CHAPTER XL.

Of Covenant.

§ 660. In general—when will lie.—The action of covenant is the remedy provided by law for the recovery of damages for the breach of a contract under seal.[1] It cannot be maintained unless the contract is sealed by the defendant; a mere recognition of the contract, though sealed by the other party, will not be sufficient.[2] No action will lie on a covenant by C to pay a sum of money to A, B and himself C, or the survivors or the survivor of them, on their joint covenant.[3]

This action may be brought on the condition of a bond,[4] and in all cases arising upon contracts under seal, or upon judgments, when an action of covenant or of debt may be maintained, an action of assumpsit may be brought and maintained, in the same manner in all respects, as upon contracts without seal.[5]

1—Saund. Pl. & Ev., 5 Am. ed., 853. Since the enactment of the statute permitting assumpsit to be brought whenever covenant may be this action is very uncommon in justice's courts. C. L., § 10417.

2—Gale v. Nixon, 6 Cow., 445.

3—Fawlkner v. Lowe, 4 Exch., R., 598.

4—*Ante,* § 12. The action of covenant lies in justice's court on a money bond, no matter how large the penalty, if given to secure specific sums of money, in one or several installments, provided the aggregate shall not exceed one hundred and fifty dollars: See, C. L., § 709; Gray v. Stafford, 52 Mich., 497; 18 N. W., 235. The statute provides in such cases for an action of covenant for any separate installment, and for several successive installments, if necessary, as independent actions. But if the bond is not strictly a money bond, it is not taken from the rules governing in other cases, and if the penalty exceeds the jurisdiction of a justice, no suit can be brought before him upon it: *Ibid.;* see, Bishop v. Freeman, 42 Mich., 533; 4 N. W., 290.

5—C. L., § 10417. This section does not compel a party to resort to an action of assumpsit on a sealed instrument: Goodrich v. Leland, 18 Mich., 118; see, Jerome v. Ortman, 66 Mich., 670; 33 N. W., 759; Stewart v. Sprague, 71 Mich., 58; 38 N. W., 673. This statute does not affect the rules of pleading. While the common counts may be joined with special counts, yet wherever the cause of action requires a special count it must still be employed: Gooding v. Hingston, 20 Mich., 440; Stewart v. Sprague, 71 Mich., 58; 38 N. W., 673. Neither does this statute affect the

§ 661. Parties to actions of.—It is a general principle, that no action can be brought upon a covenant by a person who was not a party to the deed, though the covenant name him, and be made to him expressly, and for his benefit.[6]

If the covenant be made to two or more jointly, all the covenantors must join in an action upon it, even although the covenant be to do a thing for the benefit of one of them only. And if any of the covenantees be dead, the fact must be averred in the declaration.[7] If a man covenant with two or more, and with them and each of them, and the interest of the covenantees be several and not joint, each of the covenantees may alone maintain an action on the covenant.[8] But where the interest is joint, though the covenant is several as "with them and each of them," yet all must join.[9] If the covenant be joint and not several, the action must be brought against all the covenantees jointly; but if the covenant be joint and several, the covenantee has his option in bringing the action against all the covenantors, or against any one of them, even although they be jointly interested in the subject matter of of the covenant.[10]

§ 662. Actions on implied covenants.—This action lies as well on covenants implied from the terms of the deed, as on those which are express. But no covenant shall be implied in any conveyance of real estate, whether such conveyance contain several covenants or not.[11] The term conveyance embraces every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned; or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands.[12] An implied covenant, in its proper legal sense, is a covenant not formally stated in a deed, but which is collected

statute of limitations. If assumpsit is brought the six year limitation applies: Stewart v. Sprague, *supra;* Avery v. Miller, 81 Mich., 85; 45 N. W., 503. Assumpsit will lie upon a penal bond without covenants; as upon an official bond of a bank teller: Detroit Sav. Bk. v. Ziegler, 49 Mich., 157; 13 N. W., 496.

6—Bradford v. Stuckey, 8 Moo., 88; Bradford v. Stuckey, 1 Bing., 225; Charles v. Brown, 6 B. & C., 718.

7—Scott v. Godwin, 1 B. & P., 73.

8—Mills v. Ladbroke, 7 M. & G., 218.

9—Hopkins v. Lee, 9 Jur., 616; Hopkinson v. Lee, 6 Ad. & Ell. N. S., 964.

10—Enys v. Domthorne, 2 Burr, 1190; 1 Saund. Pl. & Ev., 861.

11—C. L., § 8959. Brayton v. Merithew, 56 Mich., 168; Gage v. Jenkinson, 58 Mich., 172-3.

12—C. L., § 8994, and note.

by constructive inference from the terms used in it. Thus a covenant to supply one with lime at a stipulated price, at all times and seasons of burning lime, is an implied covenant to burn lime at all such seasons.[13] So, a stipulation in a charter party, that forty days should be allowed for unloading and loading again, implies a covenant on the part of the freighter that the vessel should not be detained longer in unloading and loading again.[14]

§ 663. **Defenses.**—The plea of the general issue at the common law only put in issue the giving of the deed, and admitted all the material averments or breaches contained in the declaration.[15] Since the enactment of the statute abolishing special pleas,[16] the general issue requires the plaintiff to prove every fact necessary for him to allege in order to recover.[17] Of all other defenses notice must be specially given.

If the performance of a covenant becomes impossible by the act of God, or the act of the plaintiff, or by the intervention of a statute, the defendant will be excused, and he may plead the matter in bar.

When the law creates a duty, and the party is, by the act of God, disabled to perform it, without any fault in him, and he has no remedy over, the law will excuse him; but when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he can, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract. And, therefore, if a lessee covenant to repair a house, though it be destroyed by lightning, yet he must repair it. So, if a party covenant to build and keep in repair a bridge for seven years, he will be held to the observance of his contract, although the bridge be, by the act of God, by an extraordinary and unusual flood of water,

13—Shrewsbury v. Gould, 2 B. & A., 487.

14—Randall v. Lynch, 12 East., 179.

15—Legg v. Robinson, 7 Wend., 194; Cooper v. Watson, 10 Wend., 202.

16—C. L., §§ 10071, 10072.

17—See, Kinne v. Owens, 1 Mich., 249; Young v. Stephens, 9 Mich., 500. Under the general issue in covenant, the defendant may show the deed is not his, by proving a lack of power in the agent who executed it in his behalf: Agent, etc., v. Lathrop, 1 Mich., 438: unless the writing containing the covenant was filed with the justice at the time of declaring, in which case its execution will be deemed admitted if not denied on oath at the time of pleading: C. L., § 826; Wren v. McLaren, 48 Mich., 197; 12 N. W., 41; see, *ante*, § 188.

broken down.[18] But in some cases where the act of God renders performance absolutely impossible, the covenantor will be discharged; as, if a lessee covenants to leave a wood in as good a plight as it was at the time of the lease, and the trees are blown down by a tempest; or if one covenant to serve another seven years, and he die before the expiration of the term; or one covenant to deliver a horse to another and the horse die, the covenant in either case is discharged, because the act of God defeats the possibility of performance.[19]

When a right of action depends upon the performance of a condition precedent, performance is not excused, although it has become impossible by the act of God.[20].

When H covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant; so if H covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed.[21] If one covenants not to do a thing, which was then unlawful, and an act comes and makes it lawful, the statute does not repeal the covenant. Nor if he covenants to do a thing which was then unlawful, and a subsequent statute legalizes the act, said statute does not repeal the covenant.[22]

18—Platt on Covenants, 274-5.
19—*Ibid.*, 583-4.
20—Carpenter v. Stevens, 12 Wend., 589.
21—Brewster v. Kitchel, 1 Salk., 198; Presbyterian church v. New York City, 5 Cow., 538; see, People v. Hawley, 3 Mich., 330.
22—Platt on Covenants, 588.