defendant in the cross-complaint." [1] The same rules as to setting out written instruments and copies thereof apply to cross-petitions which are prescribed in reference to original petitions.[2] Where, however, the cross-petition is based upon a writing which it does not set out in full, but which is annexed to the petition in the action, this is sufficient; the rule is practically complied with.[3] An answer being denominated a counter-claim by the pleader, cannot in California be treated as a cross-complaint.[4]

[1] Ewing *v.* Pattison, 35 Ind. 326, 330.

[2] [Ballin *v.* Merchants' Exch. Bank (1895), 89 Wis. 278, 61 N. W. 1118; Pine Tree Lumber Co. *v.* McKinley (1901), 83 Minn. 419, 86 N. W. 414; Smith *v.* Allen (1901), 63 Neb. 74, 88 N. W. 155; Langford *v.* Langford (1902), 136 Cal. 507, 69 Pac. 235; Hargreaves *v.* Tennis (1901), 63 Neb. 356, 88 N. W. 486; Mills *v.* Fletcher (1893), 100 Cal. 142, 34 Pac. 637; Wittenbrock *v.* Parker (1894), 102 Cal. 93, 36 Pac. 374.

Leach *v.* Rains (1897), 149 Ind. 152, 48 N. E. 858: "A cross-complaint, like an original complaint, must state facts sufficient to entitle the pleader to some affirmative relief, and it cannot be aided by the allegations of other pleadings in the action." Schmidt *v.* Zahrndt (1897), 148 Ind. 447, 47 N. E. 335: "A cross-complaint must be sufficient within itself, without aid from any other pleadings in the case. . . . Yet for matters of mere description and identification many of the allegations of the complaint may be referred to." See also Dudenhofer *v.* Johnson (1895), 144 Ind. 631, 43 N. E. 868; Island Coal Co. *v.* Streitlemier (1894), 139 Ind. 83, 37 N. E. 340.]

[3] Coe *v.* Lindley, 32 Iowa, 437, 444; Ryder *v.* Thomas, 32 Iowa, 56.

[4] McAbee *v.* Randall, 41 Cal. 136.

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