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A treatise on the principles of pleading in civil actions

Henry John
Stephen



Stephen

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Martin A. Ryan,
210 Fourth Street, S.E.,
Washington, D.C.
1891.

Columbian Law School.

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A TREATISE
ON THE
PRINCIPLES OF PLEADING
IN CIVIL ACTIONS:

COMPRISING
A SUMMARY VIEW OF THE WHOLE
PROCEEDINGS IN A SUIT AT LAW.

BY HENRY JOHN STEPHEN,
SERGEANT AT LAW.

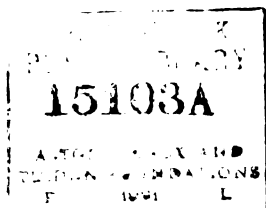
.... Res antiquæ laudis et artis
ingredior, sanctos ausus recludere fontes.—VIRG.

THIRD AMERICAN
FROM THE SECOND LONDON EDITION:
WITH A PREFACE, AN INTRODUCTION, A DISSERTATION ON PARTIES
TO ACTIONS, AND NOTES.

BY SAMUEL TYLER, LL.D.,
PROFESSOR IN THE LAW DEPARTMENT OF COLUMBIAN COLLEGE, WASHINGTON, D. C., AND
AUTHOR OF THE MARYLAND SIMPLIFIED PLEADING, ETC., ETC.

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CAXTON PRESS OF
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TO THE
ALUMNI
OF THE
LAW DEPARTMENT OF COLUMBIAN COLLEGE,

THIS EDITION OF A WORK, THE STUDY OF WHICH IS SO WELL FITTED TO
SHARPEN AND INVIGORATE THE MIND OF THE LAWYER AND IMPART
TO IT A PRACTICAL FACILITY, IS, WITH THE BEST WISHES
FOR THEIR PROFESSIONAL SUCCESS,

Respectfully Inscribed.

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PREFACE.

Stephen on Pleading is one of the great works in English law. Common-law pleading stands forth in it in its finished form. It places Mr. Stephen in the foremost rank of juridical thinkers. Besides its theoretic excellence, exhibiting the principles of pleading cohering in a logical system, the work is rendered eminently practical by introducing a summary and connected account of the whole proceedings in a suit, in which the end that pleading subserves in litigation, and the forms through which it works, are distinctly presented. This edition of the work has been prepared especially for American students of law. It is, nevertheless, as will be present'y seen, the best edition for the practicing lawyer.

In the year 1824 Mr. Stephen published the first edition of his work. In the year 1827 he published the second edition; and in the advertisement to that edition says: "This work, as its title imports, is in its main design elementary and institutional, and intended for the use rather of those who are exploring the principles, than of those who are engaged in the practice of pleading. But as there is reason to believe that it has proved in some measure acceptable to the latter class of readers also, the author has endeavored to adapt it better to their purposes, by introducing into this second edition some additional matter of a practical kind. This is contained, however, for the most part, in notes at the foot of the page, and does not at all derange or in any degree affect the original plan of the work.

"With the same view the index has been considerably enlarged and a table of cases prefixed."

In this second edition Mr. Stephen gave his matured view of the system of common-law pleading, and never attempted to do anything more towards making it more complete.

In the year 1828, the next year after the publication of this second edition of Mr. Stephen's book, the British government

appointed a commission of eminent lawyers, amongst whom was Mr. Stephen, to inquire into the practice and proceedings in the superior courts of common law. These commissioners made a report in the year 1833, recommending important changes in the system of pleading; and by acts 3 and 4 Will. IV, c. 42, power was given to the judges at Westminster to carry into effect the recommendations of the commissioners. Great changes in the forms of pleadings were accordingly effected by the pleading rules of Hilary Term, 1834, passed by the judges.

In the next year, 1835, Mr. Stephen published a third edition of his book, conformed to the requirements of the pleading rules of Hilary Term, 1834; and other editions, conformed to the same rules, were published in 1838, 1843, and 1860. And all the editions published in the United States since the year 1831, when the second edition was published in this country, are reprints of these expurgated editions, and are, and have always been, inapplicable to the practice of American courts, and unfit for the American student. And what detracts still more from these editions is, that in the year 1850 the British government appointed another commission of law reformers, and upon their recommendations statutes were passed by Parliament in 1852, 1854, and 1860, called common-law-procedure acts, by which, and the rules of court made under them, much more thorough changes were effected in pleading than those made by the pleading rules of Hilary Term, 1834, which have made all the editions of Stephen on Pleading as inapplicable to the practice of the English courts as the expurgated editions are to the practice of American courts, unless the seventh edition, by Mr. F. F. Pinder, published in 1866, which I have not seen, is conformed to these later reforms.

From the foregoing statement, it is seen that all editions of Stephen on Pleading, except the first and second, are, so far as American courts and American lawyers are concerned, mutilated editions. Therefore it is that the second edition of the book is now reprinted, it being the best manual for law students, and a most efficient guide in the practice of American courts. An introduction, discussing the relative characteristics of the Roman civil law and the common law of England, and pointing out the differences in their respective procedures, has been added, and also a dissertation on parties to actions, for the

instruction of students of law. Little else has been added, as this second edition was so fortified by authorities collected by Mr. Stephen himself, that for more than forty years the book has been received as the surest of guides in pleading, both in English and American courts.

The love of innovation induced the State of New York, some years ago, to abrogate common-law pleading, and introduce a code of procedure for the regulation of litigation in her courts; and notwithstanding the lamentable confusion and uncertainty, and the greatly increased expense which has thereby been brought into the administration of justice in that State, other States have followed in her track of barbaric empiricism. Mr. Justice Grier has, from the bench of the Supreme Court of the United States, rebuked the folly of abolishing common-law pleading, and substituting the common-sense practice, as it may be called, in its stead. "This system, (says that able judge,) matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish species and establish a single genus is found to be beyond the power of legislative omnipotence. The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and to introduce on the record an endless wrangle in writing, perplexing the court, delaying and impeding the administration of justice." This strong condemnation is more than justified by the experience of the New York courts, as may be seen in the chaos of the reports of the code practice in that State. And the evil effects of the code on the administration of law in New York has been signalized in a recent letter from Mr. Charles O'Connor, published in the Albany Law Journal. It is stated in that letter, as the effect of the decisions of the courts, that because of the mixture of law and equity by the code, a case may begin as a common-law case, with a jury impanneled to try it, and if, at the close of the testimony, a case in equity instead of a common-law case, is proved, the judge may dismiss the jury and try the case himself, as chancellor. And the confusion in practice is increased by the want of logical skill in the lawyers trained in the code practice. "All the lawyers (says Mr. O'Connor) who have been

admitted to practice in this State for the last twenty years are conversant with the code, and, of course, are not experts in the old common-law practice and pleading. Most of them are entirely ignorant of it, and you may imagine that the code could not easily be displaced by any attempt at reaction. The courts of the United States do not recognize the code, but adhere to the old practice, with its settled distinction between law and equity. This circumstance often leads to much confusion, as you may see illustrated in some reported decisions of the Supreme Court. It is truly laughable, to one conversant with both systems, to see the blunders into which lawyers of great ability, who have come to the bar within the last ten or fifteen years, sometimes fall in framing a declaration, plea, or subsequent pleading at common law in the circuit court of the United States.

“I think the code (continues Mr. O’Conor) contains, as I best recollect at this moment, only one thing which can be called new in principle, and this is an attempt at an absolute impossibility in prescribing the rule of pleading. It declares, in substance and effect, that you shall not plead, as in the old system, the conclusions in law or in reason, from the facts of the case, and at the same time it prohibits you from stating or detailing the evidence merely on which you rely. You are required to state the ‘facts’ which that evidence conduces to prove. Here, under the name of ‘facts,’ we find some things required to be stated which are neither, in the vulgar sense of the word, the mere fact, or transaction, or event which did occur, and can be proven by direct evidence, nor the general, rational, or legal conclusions from such fact, transaction, or event.

“Now, according to my conception, it requires somebody much more wise or more subtle than myself, or any special pleader I have ever been acquainted with, to define or find out what it is that should be stated in a regular pleading, drawn in compliance with this requisite of the code. I am not aware that any one has ever attempted to do it. The common practice in this State is, to tell your story precisely as your client tells it to you; just as any old woman, in trouble for the first time, would narrate her grievances; and to annex, by way of schedules, respectively marked A, B, C, &c., copies of any papers or documents that you imagine would help your case. This is most emphatically a fair description of all the pleadings which

come from the office of the chief codifier himself. *A demurral to any pleading under the code is a very dangerous step, because it is utterly impossible for the keenest investigator to determine, in most cases, what any other reader than himself will understand to be the import of the pleading, if it be demurred to.*"

It is at this time especially important that students of law be trained in common-law pleading, and be convinced of its wisdom as a means of administering justice, in order that, as men who influence public opinion, they may, if possible, gradually restore common-law pleading to its former efficiency in the courts. At all events, their training in common-law pleading will enable them, in States where it is abolished, to relieve in some measure the administration of justice from the embarrassments with which it has been environed by codes. For a knowledge of common-law pleading is not only of importance in States whose wisdom has retained it, but also in States where it has been abolished. A machinery of rules and forms is indispensable for an enlightened administration of law, and one familiar with those rules and forms that are applicable to the exigencies of litigation is more capable than one not familiar with them of efficient practice in courts where such machinery is not used.

"Nor are the works of common-law pleading (says Professor Cooley, in the preface to his able edition of Blackstone's Commentaries) superseded by the new codes which have been introduced in so many of the States. A careful study of those works is the very best preparation for the pleader, as well where a code is in force as where the old common-law forms are still adhered to. Any expectation which may have existed that the code was to banish technicality and substitute such simplicity that any man of common understanding was to be competent, without legal training, to present his case in due form of law, has not been realized. After a trial of the code system for many years, its friends must confess that there is something more than form in the old system of pleading, and that the lawyer who has learned to state his case in logical manner, after the rules laid down by Stephen and Gould, is better prepared to draw a pleading under the code which will stand the test on demurrer than the man who, without that training, undertakes to tell his story to the court

as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise facts which constitute the legal cause of action or the legal defense, is in danger of stating so much or so little, or of presenting the facts so inaccurately, as to leave his rights in doubt on his own showing. Let the common-law rules be mastered, and the work under the code will prove easy and simple, and it will speedily be seen that no time has been lost or labor wasted in coming to the new practice by the old road."

Common-law pleading should be simplified, but not abolished. A love of subtlety and of system caused, in the course of time, useless refinements to be ingrafted upon the common-law pleading. But when the system of pleading was fully matured, and what is substantial and what is only incidental could be clearly discriminated from a practical point of view, a process of simplifying it, by cutting off these refinements, was begun in England. No less than twelve statutes, beginning in the reign of Edward III, and coming down to that of George I, had been passed by Parliament before we separated from England, to remedy technical inconveniences. But the system, as we introduced it into this country, had still many over-refinements. And it is because of these mere excrescences that the system became liable to criticism and, in some States, to overthrow. But England, where enlightened opinion has so much influence, has reformed and not destroyed what is as old as her jurisprudence, and has been in all ages deemed an especially wise portion of her law procedure. By the common law procedure acts already mentioned, and the rules of court made under their provisions, pleading has been made as simple as possible, and justice has been thereby administered with entire satisfaction to even the sciolist, who had the vain hope that every litigant could be his own lawyer. But the ancient system of alternate pleadings, eliminating irrelevant facts, and finally evolving the naked question, whether of fact or of law, really in dispute between the parties, and presenting it to the proper tribunal for determination, is retained in all its integrity. The State of Maryland, fourteen years ago, after having from colonial times used the common-law pleading in its most technical form, followed the course of England, and simplified the system, until the old lawyers at first feared that their

pleadings, when they had drawn them, were erroneous, because of their simplicity and naturalness. They could not help thinking that something material was left out. It is to be hoped that other States will follow the example of Maryland.

For the common-law-procedure acts, and the rules of court made under their provisions, the reader is referred to Day's Common-Law Acts; Smith's Action at Law, tenth edition; and the 3d vol. Broom & Hadley's Commentaries on the Laws of England, chap. xii.

For the Maryland Simplified Procedure and Pleading, the reader is referred to Tyler's Pleading.

WASHINGTON CITY, *January, 1871.*

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INTRODUCTION.

OF THE CIVIL LAW AND THE COMMON LAW.

There have grown up in the history of nations only two great systems of law, the civil law of ancient Rome, and the common law of England. All the most civilized nations in the world are governed by either the one or the other of these two great schemes of justice. Though the civil law and the common law have much in common, yet in many important particulars they are the opposites of each other. In the course of his studies, the student of law finds so much said, in an incidental way, about the civil law, that is calculated to mislead his judgment in regard to the true character of that scheme of justice, that it is important, at the outset of his walks over the fields of the common law, to give him some account of the civil law, and point out in what it differs essentially from the common law. This is a matter of much importance to every student who aspires to a comprehensive and enlightened knowledge of jurisprudence.

Rome is the grandest empire presented in the great spectacle of the history of nations. From the limits of a few square miles, on the southeast bank of the lower course of the Tiber, Rome extended her territorial dominions to the Pillars of Hercules on the west, to the Euphrates on the east, to the German ocean and the Grampian hills on the north, and to the cataracts of the Nile and the great African desert on the south. Over this vast territory Rome extended her government, her laws, and her language. To preserve these immense territories, as the natural and legitimate heritage of Rome, was the one great end of Roman policy. And any of the many peo-

ples subject to Roman sway, who attempted to throw off the imperial authority, were treated as rebels against a lawful dominion.

The law which regulated the affairs of such a vast and various empire of high civilization is a wonderful scheme of human justice, attracting, with uncommon interest, the student of jurisprudence.

The political history of Rome is divided into the period of the kings, the period of the republic, and the period of the emperors. Its legal history corresponds with these political periods.

In the period of the kings, the administration of justice was in the royal hands. The law was at that epoch very much a matter of the royal discretion. During the period of the republic, the administration of justice was in the hands of the consuls, pretors, and inferior magistrates. It was during the epoch of the republic that most of the fundamental rules for the regulation of private rights and peaceful pursuits were introduced into Roman law. The law was gradually developed by the peculiar modes of administering justice. In the later days of the republic the prætor urbanus was the magistrate chiefly concerned in the administration of justice. But neither he nor any other Roman judicial magistrate ever decided directly the matter brought before him. He only allowed the action upon a statement made by the plaintiff, and regulated the proceedings to a point in which the matter in dispute was reduced to a proper form for investigation and decision. The case thus prepared was then referred by him, with directions, to a *judex*, chosen by the parties themselves from amongst their fellow-citizens, whose function it was to investigate the facts and pronounce judgment upon the issue. This judicial reference and direction by the pretor to the *judex* was called an edict. It contained a statement, in a certain formula, of the matter in dispute and the general rules of law applicable to it, with a direction to the *judex* to make his decision conform to the facts as he might find them. The ownership of land was excepted from this

mode of trial. It was decided by the court of one hundred men.

The prætor urbanus was elected annually. It was the working of his jurisdiction that chiefly developed Roman law. The old forms of action, contained in the twelve tables, required every suitor to bring his case within their strict terms; else he was without remedy, no matter how just was his complaint. These forms, so narrow and technical, were, in the course of progress, abolished, so as to enlarge legal remedies. There was given to the prætor urbanus authority to devise new rules and orders applicable to special cases which might be brought before him. If a person complained of an injury for which the old law afforded no remedy, the prætor urbanus could, upon a statement of facts by the party, allow him an action, and put the facts, with the proper judgment upon them, into a certain formula, for the direction of the *judex* to whom he referred the matter. In this way, through the jurisdiction of the prætor urbanus, new actions, enforcing claims not before recognized by the law, and new rules of law applicable to the changing wants of society, were established. But the new remedies were made to take the form of those which had been long observed; and thus progress was made to conform to the Roman spirit of conservatism. Customs, as they grew up in the various new business and changing conditions of society, were allowed as law in these new actions.

It was the custom for pretors, on entering upon their office, to publish an edict, declaring the principles upon which they intended to administer justice during the year of their pretorship. This was called a continuous edict. By this practice, the pretor would appear to the suitors to be governed by pre-established general rules, and not to be influenced by the special interests of any particular case. His administration would, therefore, be felt as more impartial and just. The pretor also passed special edicts, as cases, not anticipated in the continuous edicts, were brought before him. These continuous edicts had author-

ity only during the year of the pretor who declared them. But in time, successive pretors came to adopt, in their own edicts, the rules declared by their predecessors. In this way, a body of edictal law became as well established and as authoritative as if it had received the express sanction of positive legislation. As the edicts of the pretors embraced new usages and customs, as well as any special rules that might occur to the minds of the respective pretors, which grew up in the changing business of a progressive society like that of Rome, the edictal law was the purest sort of legislation, springing from the spontaneous acts and opinions of the people. Society, in the modes of its working, declared the rules of its actions; and the pretors gave them judicial sanction, and thereby made them law.

The edictal direction to the *judex* was not the only mode in which the pretor discharged the function of justice. He also, in certain cases, passed edicts, ordering specific things to be produced or restitution of them to be made. And he also sometimes, by interdict, forbade certain things to be done. These acts of the pretor might be final, or merely preliminary to further proceedings, in which the rights of the parties would be settled.

The law was still further developed, and that into a more ample justice, because of the relations of Rome to foreign states, especially to those with which she had formed treaties, giving their citizens certain civil rights, such as the right to acquire and hold property within the Roman dominion. In order to administer justice, in cases growing out of foreign relations, a special magistrate having jurisdiction over them was annually elected, called *prætor peregrinus*. As in the cases brought before this pretor the parties were never both Roman citizens, and the transactions involved were hardly ever entered into with reference to Roman law, the principles common to all systems of law were applied as dispensing, in such cases, a more adequate justice. Through this liberal form of administering justice between Romans and aliens, a practical acquaintance with the laws

of foreign states was acquired by the Roman magistrates, and such rules as seemed common to all systems of laws were recognized as a law of nations, and were made a part of the civil law of the Romans. And thereby the law of nations, because of its universal acceptance as a standard of right and justice, became a part of the positive law of the Romans. Under this law the rights and obligations of foreigners, as well as of Roman citizens, were recognized and judicially enforced. According to the teachings of Roman jurists, it was from the law of nations that the law of contracts, such as buying and selling, letting and hiring, loans and bailments, partnership, and the law of slavery so far as it gave the right of property in man, and many other matters, were introduced into the Roman civil law.

This mere judicial development of the law left it in a shapeless and unwieldy mass. Magistrates annually elected, as the Roman pretors were, could hardly know what had been decided by their predecessors. Consequently there could be very little like fixed principle in the law, if it were left to mere judicial development; especially, too, as the subsequent pretor was not bound by the decisions of his predecessors, but could exercise his judgment untrammelled by precedent. Therefore it was that a class of men arose by the side of the administration of justice, who became connected with it in a very peculiar relation, and supplied the defects in the judicial system, and by their writings reduced the law into shape. These were the Roman jurists, so celebrated in the history of European law. They made their first appearance in the time of Cicero. Quintus Mucius Scævola was the first of them, and Servius Sulpicius was the second. These jurists must not be confounded with the mere practitioners of the law. The mere practicing lawyer held a lower position in the legal profession than the jurist. The business of the mere practicing lawyer was to give legal advice, and to draw up testaments, contracts, and other instruments in legal form. He had nothing to do with the management of causes before a court. The orator,

though his great vocation was in the senate and before the assemblies of the people, was the advocate in criminal trials and in important civil cases. The jurists, in the time of Cicero, besides doing the business of practitioners of law, also appeared in public, at certain times and places, to give their advice orally to those who asked it, and also opened their own houses for the same purpose. Young men who wished to acquire a knowledge of the law were present when the jurists gave their advice, and saw the mode in which they transacted legal business. Cicero was a pupil of Scævola. He was admitted to the intimacies of his accomplished family, and learned, as he said, elegant conversation from his refined daughters.

But it was under the empire, when the glory of the republic was gone, that the jurists attained their eminence, and in fact became the architects of the great system of Roman law. Though Scævola and Sulpicius wrote treatises on the law, these treatises had no authority beyond the opinions of men learned in the law. But Augustus Cæsar gave to a certain number of jurists the privilege of giving opinions in cases which might be referred to them by a *judex*; and if the jurists were unanimous, the *judex* was bound by their opinion; if they were not unanimous, the *judex* was left to adopt what opinion seemed to him best. Tiberius Cæsar, during his reign, adopted the practice of authenticating, under his seal, the opinions of certain jurists. This class of privileged jurists, whose unanimous opinion made rules of law, became an established institution. Some of these jurists were advisers of the emperors in all matters of legislation, as well as in matters of law referred to them either immediately or by appeal. As the military power, which during the republic was kept in the strictest subordination to the civil, could, under the empire, at any time be put above the civil authority by the emperor, his very title being military, Septimus Severus appointed Papinian, the greatest of all the Roman jurists, pretorian prefect, which placed him at the head of the army and of the law. And Ulpian and Paulus, only a little, if at all,

less eminent as jurists than Papinian, were successively appointed prætorian præfect by Alexander Severus.

The jurists wrote innumerable treatises on the law, which came to be of as much authority as their privileged opinions. It was these writings that exerted a paramount influence in developing and bringing into system Roman jurisprudence. The law contained in the twelve tables, the edictal law, and established usage, were the materials upon which the jurists labored in their writings with great honesty of purpose, remarkable good sense, and fine dialectical skill. Oratory was no longer, as it had been during the glorious period of the republic, the great art by which men rose to eminence in the state. Its voice was now silent; when to speak of the rights of Roman citizens was treason. Therefore, to the silent and obscure labor of building up jurisprudence the greatest minds devoted themselves. The writings of the jurists became in time so numerous, that, in order to help the incapacity of those who administered law, at a time when, amidst general degradation, the great jurists had no successors, the Emperor Valentinian III, by a constitution, declared that the writings of Papinian, Paulus, Gaius, Ulpian, and Modestinus should have the force of law when they were unanimous; when they were not unanimous, the opinion of the majority was to be followed; and when they were equally divided, the opinion in which Papinian concurred was to be adopted.

Thus, according to a tendency common to all systems of law, the Roman, in the new application of principles required by the ever-changing conditions of society, gradually, through the offices of the two prætors and afterwards through the writings of the great jurists, emerged from the narrow rules which originated in the early peculiarities of Roman society, and gradually expanded itself into a more ample scheme of justice, fitted for a universal dominion. It became in time, allowing local differences, the common law of all the provinces.

This system of jurisprudence was closely connected with the imperial theory and form of government, both by the

manner of its growth and the political doctrines introduced into it by the writings of the jurists. The jurists were, in politics, imperialists; and they made their legal opinions support the imperial authority at all points of doctrinal application and administrative contact between it and the law. For though the theory of the republic was forgotten, and the right of revolution, so often exerted in the early history of Rome, was hardly even a matter of tradition, still it was deemed necessary, by the jurists, to vindicate to human intelligence, by some theory of right, an authority so stupendous as that of a Roman emperor. Therefore it was that the jurists invented the fiction of the *lex regia*, by which it was pretended that all the authority of the Roman people was irrevocably granted to the emperor. And, to complete their theory of absolutism, the jurists introduced into their writings, as a constitutional principle, the dogma, *Whatever pleases the prince has the force of law.*

Thus the jurisprudence which had been recast in an imperial mold became a part of the imperial system; and as the chief functionaries under the empire were generally selected from the profession of the law, they entered upon their official functions thoroughly imbued with imperial ideas and trained to principles of imperial policy. The administration of the law, too, was subordinate to the imperial authority, not only in theory but in practice, the courts being organized accordingly. Under the republic, the courts were open to the public in both civil and criminal trials. Under the empire, open courts disappeared, and an appeal lay in all cases to the emperor in his imperial court. Thus a perfect system of despotism, disguised under forms of law, was built up on the ruins of the republic.

After the seat of the Roman empire had been transferred by Constantine to the borders of Asia, and the unity of the Roman dominion had been broken into a western and an eastern empire, the Emperor Justinian, in the first half of the sixth century of the Christian era, had all the constitutions which had been promulgated by the success-

ive emperors compiled into a code. And afterwards, at the suggestion of Tribonian, a distinguished lawyer who had been one of the compilers of the code, a commission was appointed, with Tribonian at its head, to make a selection from the writings of the elder jurists, which should comprehend all that was most valuable in them, and should be a compendious exposition of Roman law. The commissioners, in the very short period of three years, produced their compilation, called the Pandects or Digest, containing literal extracts from thirty-nine jurists, those from Ulpian and Paulus constituting about one half of the whole work. The Pandects or Digest, besides being designed as a book for the practitioner, was designed also to form a necessary part of legal education in the schools of jurisprudence at Constantinople and Berytus. But it was too vast a work, and required for its comprehension too great a previous knowledge of law, to admit of its being made an introduction to a course of legal study. Justinian, therefore, appointed Tribonian, in conjunction with Theophilus and Dorotheus, respectively professors in the law schools of Constantinople and Berytus, to compose an elementary law book. They produced the Institutes.

The Code, the Pandects or Digest, and the Institutes contain the civil law as it has come down to modern times, and are the sources from which the modern jurists have derived their knowledge of Roman jurisprudence. • They embody principles and ideas of law which were the slow growth of ages, and which, beginning with the origin of the Roman people, had been gradually unfolded, modified, and matured.

During the progress of Roman jurisprudence the forms of legal procedure had undergone an entire change. As soon as the republic was overthrown and the empire was established by Augustus, changes in the law began to be contemplated; and two schools of law reformers arose, one school in favor of adhering to the strict technical forms of the law under the republic, and the other in favor of substituting for them simple and general forms, more accom-

modated, as they said, to the larger equity, the more ample justice of the jurisprudence required by the enlightened spirit of the age. At the head of the republican school stood Labeo, and at the head of the other stood Capito. Both were eminent lawyers. But the first, though in favor of liberalizing the principles of the old jurisprudence, was utterly averse from changing the strict technical forms of procedure, as he believed they afforded the only protection to the rights of the citizen. Capito, on the contrary, a time-serving adherent of the new order of things, maintained that the forms of legal procedure, as well as the jurisprudence itself, must be changed to suit the spirit of progress. The controversy between these schools of lawyers lasted nearly a century, the imperial party gaining ground all the time, until the Emperor Hadrian, by the perpetual edict, exercised uncontrolled legislative authority, and fixed forever the character of the imperial jurisprudence. From this epoch the civil law and its procedure assumed that pretorian form and spirit which were consummated in the Code, the Pandects, and the Institutes of Justinian. The old forms of law procedure of the republic, and the respect for precedent when the law was an emanation from the manners and spirit of the people, gave way to the more simple forms of the empire. Thus was consummated what has sometimes been considered an advance in jurisprudence. But in this opinion things wholly different have been confounded: the machinery for carrying law into effect has been confounded with the law itself. There can be no doubt that the law itself was so improved, under the empire, as to make it almost a new creation; but there should be as little doubt that the mode of procedure was changed from one suited to the liberty of the citizen to one suited to arbitrary power, by its enlarging the discretion of judges.

If we now turn to the common law of England, we will find that, as far as administrative principles and forms of procedure are concerned, it is the opposite of the Roman civil law as it was molded under the empire. The principle

which, in the practical administration of the two systems, marks the primary essential distinction between them, is the relative obligatory force under them of precedent or former decisions. Under the common law, former decisions control the court unconditionally. It is deemed by the common law indispensable that there should be a fixed rule of decision, in order that rights and property may be stable and certain, and not involved in perpetual doubts and controversies. Under the civil law the principle is different. Former decisions have not so fixed and certain an operation, but are considered as only governing the particular case, without establishing as a settled rule the principle involved in it. When a similar case occurs, the judge may decide it according to his personal views of the law, or according to the opinion of some eminent jurist. The civil law, as administered at the present time on the continent of Europe, possesses all the uncertainty and fluctuation of doctrine that results from the little respect paid by it to precedent. The commentaries of the doctors, who have succeeded to the jurists, are as various as the diversity of human judgment can make them. The late United States Attorney General, Légare, who studied law in Germany, with all his strong predilections for the civil law, said, "One who was initiated in this study, as we happened to be, under the old plan of the eighteenth century, with Heineccius for a guide, will find himself in the schools of the present day in almost another world—new doctrines, new history, new methods, new text-books, and, above all, new views and a new spirit." The diversity of doctrine in the schools signalized by Mr. Légare descends into the courts to perplex and bewilder the administration of justice. Let any one, who wishes to examine a specimen of this perplexity in regard to a fundamental classification which the civilians make of laws into personal statutes and real statutes, refer to the opinion of the supreme court of Louisiana, by Mr. Justice Porter, in *Saul v. His Creditors*, in 17 *Martin's Reports*. After referring to the jurists of the different European countries who have treated of this dis

tion, Justice Porter says: "The moment we attempt to discover from these writers what statutes are real and what personal, the most extraordinary confusion is presented. Their definitions often differ; and, when they agree in their definitions, they dispute as to their application." And Mr. Justice Story, in his "Conflict of Laws," when speaking of the civilians who have treated of the subject of his book, says: "The civilians of continental Europe have examined the subject in many of its bearings with a more comprehensive philosophy, if not with a more enlightened spirit. Their works, however, abound with theoretical distinctions, which serve little purpose than to provoke idle discussions and metaphysical subtleties, which perplex, if they do not confound the inquirer. * * * Precedents, too, have not, either in the courts of continental Europe or in the judicial discussions of eminent jurists, the same force and authority which we, who live under the influence of the common law, are accustomed to attribute to them; and it is unavoidable that many differences of opinion will exist amongst them, even in relation to leading principles." Such is the fluctuating wind of doctrine with which the judicial mind is liable to veer under civil-law institutions where precedents have but little force.

The common law, in broad contrast to the civil law, has always wholly repudiated any thing as authority but the judgments of courts deliberately given in causes argued and decided. "For (says Lord Coke, in the preface to his 9th Report) it is one amongst others of the great honors of the common law that cases of great difficulty are never adjudged or resolved *in tenebris* or *sub silentio suppressis rationibus*, but in open court; and there upon solemn and elaborate arguments, first at the bar by the counsel learned of either party, (and if the case depend in the court of common pleas, then by the sergeants at law only;) and after at the bench by the judges, where they argue (the presiding judge beginning first) *seriatim*, upon certain days openly and purposely prefixed, delivering at large the authorities, reasons, and causes of their judgments and resolutions in

every such particular case, (*habet enim nescio quid ei ergie viva vox:*) a reverend and honorable proceeding in law, a grateful satisfaction to the parties, and a great instruction and direction to the attentive and studious hearers." Nothing less elaborately learned and cautiously considered than such a judgment of a court has a legitimate place in the common law. By such adjudications has that great system of jurisprudence been built up. The opinion of no lawyer has a place in the system of the common law. And this wise principle of the common law is never lost sight of by those bred in its spirit. When Lord Coke wrote his commentaries upon certain statutes of England, from Magna Charta to Henry VIII, which are called his II Institutes, he did not give his personal opinions of their meaning, but gave the judicial interpretations of them which had been made. In the conclusion of the preface to the II Institutes he says: "Upon the text of the civil law there be so many glosses and interpretations, and again upon those so many commentaries, and all written by doctors of equal degree and authority, and therein so many diversities of opinions, as they rather increase than resolve doubts and uncertainties, and the professors of that noble science say *that it is like a sea full of waves*. The difference, then, between those glosses and commentaries and this we publish is, that their glosses and commentaries are written by doctors, which be advocates, and so in a great manner private interpretations; and our expositions or commentaries upon Magna Charta and other statutes are resolutions of judges in courts of justice in judicial courses of proceeding, either related and reported in our books or extant in judicial records, or in both, and therefore, being collected together, shall (as we conceive) produce certainty, the mother and nurse of repose and quietness." Such is the doctrine of the common law! Nothing but the solemn voice of the law itself, speaking through its constituted tribunals, is of any judicial authority. And how august is that authority, reposing as it does upon the solemn decisions of courts which have administered justice in the very same halls for nearly

eight hundred years! In vain shall we search the history of nations for a parallel to this stability of law amidst the fluctuating vicissitudes of empire. It is this stability of law, ruling over the prerogative of the crown and administering equal justice to the high and the low through so many centuries, that vindicates the "frane and ordinary course of the common law" to the consideration of the present times.

It is this primary difference in the principles of practice, under the two systems of law, which gives to the common law its great superiority over the civil law, as a practical jurisprudence regulating the affairs of society. It has the great advantage of producing certainty in regard to all rights and obligations which are regulated by law. But, above all, it excludes private interpretations and controls the arbitrary discretion of judges. In the common law the principles of interpretation are fixed and certain. Rules of interpretation were early adopted, and have never been departed from. Other rules from time to time have been adopted, but when once introduced into practice they become precedents.

But it is far otherwise in the civil law. Different schools of interpretation have existed in countries where it is administered in modern times, called respectively the historical and the philosophical schools. And the law is subject to all the fluctuation in practice which grows out of the different principles of interpretation of these schools. By these different principles of interpretation, and by the principle that former decisions may be disregarded, much certainty in the law is lost; so that often the decision of the plainest case, unless it depends upon some fundamental positive rule, can hardly be confidently foretold.

This difference in the administrative principles of the common law and the civil law is intimately connected with their different modes of procedure and with the different degree of respect paid to technical forms. Under the common law, forms are as sacred as the principles they embody. They are precedents. The precise form being a

precedent, the certainty of the principle which it embodies is thereby fixed. There can be no more dispute about the principle than about the form which embodies it. Every new case must conform to the requirements of the form; and if it conforms to it, there can be no dispute about its import.

The great instrument by which certainty has been given to precedents in the common law is special pleading. This is the mainspring and the regulative force of the whole machinery of the common law as a practical jurisprudence. By it every step, from the original writ to the judgment, is kept in specific undeviating forms. There can be no dispute about the specific import of every step in the procedure. And when the decision is made, no matter how loosely the opinion of the court may be expressed, the pleadings in the case give definiteness to the point or points decided, and preserve them forever as a precedent for future judges to follow.

The object of judicial proceedings is to ascertain and to decide upon disputes between parties. In order to do this, it is indispensable that the point or points in controversy be evolved and distinctly presented for decision. The common law and the civil law have different modes for accomplishing this purpose. The rules of common law pleading are designed to develop and present the precise point in dispute *upon the record itself*, without requiring any action on the part of the court for the purpose. The parties are required to plead alternately in writing, until their respective allegations of affirmation and denial terminate in a single material issue, either of law or of fact, the decision of which will dispose of the cause.

By the civil law the parties are not required to plead in such a way as to evolve upon the written record, by the allegations of the respective parties, the point in dispute, but are permitted to set forth all the facts which constitute the cause of action or defense at large; the questions of law not being separated from the questions of fact, as in the common law pleadings, but the whole case is presented in

gross to the court for its determination. Under this practice the court has the labor of reviewing the complex allegations of the respective parties, and methodizing them, and evolving for adjudication the material points on which the controversy turns.

When the court of chancery in England began to take cognizance of disputes between parties, it adopted the civil law mode of procedure. This court assumed to eschew the strict technical rules of the common law, and to proceed upon the broad equities of the case; and, therefore, naturally required the statement of the facts at large. As the trial by jury did not pertain to this court, the inconvenience of mingling questions of law and of fact was not felt, as they were both decided by the court, and therefore needed not to be separated on the record, as in courts of law, where they are decided by different tribunals. And, besides, the chancellor, from the nature of his court, can take all the time required for the examination of the questions of law and of fact involved in the allegations of the opposite parties. There is, therefore, nothing in the organization of the court of chancery which forbids the use of the civil law mode of pleading. Indeed, the court of chancery is, in form, a civil law tribunal. Its whole practice is modeled after the edictal law of the Roman pretor.

But the civil law mode of pleading is not applicable to the common law courts. In these courts questions of law are determined by the judges, while questions of fact are determined by the jury. It is therefore manifest that it is at least convenient that these questions, which are to be decided by different tribunals, should be separated upon the written record before the case is presented for trial. The material points, about which the parties are in dispute, cannot be so easily evolved from the complicated mass of facts in the hurry of a trial as they can be by pleadings carefully framed beforehand by experienced lawyers, in accordance with rules which require all issues to be single, involving only one question, and to be stated upon the written record itself. And certainly it facilitates the ad

ministration of justice to have the record of every case disincumbered of all extraneous matters, and of everything irrelevant and immaterial, and nothing but the naked points in dispute, whether of fact or of law, presented distinctly to the judges and the jury, as is done by the special pleading of the common law.

Nothing is more important, in the administration of justice, than a distinct theory and law of evidence. Without it there can be no certainty in administrative justice. For it matters not how clearly a system of jurisprudence may define obligations and rights, if in judicial investigations improper evidence is admitted, and proper evidence is rejected, there can be no security. The system of common law pleading is framed with reference to this point, making issues of fact simple, so that the relevancy of evidence can be easily perceived. The common law is greatly superior to the civil law on this point. In the loose, detailed statements of civil law pleadings the exact point in dispute will often be left in so much doubt that the evidence will be various, latitudinous, and vague; and many topics will be introduced at the trial which have nothing to do with the real questions in dispute. It has been said that the whole government of England is but a contrivance to bring twelve men into the jury box. Trial by jury is, therefore, in connection with the court, the great end of the government; and special pleading is the great instrument by which that peculiar form of judicature is made efficient. It presents the precise points to be determined, and thereby indicates the character of the evidence required, which is all that any contrivance can accomplish.

It is thus seen how the common law pleading gives certainty to trials at law, making the questions to be decided precise, the admission and rejection of evidence definite, and retaining on the record, after the trial, precision in everything, from the summons to the judgment, so that it can be known what was in dispute, what was proved, and what was adjudged.

It must not be inferred from what has been said that I

undervalue any influence which the civil law has exerted in liberalizing any too narrow principles of the common law in that long sweep of ages through which they both have governed the affairs of men; though I think that this influence has been exaggerated by some of the ablest writers on the common law. It is not as systems of principles of justice that I have contrasted the common and the civil law. It is only their respective modes of procedure in administering justice that I have contrasted. We must, in such a discussion, be careful not to confound what Sir Henry Spelman calls "the course and frame of justice" with the principles of justice.

In concluding the contrast between the common law and the civil law, as a juridical question, it will be profitable to consider the two systems of law in their political aspects.

The march which the civil law has made over the continental European nations has carried its forms of procedure with it; and it cannot be pretended that either liberty or property has been as well protected in these countries as in England. The people of these countries are of the same race with those of England, and had originally the same institutions. "When we peruse," says Sir Francis Palgrave, "the annals of the Teutonic nations, the epithet Teutonic being used in its widest sense, the first impression which we receive results from the identity of their ancient laws and modes of government which prevailed amongst them. Like their various languages, which are in truth but dialects of one mother-tongue, so their laws are but modifications of one primeval code. In all their wanderings from their parent home the Teutons bore with them that law which was their birthright and their privilege; and even now we can mark the era when the same principles and doctrines were recognized at Upsula and at Toledo, in Lombardy and in England. But, descending the stream of time, the tokens of relationship diminish, and at length disappear. Amongst the cognate races of the continent of Europe political freedom was effaced by the improvement of society. England alone has witnessed

the concurrent development of liberty and civilization. From whatever causes it may have originated, a beneficial impulse was given by the Anglo-Saxon and Anglo-Norman governments to the courts of justice, which, though emanating from the crown, were interposed between the sovereign and his subjects in such a manner as to tend towards a limited monarchy. And if this tendency had not continued and increased, the share of authority possessed by the people or their representatives would have been as feebly established here as in other countries, which, starting from the same point, proceeded in a less fortunate career. Deprived of the security afforded by the institutions which became the strongholds of liberty and the stations of defense, from which the patriot could not be dislodged, the Parliament of England, like the Cortes of Spain or the States-General of France, would long since have declined into inefficiency and extinction."

It was the civil law of imperial Rome which gradually undermined the Teutonic institutions on the continent of Europe. The fundamental text of that law, as we have seen, is, "The will of the prince has the force of law." This gradually became the fundamental doctrine of the governments of continental Europe; and the juridical principles and the modes of procedure made it efficient in practice. The palatial courts, to which appeals lay from all inferior tribunals, enabled the prince to control the whole administration of justice. The prerogative of the crown could not, therefore, be resisted by the courts, as it has been at important junctures by the courts of England. It is the law, and the law only, which can successfully resist the encroachments of despotism. In the absence of defined laws, and an independent judiciary to enforce them, the only check upon arbitrary power is popular insurrection; and the people, after they have overthrown by force one despotism, are liable, by their excesses, as all history shows, to succumb to another.

In the great contest between the civil law and the Teutonic laws and institutions, which occurred all over Europe

after the fall of the Roman empire, the Teutonic, under the name of Anglo-Saxon, prevailed in England. King John was compelled, while that contest was going on, to sign Magna Charta, proclaiming the great fundamental principles of the common law. Soon afterwards, under the influence of the spirit of the common law, the representative system of government, composed of democracy, monarchy, and aristocracy, was established; which has served as a model for our form of government, and that of every nation that aspires after freedom. At that epoch Bracton wrote his treatise, "On the laws and customs of England." In it he asserted the supremacy of the law over the king. His words are, "*Rex non debet esse sub homine sed sub Deo et lege.*" This work was afterwards translated into French by Houard, an eminent Norman lawyer, and he avowedly suppressed that passage as too inconsistent with French constitutional law to be circulated in France. Such was the difference, at that early period, in the principles of constitutional law in England, where the common law prevailed, and in France, where the civil law prevailed.

In the beginning of the reign of Edward I the foundations of the common law were laid. The clergy, who favored the civil law, no longer monopolized legal knowledge. A school of common law had been established. Laymen had gradually formed themselves into societies called "inns of court," where they devoted their lives to the study of the common law. Edward selected his judges from this body of professional men. Then it was that the principles of the common law and the modes of procedure were systematized, and the courts, as they have subsisted for nearly six centuries, were framed and established; and the statutes which were passed during the reign for reforming the law were framed with reference to the principles of Magna Charta and the common law.

In the latter part of the fifteenth century the common law received a new impulse towards development from the celebrated treatise of Sir John Fortescue, "In Praise of the Laws of England." The work was written to in-

struct the prince royal, who was afterwards Henry VI, in the principles of the constitution of England as a monarchy limited by law. The superiority of the common law to the civil law as a scheme of liberty is thoroughly vindicated, and the greater prosperity of the people of England, when compared with the people of France, is ascribed to the different systems of law by which the two countries are respectively governed.

It was during the Elizabethan period of English history that the character of English jurisprudence was fixed forever on the basis of the common law. The great lawyers who fixed the land-marks of English jurisprudence at that climacteric epoch in English civilization utterly repudiated the civil law as inapplicable to the English polity. "As for your Majesty's laws of England," said Lord Bacon, "I could say much of their dignity, and somewhat of their defect, but they cannot but excel the civil law in fitness for the government; for the civil law was not made for the countries which it governeth." Lord Coke, by his Reports and his Institutes, laid that broader foundation for the common law which the exigencies of society in the era which was opening required. From that period to the present time the common law has held on in the direction then given to it. It has within itself an inherent force of expansion and progressiveness. It consists of elementary principles capable of indefinite development in their applications to the ever-varying and increasing exigencies of society. There are certain fundamental maxims belonging to it which are never departed from. These are the immutable basis of the system. There are other maxims which are restricted by modifications or limited by exceptions. It is pre-eminently a practical system. It has broken away from the shackles of theory and technicality when, in the changing conditions of society and of property, justice and expediency required it. For a time the ancient rules and practice may have resisted the equitable demands of the new exigencies in human life; but when the new exigencies have shown themselves to be perma-

nent interests in society, English jurisprudence has always found within its acknowledged frame of justice means of providing for the new rights and obligations which have sprung from the ever-widening sphere of civilization. The method of its progress is simple and plain. When a case is brought into a court the first question which legitimately emerges from the facts is, whether there is any statute which provides for it. If there is none, then it is inquired whether there be any clear principle of common law which fixes the rights and obligations of the parties. If the answer be again in the negative, then springs up the inquiry, whether there be any principle of the common law which, by analogy or parity of reason, ought to govern. If from neither of these sources a principle of adjudication for the case can be educed, it is recognized as a new case, and the principles of natural justice are applied to its solution. But if the principles of natural justice, on account of any technical or other impediment, cannot be applied to the settlement of the respective rights of the parties, then, by the immutable juridical principles of the common law, founded upon the jealous limitation of judicial discretion, if equity cannot relieve, the case must fail; and provision can only be made by statute for future cases of like nature. It matters not how the civil law or other foreign jurisprudence may have disposed of the question, unless, upon one of the principles which have been stated, the case can be adjudged, the party must fail of relief who seeks the aid of a court. "The Roman law," said Tindal, C. J., in *Acton v. Blendell*, "forms no rule, binding in itself, upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our own books, it affords no small evidence of the soundness of the conclusion at which we have arrived if it proves to be supported by that law the fruit of the researches of the most learned men, the collective wisdom of ages, and the ground-work of the municipal law of most of the countries in Europe."

Upon such principles has the common law based its

practice and developed its science. From first to last, through the courts at Westminster, the common law has resisted the introduction of the civil law into the jurisprudence of England. At the very time that the Tudors and the Stuarts were grasping at high prerogative the common law was maturing its vigor in the courts. Coke, one of their judges, did more to develop and organize it for protecting the individual against arbitrary power than any man who has appeared in the progress of English society. In him the professional instinct of the common law judge reached its sublimest sense of human right. He saw that the English constitution draws its whole life from the common law, and is but the frame-work of its living spirit. By the common law "every man's house is called his castle. Why? Because it is surrounded by a moat or defended by a wall? No! It may be a straw-built hut; the wind may whistle through it, the rain may enter it, but the king cannot."

In all the various revolutions, with their dark and dreary scenes of violence and bloodshed, through which England has passed, the people have clung to their ancient laws with a devotion almost superstitious. When our forefathers established governments in America they laid their foundations on the common law. And when difficulties grew up between them and the mother country, they acted as their English ancestors had always acted in their political troubles—interposed the common law as the shield against arbitrary power. When the United Colonies met in Congress, in 1774, they claimed the common law of England as a branch of those "indubitable rights and liberties to which the respective colonies are entitled." And the common law, like a silent providence is still the preserver of our liberties.

OF PARTIES TO ACTIONS.

Parties to actions will be presumed to be citizens of the State until the contrary appears, (a.)

Causes of action consist either of breaches of contract, or of injuries to the person, or to character, or to property.

Every person seeking redress at law must seek it in regard to a breach of contract, or to an injury to the person, or to character, or to property. It must always be concerning some one of these causes of action that the professional advice of a lawyer is sought. And the question will at once arise, whether the right claimed, or the redress sought, if any, be in one person or in more than one. If it be in one, the action, if brought, must be in the name of that person alone. But if it be in more than one, the action must be brought in the name of all, (b.) So, on the other hand, if the obligation or liability be upon one person only, the action must be brought against that person alone. But if the obligation or liability be upon more than one person, the action must be brought against all the persons bound or liable, (c.) And if the obligation or liability be both joint and several, either a joint or a several action may be brought, (d.)

Two incorporated companies may join in an action of assumpsit, to recover money deposited in a bank in their joint names, (e.)

Actions founded upon breaches of contract are techni-

(a.) *Lester v. Wright*, 2 Hill, 320.

(b.) 1 Chitty Plead., 8

(c.) 1 Chitty Plead., 41; 1 Saund., 291 b, note 4.

(d.) 1 Chitty Plead., 43.

(e.) *New York and Sharon Canal Company v. Fulton Bank*, 7 Wend., 412.

cally called actions *ex contractu*. Actions for injuries to character, or person, or property, are technically called actions *ex delicto*.

The rules relative to the number of *plaintiffs* in actions will be stated first.

1. If too many persons are made plaintiffs in an action, either *ex contractu* or *ex delicto*, the objection is fatal at any stage of the proceedings, by motion in arrest of judgment, if the objection appears on the face of the pleadings, or at the trial as a ground of nonsuit.

2. If too few persons are made plaintiffs in an action *ex contractu*, the objection, if appearing on the face of the pleadings, is fatal in like manner at any stage of the proceedings, (*f.*) But in an action *ex delicto*, where there are too few plaintiffs, the plea in abatement is the only remedy, or sometimes an apportionment of damages at the trial.

The rules relative to the number of *defendants* in actions will be next stated.

1. In actions *ex contractu*, if too many persons are made defendants, the objection, if appearing on the face of the pleadings, is fatal on demurrer, or in arrest of judgment, or on nonsuit at the trial, (*g.*) In actions *ex delicto*, if too many persons are made defendants, the objection will not be fatal at the trial; the plaintiff may either enter nonsuit as to one and take a verdict as to another, or one may be acquitted by the jury and a verdict for damages be rendered against the others, (*h.*)

There are, however, some torts or injuries which are incapable of being committed jointly, as spoken slander. In such case the defendants may demur; or if a joint verdict be taken against them, they may move in arrest of judgment. But even in this case the plaintiff may remedy the defect by nonsuit as to all except one, against whom he may claim a verdict.

2. In actions *ex contractu*, if too few persons are made

(*f.*) 1 Chitty Plead., 13.

(*g.*) 1 Chitty Plead., 44.

(*h.*) 1 Chitty Plead., 86-87.

defendants, advantage can only be taken of it by plea in abatement. Hence, if there be any doubt as to the number of persons liable, the plaintiff should first sue only those certainly liable, running the risk of the plea in abatement, which must, at an early stage in the proceedings, furnish him a better writ, and will operate as an estoppel to prevent a denial of the contract being joint, (i.) In actions *ex delicto*, the plaintiff is not compelled to sue all the persons jointly liable. A tort is in its nature the separate act of each person committing it, and the plaintiff may, at his discretion, join all of them in an action, or he may sue any one or more of them, (j.) But if he brings a separate suit against each cotrespasser, the one to the subsequent action may plead the first action in abatement, and a recovery against one will be a bar to an action against another. This doctrine is, however, controverted by some authorities, which maintain that separate actions may be sustained against each cotrespasser. If, however, the action *ex delicto* be against one for matters affecting real property held in common, the party sued may plead in abatement the non-joinder of his cotenant.

An outline of the doctrine and the consequences of making too many or too few persons parties, either as plaintiffs or defendants, to actions, has now been presented.

Attention will next be directed to the doctrine relative to the interest which a person must have in a cause of action to authorize him to maintain an action at law.

The person who brings the suit must be the party with whom the contract on which it is brought was made, or in whom his legal interest is vested. And in actions *ex delicto* the person who brings the suit must be the party whose legal rights have been affected by the injury. This rule excludes persons who have only *equitable* rights from becoming plaintiffs in actions at law, (k.) As where a bond is given to A, to pay him a sum of money for the benefit of

(i.) 1 Chitty Plead., 46.

(j.) 1 Chitty Plead., 86-87.

(k.) 1 Chitty Plead., 1, note a; *ib.*, 2 and note 2.

B, the action must be brought by A, and not by B; so, if injury is done to land of which A is trustee and B is *cestui que trust*, the action must be brought in the name of the trustee. So, also, a mere agent cannot bring suit, but it must be brought in the name of the principal; as, where a person contracted to pay to the treasurer of a board of commissioners a certain sum of money, it was held that the board, and not the person who *happened* to be treasurer, was the proper party to sue, (*l.*) Where, however, the agent has a beneficial interest in the contract, as a factor, or has a special property in the thing which renders him liable *over* to his principal, as a common carrier, he may sue, unless the principal elect to sue in his own name. So, if an agent or servant appear to be the principal, and act as such, so as to become personally liable on the contract, he may sue; for his responsibility gives him an interest in the transaction. And the agent may do this, even where he purchases goods for a principal and by his authority, but in his own name, and although he state at the same time to the vendor that he has an unnamed vendee, (*m.*)

In suing on a joint contract made by several persons, all the contractors must join in the action. And where the contract is several, each party must bring a separate action. But some causes of action are both joint and several; and they may be treated as either joint or several, at the discretion of the plaintiff. But the plaintiff must treat them in his action either as entirely several or as entirely joint. He cannot treat them as joint in regard to two or more persons and several as to others. Thus, tenants in common may join or sever in contracts relating to the common estate. So, in a covenant with four, to pay each of them a sum of money, all may join or each may sue separately. And where three persons contract jointly and severally to pay a debt, all may be sued for the whole, or each one separately. But one action cannot be brought against two of

(*l.*) *Pigott v. Thompson*, 3, B. & P.; 1 Chitty Plead., 7.

(*m.*) *Thort and others v. Spackman*, 2, B. & Ad., 962.

them and another action against the third obligor. There is, however, an exception to this rule. Dormant partners may join in an action with their copartners, or their names may be omitted from the action. And in actions against the firm, the plaintiff may sue the dormant partners or omit their names, at his election, (*n*)

At common law no one could bring a suit but the party with whom the contract was made, or to whom the injury was done. An assignee could not sue, the doctrine of the common law being that choses in action are not assignable. The common law grew up in feudal times, when land was the only property worthy of consideration. All its rules, therefore, were framed with special reference to land and the feudal policy. The whole spirit of the common law, with its technical doctrines and strict forms, is, therefore, directly opposed to the easy transfer of property, and in open hostility to the spirit of commerce, which requires the transfer of property to be as easy as possible. When, therefore, commerce began to be a great interest in England, the courts, with judges trained in the technical subtleties of the common law, endeavored to schackle its transactions with the technicalities of the common law. As it had been adjudged in the Year Books that "a chose in action cannot be transferred because livery of seizin cannot be given of it, as of land," the principle of the adjudication was applied to bills of exchange and promissory notes when they began to be used by merchants to facilitate their transactions. Lord Holt rescued bills of exchange and promissory notes from the trammels of the common law, and established the doctrine of negotiable securities as it now prevails. It was settled that indorsees could sue in their own names, (*o*.) The principle being thus established that certain choses in action are assignable, the principle has been extended in modern times, and especially in this country, by legislation, so far as to enable assignees of bonds,

(*n*.) 1 Chitty Plead., 43.

(*o*.) 1 Chitty Plead., 15, 16.

legacies, distributive shares of estates, accounts current, and other choses in action for the payment of money, in many of the States of our Union, to sue in their own name.

As early as the 32 Henry VIII, by statute, ch. 34, the assignee of a reversion of land might sue on the covenants running with the land. And wherever there has been an assignment by operation of law, as in cases of bankruptcy and insolvency, the assignee may sue in his own name.

In actions *ex delicto* there can be no assignment of the cause of action. For injuries to property the assignee by operation of law may sue.

As all persons who have causes of action and all persons liable to be sued may die, the law has made provision for this constantly occurring contingency.

1. In the case of the death of a person jointly interested with others, the right of action accrues to the survivors; and in the case of the defendants, the responsibility rests upon the survivors. The executors of deceased joint plaintiffs or defendants have no concern at law with the cause of action. In equity, however, their ulterior rights and liabilities are preserved, (*p.*)

2. In actions *ex contractu*, upon the death of either plaintiff or defendant, or of the last survivor when the cause of action was joint, the cause of action survives to and against the executor or administrator of each. But in actions *ex delicto*, at common law the cause of action was entirely gone. This rule was, however, altered by the statute 4 Edward III, ch. 7.; under a liberal construction of which it is now held, that all actions for injury to personal property may be brought by the personal representatives. But it does not provide for actions against the representatives of the wrongdoers. The principle of this statute has been so extended by legislation in almost all the States of our Union, that it may be assumed, as a general rule, that in actions *ex delicto*, whether for injuries to real or to personal property,

(*p.*) 1 Chitty Plead., 19.

the right of action survives for and against personal representatives. But with regard to injuries to the person, or to reputation, as assaults, slanders, malicious prosecutions, and other such wrongs, the common law, in its noble charity, covered the wrongs with the oblivion of the grave, and would not suffer actions for them to be brought by or against an executor or administrator. The modern law has not disturbed this rule of the common law.

Owing to the changed conditions of modern life, with its contingencies of injury, legislation has, within a few years, granted a remedy where the common law gave no redress. An action of damages has been given to a husband, or wife, or parent, or child, in those cases where death has been occasioned by the carelessness or negligence of another, under such circumstances as that, if death had not ensued, the party injured would have had an action. In such cases the jury will give the pecuniary value of the life destroyed to the party entitled to sue, as nearly as it can be estimated. In cases of death by railroad collisions and like accidents, the remedy is now very common, and the damages are generally liberal.

In the case of a contract under seal or of record, the heir of the contracting party may be sued after his death, provided he be named in the contract and have assets by descent. And by virtue of the statute 3 and 4 William and Mary, chapter 14, devisees may be sued together with the heir in an action of debt; but not in an action of covenant for a violation of the contract in the life of the testator, (*q.*)

Another of the great contingencies of life which change the relations of persons to causes of action is marriage.

Where the husband is civilly dead, as where he has left the country and has deserted his wife, or where he is confined in the penitentiary for an infamous crime, the wife may, in general, contract and sue and be sued as a single woman. Where a contract has been made with a female

(*q.*) 1 Chitty Plead., 68-69.

before marriage, or a wrong has been done to her person or property, she must join her husband as plaintiff, and she cannot sue alone, (r.) And where an action is brought against her, upon any contract made by her before marriage, or any wrong committed by her before or after marriage, the husband must be joined in the action. And a husband cannot sue alone upon contracts made by a third person with his wife before her marriage, nor for injuries to her person or to her personal or real property; because in all such cases, she being the meritorious cause of action, the right would survive to her upon his death. The husband may sue alone for an injury to the person of his wife during marriage; but in such case he can recover only for his own loss and not for her personal sufferings. An action of this sort is very rare; for when husband and wife join in action, the injuries sustained by both are estimated and allowed by the jury in one verdict with very liberal compensation. If the wife survive the husband, she may be sued upon all personal wrongs committed by her before or during marriage. If the husband survive the wife, he cannot be sued for her wrongs or contracts personally; but if she has left personal property not reduced into possession by her husband, he may be sued upon her contracts, and held responsible, to the extent of such choses in action, in the character of administrator of his wife.

The objection that a wife has sued or had been sued without her husband, is only matter of abatement and not matter in bar of the action, in those cases where she is the meritorious cause of action; or she may have writ of *coram nobis* to correct the error. But if the husband sue alone, where she ought to join, or joins her in the action where he ought to sue alone, it is fatal on demurrer, or as ground of nonsuit.

Infancy is another consideration which affects the doctrine and practice relative to parties to actions at law, (s.)

(r.) 1 Chitty Plead., 28-33; *ib.*, 73-75.

(s.) 1 Chitty Plead., 428.

Where infants are concerned as plaintiffs, they must appear and sue by guardian or next friend. And where they are made defendants, they must appear and plead by guardian. It requires, in such cases, a motion to the court for leave to appear or compel him to appear by guardian. If an infant defendant appear and plead by attorney, though judgment be entered against him in the action, he may, after he comes of age, have writ of error *coram nobis*, to correct the error and reverse the judgment, (t.)

I have spoken of the right of action surviving, in certain cases, to the executor or administrator, heir and devisee, and against them.

We must, however, distinguish the right of action from the particular action which may have been brought and was pending at the time of the death of either plaintiff or defendant. While the right of action in the cases mentioned survives, the particular action itself, if any had been brought, ceased; and the parties succeeding to the right were compelled, at an early period in the history of the law of actions, to bring a new action, all the steps taken in the previous action being of no avail. But a remedy for this evil was provided in England by the statute 9 William III, ch. 2, § 7, which enacted that where there were two or more plaintiffs and defendants, the death of one or more should not abate the action if the cause of action survived, but, upon suggesting the death upon the record, the suit should proceed between survivors. But the statute went no further than the particular case, and the case of death after interlocutory and before final judgment for the plaintiff or defendant. The principle of the statute of William III has been extended to all other cases where the right survives; and now, instead of bringing a new suit, the party, whether plaintiff or defendant, may suggest, upon the record, the death of his adversary, whereupon a summons issues to bring in his proper representatives, and upon their appearance the cause is said to *revive*, and pro-

(t.) 11 Johnson, 460, DeWit v. Post.

ceeds from the point at which it was arrested as if no death had interposed. The opposite party is allowed such new and further pleas touching the sufficiency of assets, &c., as the altered circumstances require, (*u.*)

As the misjoinder or nonjoinder of parties is the chief evil to be avoided in bringing actions at law, and the means by which advantage is to be taken of it is important, I will propound the doctrine on the subject, (*v.*)

The means especially established in pleading for taking advantage of the misjoinder and nonjoinder of parties is the plea in abatement. The object of a plea in abatement is not to defeat the right of action. That can only be done by a plea in bar. Its purpose is to give a better writ. In a case of nonjoinder of defendants, the persons sued by a plea in abatement pray judgment of the writ and declaration; and then allege, as a ground, that the instrument of writing in the declaration mentioned was made by themselves jointly, with others, whom they must describe by their christian and surnames as in a declaration, in order that the plaintiff may do the same in his new writ. The plea must allege that the cocontractors are still living. Where one of the co-obligors in a common bond is dead, it is not necessary, in a plea in abatement, to state the fact; because it is only necessary to name those who can be sued in the new writ. But where a suit is brought on a recognizance, it is necessary to allege the death of deceased obligors; and in a plea in abatement to an action upon a recognizance for nonjoinder of a living party, *perhaps* it would be proper also to allege the death of any deceased obligor, if the mention of the fact had been omitted in the writ and declaration. In an action on a common bond it is not necessary to mention the death of a deceased obligor. It is not noticed. Hence, the difference in pleas in abatement to actions on the two kinds of instruments for a nonjoinder. It is a rule of law, that in general a person is

(*u.*) 1 Chitty Plead., 19.

(*v.*) 1 Chitty Plead., 13, 16, 45, 66, 443, 452, 467, 468, 703.

presumed to be living until he is proved to be dead, unless seven years have elapsed since he was heard of; and it might be inferred from this rule that in suing on a bond it would be necessary to allege the death of a co-obligor. The rule is a rule of evidence and not a rule of pleading. Hence, there is no necessity for such allegation of death.

It is important for a pleader to look well ahead to the consequences of the failure of a plea in abatement before he adopts it. The failure of a plea in abatement is the same in effect as a judgment by default. The plea admits the cause of action. In a case of damages, all is admitted but the amount; that may be contested. But nominal damages is, at all events, admitted. And as the allegations in a plea in abatement must be strictly proved as in a declaration, a failure in any material particular will be fatal. When the plea is successful, as the writ must be quashed and cannot be amended, that particular action fails. But in the new action the defendant is estopped by the plea in abatement from denying that there was once a good cause of action, though he may offer in defense any proper matter which has occurred since the plea was pleaded.

THE PRINCIPLES OF PLEADING,

&c., &c., &c.

In the course of administering justice between litigating parties there are two successive objects: to ascertain the subject for decision, and to decide. It is evident that, towards the attainment of the first of these results, there is, in a *general* point of view, only one satisfactory mode of proceeding; and that this consists in making each of the parties state his own case, and collecting, from the opposition of their statements, the points of the legal controversy. Thus far, therefore, the course of every system of judicature is the same. It is common to them all to require, on behalf of each contending party, before the decision of the cause, a statement of his case. But from this point the coincidence naturally ceases. In the style of the contending statements, (called in forensic language *the pleadings*,) the principles on which they are framed, the manner in which they govern or affect the subsequent course of the cause, and the degree of attention paid to their construction, each different code of law exhibits some material difference of practice. The present disquisition relates only to that peculiar system of statement established in the *common law of England*.

This system, known by the name of *Pleading*, (a,) of remote antiquity in its origin, has been gradually molded into its present form by the wisdom of successive ages. Its great and extensive importance in legal practice has long recommended it to the early and assiduous attention of every professional student. Nor is this its only claim

(a.) See Appendix, note 1.

to notice; for, when properly understood and appreciated, it appears to be an instrument so well adapted to the ends of distributive justice, so simple and striking in its fundamental principles, so ingenious and elaborate in its details, as fairly to be entitled to the character of a fine juridical invention.

It is proposed in this work to *collect and arrange the principal rules of pleading, and to explain their scope and tendency as parts of an entire system.* But, for the sake of greater clearness and comprehensiveness of view, it will be necessary, first, to give some idea of the general form and manner of pleading, and of its connection with other parts of the suit. The following chapter shall, therefore, be devoted to a summary and connected account of *the whole proceedings in an action.*

CHAPTER I.

OF THE PROCEEDINGS IN AN ACTION, FROM ITS COMMENCEMENT TO ITS TERMINATION.

Actions are divided into *real*, *personal*, and *mixed*, (b.) *Real* actions are those brought for specific recovery of lands, tenements, or hereditaments. *Personal*, are those brought for specific recovery of goods and chattels, or for damages, or other redress, for breach of contract, or other injuries, of whatever description, the specific recovery of lands, tenements, and hereditaments only excepted. *Mixed* actions are such as appertain in some degree to both the former classes, and therefore are properly reducible to neither of them, being brought both for specific recovery of lands, tenements, or hereditaments, and for damages for injury sustained in respect of such property. Again, in *real* actions there is a division between those founded on the *seizin* or *possession*, and those founded on the *property* or *right*, (c.)

There are three superior courts (d) of the common law, in each of which actions may be brought. These are the king's bench, the common pleas, and the exchequer, each consisting at present of four judges. The original distribution of business among them, upon their first establishment, was as follows: The cognizance of crime, and of such matters of litigation in general as directly concerned

(b.) Bract., 101., b.; Fleta, lib. 1, c. 1; 3 Bl. Com., 117.

(c.) Placita de *recto*—placita super *seisinis*. Glan., lib. 13, c. 1. Earum que sunt in *rem*, quædam proditæ sunt super ipsa *possessione*, et quædam super ipsa *proprietate*; est enim *possessio* rei, et *proprietas*. (Bract., 103, a.) Est jus *possessionis* et jus *proprietatis*. (Fleta, lib. 4, c. 1.)

(d.) This term is here used to express the courts of general as opposed to those of local and peculiar jurisdiction. But there is another sense of the term which includes certain other courts besides those mentioned in the text. (See Peacock v. Bell, 1 Saund., 73.)

the crown, (those relating to the revenue excepted,) was exclusively appropriate to the court of king's bench; civil suits between subject and subject, (called *communia placita*,) to the common pleas; and matters relating to the royal revenue, to the exchequer, (*e.*) In course of time considerable violations of this arrangement took place, usurpation on the province of the common pleas being made by each of the other courts. Of these changes the general result is as follows: The king's bench has now jurisdiction, not only in those matters which belonged to it by its original constitution, but in *all personal actions whatever*. The case is the same with the exchequer; but both these courts are still excluded from the cognizance of actions *real* and *mixed*, (*f.*) The common pleas retains its original province, and therefore entertains all actions whatever between subject and subject, whether of the real, mixed, or personal class.

An action is commenced in the king's bench or common pleas either by *original writ* or by *bill*; in the exchequer, by *bill* only. Of these methods of proceeding, the former is the regular and ancient one, and the latter is in the nature of an exception to it. The proceeding by *original writ* consequently claims the first notice.

An *original writ* (*breve originale*) is a mandatory letter issuing out of the court of chancery, under the great seal, and, in the king's name, directed to the sheriff of the county where the injury is alleged to have been committed, (*g.*) containing a summary statement of the cause of complaint, and requiring him, in most cases, to command the defendant (*h.*) to satisfy the claim; and, on his failure

(*e.*) Introd. to Sellon's Prac., sec. xxiv; 3 Bl. Com., 44.

(*f.*) Hale's Disc. of the K. B. and C. P., (in Harg. Law Tracts,) c. 4. With respect, however, to the K. B., this author excepts the following mixed actions: *Assize*, *ejectio firmæ*, and *ejectio custodæ*. And a *quare impedit* at suit of the king may be either in the C. P. or K. B. (1 Arch., 435; F. N. B., 32 E.)

(*g.*) An original writ cannot be issued into a county *palatine*. For the mode of practice pursued to obviate this difficulty, see 1 Tidd's Pract., p. 100, 8th edit.

(*h.*) It may be observed here that in a *personal* action the parties are called

to comply, then to summon him to appear in one of the superior courts of common law, there to account for his non-compliance. In some cases, however, it omits the former alternative, and requires the sheriff simply to enforce the appearance.

One object of the original writ, therefore, is to *compel the appearance* of the defendant in court; but it is also necessary; as *authority for the institution of the suit*; for it is a principle, (subject only to the exception introduced by the practice of proceeding by *bill*,) that no action can be maintained in any superior court without the sanction of the king's original writ; the effect of which is, to give cognizance of the cause to the court in which it directs the defendant to appear, (i.) To sue out an original writ is, consequently, the first step taken in the suit. It is the business of the plaintiff to sue it out, and he obtains it as a matter of course, upon payment, however, to the king of a *fine* proportionate to the amount of the demand in the action, (k.)

The original writs differ from each other in their tenor, according to the nature of the plaintiff's complaint, and are conceived in fixed and certain forms. Many of these forms are of a remote and undefined antiquity, but others are of later origin, and their history is as follows: The most ancient writs had provided for the most obvious kinds of wrong; but in the progress of society cases of injury arose, new in their circumstances, so as not to be reached by any of the writs then known in practice; and it seems that either the clerks of the chancery (whose duty it was to prepare the original writ for the suitor) had no author-

plaintiff and *defendant*; in a *real* action, more properly *demandant* and *tenant*. The former terms, however, are applicable in actions of every description, and are those commonly employed when a suit is mentioned generally, without reference to its particular nature.

(i.) Non potest quis sine brevi agere. (Bract., 413 b.; Gilb. Hist. C. P., 2; 3 Bl. Com., 273.)

(k.) See the table of fines payable on original writs, Tidd's Appendix, p. 24, 6th edit.; and see the subject of these fines fully explained in the Introduction to Sellon's Practice, xl-xliv.

ity to devise new forms to meet the exigency of such new cases, or their authority was doubtful, or they were remiss in its exercise, (*l.*) Therefore by the statute Westminster 2, 13 Edward I, chapter 24, it was provided, "That as often as it shall happen in the chancery that in one case a writ is found, and in a *like case*, (*in consimili casu*,) falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the chancery shall agree in making a writ, or adjourn the complaint till the next Parliament, and write the cases in which they cannot agree, and refer them to the next Parliament," &c. This statute, it will be observed, while it gives to the officers of the chancery the power of framing new writs *in consimili casu* with those that formerly existed, and enjoins the exercise of that power, does not give or recognize any right to frame such instruments for cases *entirely new*. It seems, therefore, that for any case of that description no writ can be lawfully issued except by authority of Parliament. But on the other hand, new writs were copiously produced, (*m.*) according to the principle sanctioned by this act, *i. e.*, *in consimili casu*, or upon the analogy of actions previously existing; and other writs also being added from time to time, by express authority of the legislature, large accessions were thus, on the whole, made to the ancient stock of *brevia originalia*.

All forms of writs once issued were entered from time to time and preserved, in the court of chancery, in a book called the *Register of Writs*, (*n.*) which in the reign of Henry VIII was first committed to print and published, (*o.*) This book is still in authority, as containing, in general, an accurate transcript of the forms of all writs as then framed, and as they ought still to be framed in modern practice. It seems, however, that a variation from the register is not conclusive against the propriety of a form,

(*l.*) *Vide* 2 Reeves, 203; 3 Bl. Com., 50; 8 Rep., 48, 49.

(*m.*) 3 Bl. Com., 51; 3 Woodd., 168; 4 Reeves, 430.

(*n.*) 3 Bl., 183; 4 Reeves, 426; Gilb. Hist. C. P., 4.

(*o.*) 4 Reeves, 426, 432.

if other sufficient authority can be adduced to prove its correctness, (*p.*)

An original writ, as already stated, is essential to the due institution of the suit, (*q.*) These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are considered as within the scope of judicial remedy, in the English law, but those to which the language of some known writ is found to apply, or for which some new writ, framed on the analogy of those already existing, may, under the provision of the statute of Westminster 2, be lawfully devised. The enumeration of writs, and that of actions, have become, in this manner, identical, (*r.*)

The *law of actions*, comprising their more particular divisions, (*s.*) and the rules as to their respective competency in different cases, the proper parties to the suit, and the power of joining different claims or demands in the same writ, is a subject which it is not necessary here to discuss, the object of this work being only to treat of those general and fundamental rules of pleading which are applicable to all actions without distinction. In order, however, to the subsequent illustration of these rules, it will be proper to present the reader with examples of such of the forms of original writs as most frequently occur in modern practice.

The *real* and *mixed* actions which in modern times have perhaps come most frequently into use are those of a WRIT OF RIGHT, FORMEDON, DOWER, and QUARE IMPEDIT.

The WRIT OF RIGHT is the remedy appropriate to the case where a party claims the specific recovery of corporeal hereditaments in fee simple; founding his title on the right of property, or mere right, arising either from his

(*p.*) Bac. Ab., Abatement, H; 4 Reeves, 432.

(*q.*) *Supra*, 41.

(*r.*) See Appendix, note 2.

(*s.*) See a Table of Actions, Com. Dig., Action D, 2; and another, in Roscoe on Actions, &c., p. 3.

own seizin, or the seizin of his ancestor or predecessor, (L) Its form is as follows:

WRIT OF RIGHT.

George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, and so forth, to the sheriff of ——— greeting:

Command *C. F.* that justly and without delay he render unto *A. B.* four messuages, four gardens, and four acres of land, with the appurtenances, in the parish of ———, in the county of ———, which he claims to be his right and inheritance, and whereof he complains that the aforesaid *C. D.* unjustly deforces him. And unless he shall so do, and if the said *A. B.* shall give you security of prosecuting his claim, then summon, by good summoners, the said *C. D.*, that he be before our justices at Westminster, (*u.*) in eight days of Saint Hilary, to show wherefore he hath not done it; and have you there the summoners and this writ.

Witness ourself at Westminster, on the ——— day of ———, in the ——— year of our reign, (*x.*)

The WRIT OF FORMEDON lies where a party claims the specific recovery of lands and tenements, as issue in tail; or as remainderman, or reversioner, upon the determination of an estate tail, (*y.*) Its form is as follows, (*z.*)

WRIT OF FORMEDON.

George the Fourth, &c., (a.) to the Sheriff of ——— greeting:

Command *C. D.*, that justly and without delay he render unto *A. B.* the manor of *N.*, with the appurtenances, which *E. F.* gave to *G. B.* and the heirs

(*t.*) *F. N. B.*, 1 B.; 3 *Bl. Com.*, 191. As to the "right of property, or mere right," *vide supra*, p. 39. The writ here mentioned is the writ of right *quia dominus remisit curiam*, which is the principal and most usual species. As to this and the other species of the writ of right, see 1 *Arch.*, 402, 418; 3 *Chitty*, 635.

(*u.*) By "our justices at Westminster," or "our justices of the bench at Westminster," is intended, in writs, the court of common pleas, where, as already remarked, all real actions must be brought.

(*x.*) *Arch.*, 404; 3 *Chitty*, 635, 1st edit.; *Tyssen v. Clarke*, 3 *Wils.*, 558; *Glan.*, lib. 1, c. 6.

(*y.*) *Co. Litt.*, 326 b; *Booth*, 139, 151, 154.

(*z.*) The form here given is that of formedon in *descender*, viz, that brought by the issue in tail; when the action is at suit of the remainderman or reversioner, it is called a formedon in *the remainder* or in *reverter*, and the form of the writ varies accordingly.

(*a.*) The king's title is set forth in this and all the following writs in the same form as in the writ of right. (*Supra*, 44.)

of his body issuing, and which, after the death of the said *G. B.*, ought to descend to the said *A. B.*, the son and heir of the said *G. B.*, by form of the gift aforesaid, as it is said. And unless he shall so do, and if the said *A. B.* shall give you security of prosecuting his claim, then summon, by good summoners, the said *C. D.*, that he be before our justices at Westminster, in eight days of Saint Hilary, to show wherefore he hath not done it; and have you there the summoners and this writ.

Witness ourself at Westminster, on the — day of —, in the — year of our reign, (*b.*)

The WRIT OF DOWER lies for a widow claiming the specific recovery of her dower, no part of it having been yet assigned to her, (*c.*) Its form is as follows:

WRIT OF DOWER.

George the Fourth, &c., to the sheriff of — greeting:

Command *C. D.*, that justly and without delay he render to *A. B.*, widow, who was the wife of *E. B.*, now deceased, the reasonable dower which falleth to her of the freehold, which was of the said *E. B.*, her late husband, in the parish of —, whereof she hath nothing, as she says, and whereof she complains that the said *C. D.* deforces her. And unless he shall so do, and if the said *A. B.* shall give you security of prosecuting her claim, then summon, by good summoners, the said *C. D.*, that he be before our justices of the bench at Westminster, in eight days of Saint Hilary, to show wherefore he hath not done it; and have you there the summoners and this writ.

Witness ourself at Westminster, the — day of —, in the — year of our reign, (*d.*)

The WRIT OF QUARE IMPEDIT is the remedy by which, where the right of a party to a benefice is obstructed, he recovers the presentation; and is the form of action now constantly adopted to try a disputed title to an advowson, (*e.*) Its form is as follows:

WRIT OF QUARE IMPEDIT.

George the Fourth, &c., to the sheriff of — greeting:

Command *T.*, bishop of —, and *C. D.*, esquire, and *E. F.*, clerk, that

(*b.*) Booth, 141.

(*c.*) The writ here mentioned is the writ of dower *unde nil habet*, which is the principal species, and the only one known in practice. There is another, called a *writ of right of dower*, which applies to the particular case where the widow has received part of her dower from the tenant himself, and of land lying in the same town in which she claims the residue. (Booth, 166; *Glan.*, lib. 6, c. 4, 5.)

(*d.*) 3 Chitty, 593, 1st edit.; Booth, 166; *Glan.*, lib. 6, c. 15.

(*e.*) Booth, 223; 1 Arch., 434.

justly and without delay they permit *A. B.*, widow, to present a fit person to the church of ———, which is vacant and belongs to her presentation, as she saith, and whereof she complaineth that the said bishop and *C. D.* and *E. F.* unjustly hinder her. And unless they shall so do, and if the said *A. B.* shall give you security of prosecuting her suit, then summon, by good summoners, the said bishop and *C. D.* and *E. F.*, that they be before our justices at Westminster, in eight days of Saint Hilary, to show wherefore they will not do it; and have you there the names of the summoners and this writ.

Witness ourself at Westminster, the ——— day of ———, in the ——— year of our reign, (*f.*)

Of *personal actions* the most common are the following:
DEBT, COVENANT, DETINUE, TRESPASS, TRESPASS ON THE CASE, and REPLEVIN.

The WRIT OF DEBT lies where a party claims the recovery of a *debt*, *i. e.*, a liquidated or certain sum of money alleged to be due to him, (*g.*) Its form is as follows:

WRIT OF DEBT

George the Fourth, &c., to the sheriff of ——— greeting:

Command *C. D.*, late of ———, gentleman, that justly and without delay he render to *A. B.* the sum of ——— pounds, of good and lawful money of Great Britain, which he owes to and unjustly detains from him, as it is said. And unless he shall do so, and if the said *A. B.* shall make you secure of prosecuting his claim, then summon, by good summoners, the said *C. D.*, that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, (*h.*) to show wherefore he hath not done it; and have you there the names of the summoners and this writ.

Witness ourself at Westminster, the ——— day of ———, in the ——— year of our reign, (*i.*)

The WRIT OF COVENANT lies where a party claims *damages* for breach of *covenant*, *i. e.*, of a *promise under seal*. Its form is as follows:

(*f.*) Booth, 225; 3 Chitty, 583, 1st edit.; 1 Arch., 435.

(*g.*) This is debt in *the debet*, which is the principal and only common form. There is another species mentioned in the books, called debt in *the detinet*, which lies for the specific recovery of *goods*, under a contract to deliver them. (1 Chitty, 101, 1st edit.)

(*h.*) "Before us, wheresoever we shall then be in England," expresses in writs the court of king's bench, where the action in this and the following examples is supposed to be brought.

(*i.*) Tidd's Appendix, 6th edit.; see the most ancient form of this writ, Glan., lib. 10, c. 2.

WRIT OF COVENANT.

George the Fourth &c., to the sheriff of ——— greeting:

Command *C. D.*, late of ———, gentleman, that justly and without delay he keep with *A. B.* the covenant made by the said *C. D.* with the said *A. B.*, according to the force, form, and effect of a certain indenture (*k*) in that behalf made between them, as it is said. And unless he shall so do, and if the said *A. B.* shall make you secure of prosecuting his claim, then summon, by good summoners, the said *C. D.*, that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, to show wherefore he hath not done it; and have you there the names of the summoners and this writ.

Witness ourself at Westminster, the ——— day of ———, in the ——— year of our reign, (*l.*)

The WRIT OF DETINUE lies where a party claims the specific recovery of goods and chattels or deed and writings detained from him. This remedy is in somewhat less frequent use than any of the other personal actions above enumerated. The form of the writ is as follows:

WRIT OF DETINUE.

George the Fourth, &c., to the sheriff of ——— greeting:

Command *C. D.*, late of ———, yeoman, that justly and without delay he render to *A. B.* certain goods and chattels (*m*) of the value of ——— pounds, of lawful money of Great Britain, which he unjustly detains from him, as it is said. And unless he shall do so, and if the said *A. B.* shall make you secure of prosecuting his claim, then summon, by good summoners, the said *C. D.*, that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, to show wherefore he hath not done it; and have you there the names of the summoners and this writ.

Witness ourself at Westminster, the ——— day of ———, in the ——— year of our reign, (*n.*)

The WRIT OF TRESPASS lies where a party claims *damages* for a *trespass* committed against him. A trespass is an injury committed with *violence*, and this violence may be either *actual* or *implied*; and the law will imply violence, though none is actually used, where the injury is of a *direct* and *immediate* kind, and committed on the *person* or *tangible and corporeal property* of the plaintiff. Of *actual* violence,

(*k.*) Or "a certain deed-poll," or "certain articles of agreement," as the case may be.

(*l.*) Tidd's Appendix, 6th edit.; see the most ancient form of this writ, Glan., lib. 8, c. 4.

(*m.*) Or "deeds and writings," according to the nature of the case.

(*n.*) Impley, C. P., 772.

an assault and battery is an instance; of *implied*, a peaceable but wrongful entry upon the plaintiff's land. The form of the writ is as follows:

WRIT OF TRESPASS.

For an assault and battery.

George the Fourth, &c., to the sheriff of ——— greeting:

If *A. B.* shall make you secure of prosecuting his claim, then put by gages and safe pledges *C. D.*, late of ———, yeoman, that he be before us on the morrow of All Souls, wheresoever we shall then be in England, to show wherefore, with force and arms, at ——— aforesaid, he made an assault upon the said *A. B.*, and beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to him there did, to the damage of the said *A. B.* and against our peace; and have you there the names of the pledges and this writ.

Witness ourself at Westminster, the — day of ———, in the — year of our reign.

WRIT OF TRESPASS.

Quare clausum fregit.

George the Fourth, &c., to the sheriff of ——— greeting:

If *A. B.* shall make you secure of prosecuting his claim, then put by gages and safe pledges *C. D.*, late of ———, yeoman, that he be before us on the morrow of All Souls, wheresoever we shall then be in England, to show wherefore, with force and arms, he broke and entered the close of the said *A. B.*, situate and being in the parish of ———, in the county of ———, and with his feet, in walking, trod down, trampled upon, consumed, and spoiled the grass and herbage of the said *A. B.* there growing and being of great value, and other wrongs to the said *A. B.* there did, to the damage of the said *A. B.* and against our peace; and have you there the names of the pledges and this writ.

Witness ourself at Westminster, the — day of ———, in the — year of our reign.

The WRIT OF TRESPASS UPON THE CASE lies where a party sues for *damages* for any wrong or cause of complaint to which *covenant* or *trespass* will not apply, (*o.*) This action originates in the power given by the statute of Westminster 2 to the clerks of the chancery to frame new writs *in consimili casu* with writs already known, (*p.*) Under this

(*o.*) It is not easy to give a short and sufficiently comprehensive description of the scope of this action. That which is here attempted is perhaps new, and is believed to be accurate. A definition somewhat similar is given in 3 Woodd., 167.

(*p.*) *Supra*, 42.

power they constructed many writs for different injuries which were considered as *in consimili casu* with, that is, to bear a certain analogy to, a *trespass*. The new writs invented for the cases supposed to bear such analogy have received, accordingly, the appellation of writs of *trespass on the case* (*brevia de transgressione super casum*) as being founded upon the particular circumstances of the case thus requiring a remedy, and to distinguish them from the old writ of *trespass*, (*q.*) and the injuries themselves, which are the subject of such writs, are not called *trespasses*, but have the general names of *torts*, *wrongs*, or *grievances*. The writs of *trespass on the case*, though invented thus *pro re nata*, in various forms, according to the nature of the different wrongs which respectively called them forth, began, nevertheless, to be viewed as constituting collectively a new individual *form of action*; and this new genus took its place, by the name of **TRESPASS ON THE CASE**, among the more ancient actions of debt, covenant, *trespass*, &c. Such being the nature of this action, it comprises, of course, many different species. There are two, however, of more frequent use than any other species of *trespass on the case*, or perhaps than any other form of action whatever. These are, *assumpsit* and *trover*.

The action of *assumpsit* lies where a party claims *damages* for breach of *simple contract*, *i. e.*, a *promise not under seal*. Such promises may be *express* or *implied*; and the law always *implies* a promise to do that which a party is legally liable to perform. This remedy is consequently of very large and extensive application. The action of *trover* is that usually adopted (by preference to that of **DETINUE**) to try a disputed question of property in goods and chattels. In form it claims *damages*; and is founded on a suggestion in the writ, (which in general is a mere fiction,) that the defendant *found* the goods in question, being the property of the plaintiff, and proceeds to allege that he

(*q.*) 3 Reeves, 89, 243, 391. The first example in the books of this kind of action (*viz.* *trespass on the case*) that has been noticed by Mr. Reeves occurs in the reign of Edward III, 22 Ass., 41.

converted them to his own use. Specimens shall here be given of the original writ in *assumpsit*, in *trover*, and in another species of frequent occurrence, namely, an action on the case for *libel*.

WRIT OF TRESPASS ON THE CASE.

In assumpsit—for goods sold and delivered.

George the Fourth, &c., to the sheriff of ——— greeting:

If *A. B.* shall make you secure of prosecuting his claim, then put by gages and safe pledges *C. D.*, late of ———, gentleman, that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England, to show for that, whereas the said *C. D.* heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, at ———, in the county of ———, was indebted to the said *A. B.* in the sum of ——— pounds, of lawful money of Great Britain, for divers goods, wares, and merchandises by the said *A. B.* before that time sold and delivered to the said *C. D.*, at his special instance and request; and being so indebted, he, the said *C. D.*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, undertook and faithfully promised the said *A. B.* to pay him the said sum of money when he the said *C. D.* should be thereto afterwards requested; yet the said *C. D.*, not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtilly, to deceive and defraud the said *A. B.* in this behalf, hath not yet paid the said sum of money, or any part thereof, to the said *A. B.*, (although oftentimes afterwards requested;) but the said *C. D.*, to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said *A. B.* of ——— pounds, as it is said; and have you there the names of the pledges and this writ.

Witness myself at Westminster, the ——— day of ———, in the ——— year of our reign.

WRIT OF TRESPASS ON THE CASE.

In trover.

George the Fourth, &c., to the sheriff of ——— greeting:

If *A. B.* shall make you secure of prosecuting his claim, then put by gages and safe pledges *C. D.*, late of ———, gentleman, that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England, to show for that, whereas the said *A. B.* heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, at ———, in the county of ———, was lawfully possessed, as of his own property, of certain goods and chattels, to wit, twenty tables and twenty chairs of great value, to wit, of the value of ——— pounds, of lawful money of Great Britain; and being so possessed thereof, he, the said *A. B.*, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, came to the possession of the said *C. D.* by finding; yet the said *C. D.*, well knowing the said goods and chattels

to be the property of the said *A. B.*, and of right to belong and appertain to him, but contriving and fraudulently intending, craftily and subtilly, to deceive and defraud the said *A. B.* in this behalf, hath not as yet delivered the said goods and chattels, or any part thereof, to the said *A. B.*; (although often requested so to do;) but so to do hath hitherto wholly refused, and still refuses; and afterwards, to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, converted and disposed of the said goods and chattels to his, the said *C. D.*'s, own use, to the damage of the said *A. B.* of — pounds, as it is said; and have you there the names of the pledges and this writ.

Witness ourself at Westminster, the — day of —, in the — year of our reign.

WRIT OF TRESPASS ON THE CASE.

For a libel.

George the Fourth, &c., to the sheriff of —, greeting:

If *A. B.* shall make you secure of prosecuting his claim, then put by gages and safe pledges *C. D.*, late of —, gentleman, that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England, to show for that whereas the said *A. B.* now is a good, true, and honest subject of this realm, and as such hath always conducted himself; and, until the committing of the grievance hereinafter mentioned, was always reputed to be a person of good fame and credit, and hath never been guilty, nor, until the committing of the said grievance, been suspected to have been guilty, of perjury, or any other such crime; by means of which said premises he, the said *A. B.*, before the committing of the said grievance, had deservedly obtained the good opinion of all his neighbors and of all other persons to whom he was known, to wit, at —, in the county of —. And whereas, before the committing of the said grievance, a certain action had been depending in our court before us at Westminster, in the county of Middlesex, wherein one *E. F.* was the plaintiff and one *G. H.* was the defendant, which said action had been then lately tried at the assizes in and for the county of —; and on such trial the said *A. B.* had been examined on oath, and had given his evidence as a witness on the part of the said *E. F.*, to wit, at — aforesaid, in the county last aforesaid; yet the said *C. D.*, well knowing the premises, but greatly envying the happy condition of the said *A. B.*, and contriving and wickedly and maliciously intending to injure the said *A. B.* in his good fame and credit, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that he, the said *A. B.*, had been guilty of perjury, heretofore, to wit, on the — day of —, in the year of our Lord —, at — aforesaid, in the county last aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published, of and concerning the said action, and the evidence so given by the said *A. B.*, a certain false, scandalous, malicious, and defamatory libel, containing, among other things, the false, scandalous, defamatory, and libellous matter following, of and concerning the said *A. B.*, and of and concerning the said action, and the evidence so given by the said *A. B.*, that is to say: He (meaning the said *A. B.*) was forsworn on the trial, (meaning the

said trial, and thereby then and there meaning that he, the said *A. B.*, in giving his evidence as aforesaid, had committed willful and corrupt perjury.) By means of the committing of which grievance he, the said *A. B.*, hath been and is greatly injured in his said good fame and credit, and brought into public scandal, infamy, and disgrace, insomuch that divers good and worthy subjects of this realm have, by reason of the committing of the said grievance, suspected and believed, and still do suspect and believe, the said *A. B.* to have been guilty of perjury; and have, by reason of the committing of the said grievance, from thenceforth hitherto refused to have any transaction or acquaintance with the said *A. B.*, as they otherwise would have had, to the damage of the said *A. B.* of ——— pounds, as it is said; and have you there the names of the pledges and this writ.

Witness ourself at Westminster, the ——— day of ———, in the ——— year of our reign.

In the action of REPLEVIN (which is the last of those above enumerated) there is *no* original writ, (*r.*) this action not being *commenced* in the superior courts. It is, however, *entertained* there, by virtue of an authority which the superior courts exercise of *removing* suits, in certain cases, from an inferior jurisdiction, and transferring them to their own cognizance. Where goods have been *distrained*, a party making plaint to the sheriff may have them *replevied*, that is, redelivered to him, upon giving security to prosecute an action against the distrainer, for the purpose of trying the legality of the distress; and, if the right be determined in favor of the latter, to return the goods. The action so prosecuted is called an action of REPLEVIN, and is commenced in the county court. From thence it is removed into one of the superior courts by a writ either of *recordari facias loquelam*, or *accedas ad curiam*, (*s.*) In form it is an action for *damages* for the illegal taking and detaining of the goods and chattels. It is held that a replevin may be had

(*r.*) The action of replevin here mentioned is that by *plaint*, which is the only kind known in practice. There was anciently in use another species of replevin, in which a writ issued out of the court of chancery, directed to the sheriff. For the learning on this subject, consult *F. N. B.*, 69, 70; *Doct. Pl.*, 313, 314; *2 Inst.*, 139; *Dalt. Sh.*, 273; *Moor v. Watts*, *Ld. Ray.*, 617; *2 Selwyn*, 1053.

(*s.*) These writs vary slightly in their form. The former is in use when the replevin was commenced in the county court; the latter, when commenced in the court of a lord. (*2 Selwyn*, 1063.)

and an action of replevin brought upon other kinds of illegal taking, besides that by way of a distress, (*t.*) but in no other case is the proceeding now known in practice.

The reader has now seen the form of the writs in the most usual actions, as well those real and mixed, as personal; but it is proper, before proceeding further, to explain that even those more common real and mixed actions are incomparably less frequent than the ordinary actions of the personal class, and may be said to be of rare occurrence. At a very early period indeed, that is, soon after the reign of Edward III, (*u.*) two former kinds of remedy began gradually to fall into neglect, in consequence of their being more dilatory and intricate in their forms of proceeding than personal actions, and of their being cognizable only in the court of common pleas. In lieu of them recourse was had to certain *personal* actions, which, though they did not *claim* the specific recovery of land, (like those of the real and mixed class,) were yet attended with incidents that indirectly produced that benefit. Of these the principal, (*x.*) and that which is alone retained in modern practice, was the action of *ejectment*, (*ejectio firmæ*), a species of the personal action of TRESPASS, (*y.*) in which damages were claimed by a tenant for a term of years, complaining of forcible ejection or ouster from the land demised, (*z.*) In favor of this mode of remedy the courts determined that the plaintiff was entitled not only to recover the *damages* claimed by the action, but should also, by way of collateral and additional relief, recover *possession*

(*t.*) 2 Selwyn, 1053; 1 Chitty, 159, 1st edit.

(*u.*) See Hale's Hist. of Com. Law, 176.

(*x.*) It was, however, not the only one. The action of *forcible entry*, given by the stat. 8 Henry VI, had been applied to this purpose before the recovery of possession by ejectment came into practice. (Hale, Hist. Com. Law, p. 176.)

(*y.*) See Appendix, note 3.

(*z.*) This action is said by Mr. Serjeant Adams to have been invented in the reign of Edward II, or in the early part of that of Edward III. (Adams on Ejectment, ch. i, p. 7.)

of the land itself for the term of years of which he had been ousted, (a.)

In consequence of the establishment of this doctrine, which gave an ejectment an effect similar to that of a real or mixed action, claimants of land were led to have recourse to it in lieu of those inconvenient remedies. Regularly, indeed, none could resort to this form of suit but those who had sustained ouster from a term of years, such being the shape of the complaint; but it was rendered much more extensive in its application by the invention of a *fictional* system of proceeding, which enabled claimants of land, in almost every instance, upon whatever title they relied, (whether term of years or freehold,) to bring their cases ostensibly within the scope of this remedy. This fictitious method, being favored and protected by the courts, passed into regular practice; and the consequence is, that ejectment has long been the usual remedy for the specific recovery of real property, (b.) There are cases, however, in which the writ of right, the writ of dower, and other real and mixed actions are still necessary, and to which the proceeding by ejectment is held inapplicable; and it may be laid down generally, on this subject, that whenever the case is such that the claimant has not in him the *right of entry*, (c,) the fiction on which an ejectment rests ceases to be allowable, and recourse must consequently be had to a real or mixed action.

The different forms of original writs and actions having been now in some measure explained, it is time to consider the course of proceeding upon the original writ.

Supposing it to be duly issued and executed on the defendant, it is next to be *returned*.

(a.) This is said to have been determined at some time between 1455 and 1499. (See Adams on Ejectment, ch. i, p. 9.) Hale says it was not till the end of the reign of Edward IV. (Hist. Com. Law, p. 175)

(b.) See the whole course of proceeding in an ejectment, perspicuously stated, in 3 Bl. Com., 199.

(c.) See, as to this point, 3 Bl. Com., 174; Adams on Ejectment, ch. i, p. 34.

It will be seen, on inspection of the tenor of these instruments, that the sheriff is commanded to have the writ itself in court on a certain day, viz, the day on which the defendant is directed to appear there. On that day the writ is said to be *returnable*, and it is called the *return-day* of the writ. In each of the terms, except Easter, there are four stated days, called *general return-days*; in that term, five; and on one or other of these general return-days an original writ must be always made returnable. On the return-day it is the duty of the sheriff to remit the writ into the superior court of common law, with his *return*; that is, a short account in writing of the manner in which he has executed it.

If the defendant does not appear in obedience to the original writ, there issue, when the time for appearance is past, other writs, also returnable on some general return-day in the term, called writs of *process*, enforcing the appearance of the defendant, either by attachment, or distress of his property, or arrest of his person, according to the nature of the case. These differ from the original writ in the following principal particulars: They issue not out of chancery, but out of the court of common law, into which the original is returnable, and accordingly are not under the great seal, but the private seal of the court; and they bear *teste* (that is, conclude with an attesting clause) in the name of the chief justice of that court, and not in the name of the king himself. It may also be observed that, in common with all other writs issuing from the court of common law during the progress of the suit, they are described as *judicial* writs, by way of distinction from the *original* one obtained from the chancery, (*d.*)

On these writs of process it is not necessary here to enlarge, (*e.*) but there is one of them which will require some specific notice. That is called a *capias ad responden-*

(*d.*) Bract., 413, b. 3; Bl. Co., 282.

(*e.*) Full information on this subject, with respect to personal actions, will be found in 1 Tidd, 105-142, &c., 8th edit; 1 Sellon, 64-102. (As to the process in real actions, see Booth, 4-23.)

dum. This writ directs the sheriff to enforce the appearance of the defendant by *arrest of his person*; and it lies in all the most usual personal actions. It is connected with the following important relaxation of practice relative to the original writ: The *capias*, being only process, is of course regularly issuable only after an original writ has been first sued out and returned; but to save time and expense, (*f*;) it has become the general practice, in all cases where it lies, *to resort to it in the first instance*, and to suspend the issuing of the original writ, or even to neglect it altogether, unless its omission should afterwards be objected by the defendant. Thus the usual *practical* mode of commencing a personal action by original writ is to begin by issuing not an original, but a *capias*. It will be convenient, however, to explain more particularly the manner in which this is done. In the king's bench the plaintiff's attorney commences the suit by preparing a draft (called a *præcipe*) (*g*) of the original writ, appropriate to the proposed action, in such form as is thought most proper and conformable to precedent. This he brings to the *filacer*, (an officer of the court of common law, whose duty it is to issue the *capias* and other process on original writs,) to serve as instructions for the preparation both of the original and the *capias*. To prepare or issue the *original*, indeed, is not the duty of the *filacer*, but of the *cursitor*, (an officer of the court of chancery;) but the *filacer* receives the *præcipe* for the purpose of transmitting it afterwards to the *cursitor*, as instructions for the latter officer to prepare an original, if it should become necessary to issue that writ, (*h*;) and, accordingly, he also receives from the plaintiff's attorney, on behalf of the *cursitor*, the *fine* which is payable to the king on obtaining an original, (*i*.)

(*f*.) 3 Bl. Com., 281.

(*g*.) The *præcipe* differs from the writ itself only in omitting some formular words at the commencement and conclusion. (See the form of it in Tidd's Appendix, p. 23, 6th edit.)

(*h*.) 1 Tidd, 100, 8th edit.; 1 Sellon, 212.

(*i*.) Attorn. Pract. Epit., 46.

In the mean time, and without waiting for the intended original, the filacer issues the *capias* in the form marked out by the *præcipe*; and after this, the plaintiff having no actual use for the original, it is seldom, in fact, taken out from the cursitor's office. In the common pleas the common course of proceeding is similar, but with this difference: that the *præcipe* is framed, and the *capias* made out, in a form not varying, (as in the king's bench,) according to the form of an action really intended to be brought, but always in that particular form of action called *trespass*, a fictitious method, pursued in a view to cheapness and expedition, (*k.*) In this action of *trespass* no fine is payable on obtaining the original writ, and consequently the filacer receives none from the plaintiff upon issuing the *capias*.

Such is the usual practical mode of commencing personal actions by original writ; but it is not the invariable course; for in some cases, both in the king's bench and common pleas, the *præcipe* is taken to the cursitor, and the original writ regularly made out and issued, (*l.*) and in all real and mixed actions, and also in personal ones, when the *capias* does not lie, the same regular method must be pursued. And even when the action actually commences with a *capias*, in the manner above described, it is to be observed, that the existence and issuing of an original is still, in point of law, always *supposed*; that instrument being, in principle, required, both as authority for the institution of the suit itself, and for the issuing of the process. Accordingly it is in the power of a defendant, in some cases, to object, at a proper period of the suit, that no original writ has issued; and upon such objection the

(*k.*) 3 Bl. Com., 281. "*A clausum fregit* is the ancient process of the C. P., and very useful to the subject, in saving the fines due upon the original, which they never sue if there is a verdict in the cause, but after a demurrer they sue it." Per Powell, J., *Brown v. Babbington*, *Ld. Ray.*, 883. (See this subject further explained in the introduction to *Sellon's Practice*, xliiii.)

(*l.*) *E. g.*, in proceeding to outlawry, 1 Tidd, 109, 8th edit. *Attorn. Pract. Epit.*, 57.

plaintiff will be obliged, retrospectively, to supply the defect by obtaining it in proper form from the cursitor's office, (*m.*)

Under the *capias* or other process the defendant is compelled to *appear*, either by force of *actual arrest*, (where the law authorizes that proceeding,) or by other methods of practice, which may be here passed over as belonging to the law of process, (*n.*) This *appearance* shall now be supposed to take place. At the same time the plaintiff also *appears*, and the *pleadings* commence. The next subject for consideration, therefore, shall be the manner in which the parties *appear and plead*.

Of this subject it is impossible to obtain a clear and correct idea, without some preliminary consideration of the method of appearance and pleading *anciently* in use. It will be necessary, therefore, here to give a short account of that method.

As now, so formerly, the defendant was made to appear by original writs and process founded upon them. These, as now, were returnable in *term time*; and it may be here observed, that as these writs were returnable always in *term*, so the appearance of the parties, the pleading, and all proceedings whatever in open court took place in term time only, and never in vacation.

The appearance of the parties might be either in *person* or by *attorney*; but *actual and personal* appearance in *open court*, either by the attorney or his principal, was requisite, (*o.*)

Upon such appearance followed the allegations of fact, mutually made on either side, by which the court received information of the nature of the controversy. These, described at first by the rude term of *loquela*, have been, in more modern times, denominated the *pleading* or *pleadings*.

(*m.*) 1 Sellon, 69, Introd., xlv; see Appendix, note 4.

(*n.*) On this subject the reader will find the necessary information in 1 Selton's Pract., ch. iii. iv.; Booth 4-23.

(*o.*) See Appendix, note 5.

As the appearance was an actual one, so the pleading was an *oral* altercation, in *open court*, in *presence of the judges*, (*p.*) This method of pleading *viva voce*, universally in use among the early European judicatures, (*q.*) and indeed the natural practice of all countries where the arts of civilization have made little progress, certainly prevailed in the English courts in the reign of Henry III, (*r.*) and is generally supposed to have been retained there to a much later era, (*s.*)

These oral pleadings were delivered either by the party himself or his *pleader*, called *narrator* and *advocatus*, (*t.*) and it seems that the rule was then already established, that none but a regular *advocate* (or, according to the more modern term, *barrister*) could be a pleader in a cause not his own, (*u.*)

It was the office of the judges to superintend or, according to the allusion of a learned writer, (*x.*) *moderate* the oral contention thus conducted before them. In doing this, their general aim was to compel the pleaders so to manage their alternate allegations as at length to arrive at some *specific point or matter affirmed on the one side and denied on the other*. When this matter was attained, if it proved to be a point of *law*, it fell of course to the decision of the judges themselves, to whom alone the adjudication of all legal questions belonged, (*y.*) but if a point of *fact*, the parties then, by mutual agreement, referred it to one of the various methods of trial then practiced, or to such trial as the court should think proper. This result being attained, the parties were said to be *AT ISSUE*, (*cd*)

(*p.*) See Appendix, note 6.

(*q.*) See Appendix, note 7.

(*r.*) *Vide* Bract., 372 b.

(*s.*) The practice is said to have been abandoned about the middle of the reign of Edward III. (Gilbert's Origin of King's Bench, v; 3; Reeves, 95.)

(*t.*) Bract., 412 a; 372 b.

(*u.*) See Appendix, note 8.

(*x.*) Mr. Reeves, vol. ii, 344, where some curious specimens from the Year Books are given of the manner of the *viva voce* pleading.

(*y.*) See Appendix, note 9.

exitum—that is, at the *end* of their pleading;) the question so set apart for decision was itself called **THE ISSUE**, and was designated, according to its nature, either as an issue in *fact* or an issue in *law*, (z.) The whole proceeding then closed, in case of an issue in *fact*, by an award or order of the court, directing the institution, at a given time, of the mode of trial fixed upon; or, in case of an issue in *law*, by an adjournment of the parties to a given day, when the judges should be prepared to pronounce their decision.

During this oral altercation a contemporaneous official minute, in writing, was drawn up by one of the officers of the court on a parchment roll, containing a transcript of all the different allegations of fact to the issue, inclusive. And, in addition to this, it comprised a short notice of the nature of the action, the time of the appearance of the parties in court, and the acts of the court itself during the progress of the pleading. These chiefly consisted of what were called the "*continuances*" of the proceedings, the nature of which was as follows: There were certain purposes for which the law allowed the proceedings to be adjourned, or continued over, from one term to another, or from one day to another in the same term; and, when this happened, an entry of such adjournment to a given day, and of its cause, was made on the parchment roll; and by that entry the parties were also appointed to reappear at the giving day in court. Such adjournment was called a *continuance*. Thus the award of the mode of trial on an issue in fact, and also the adjournment of the parties to a certain day to hear the decision of the court on an issue in law, were each of them *continuances*, and were entered as such on the roll. And if any interval or interruption took place without such an adjournment duly obtained and entered, the chasm thus occasioned in the progress of the suit was called a *discontinuance*, and the cause was considered as *out of court* by the interruption, and was not allowed

(z.) See Appendix, note 10.

afterwards to proceed, (a.) The official minute of the pleading and other proceedings thus made on the parchment roll was called **THE RECORD**. As the suit proceeded similar entries of the remaining incidents in the cause were, from time to time, continually made upon it; and when complete, it was preserved as a *perpetual, intrinsic, and exclusively admissible* testimony of all the judicial transactions which it comprised. From the beginning of the reign of Richard I (b) commences a still extant series of records, down to the present day; and such, as far back as can be traced, has always been the stable and authentic quality of these documents in contemplation of law, (c.)

To return to the modern practice.

The *appearance* of the parties is no longer (as formerly, by the *actual presence* in court either of themselves or their attorneys. It is to be observed, however, that an appearance of this kind is still *supposed*, and exists in fiction or contemplation of law. But, in fact, appearance is effected on the part of the defendant (where he is not arrested) by making certain formal entries in the proper office of the court, expressing his appearance, (d,) or, in case of arrest, it may be considered as effected by giving bail to the action. On the part of the plaintiff no formality expressive of appearance is observed; but upon appearance of the

(a.) See 3 Bl. Com., 316; 2 Hawk., 298.

(b.) 1 Reeves, 218. "In the king's bench the rolls are preserved in the treasury (of that court) from the beginning of the reign of Henry IV; in the C. P., from that of Henry VIII. The earlier rolls, from the year 1195 to the end of the reign of Henry V, in the former court; and in the latter, from 1199 to the year 1509, are deposited in the chapter-house of Westminster Abbey." (2 Tidd's Pract., 790; 8th edit. cites Jones's Index to Records, Preface, xxii.)

(c.) Co. Litt., 290 a; Ramsbottom v. Buckhurst, 2 M. & S., 565. (See some remarks on the general subject of Records, Appendix, note 11.) And for a particular account of the rolls and records of the different courts, consult 2 Tidd's Pract., 785, 8th edit., and the Report to the House of Commons on the Public Records, ordered to be printed July, 1800, pp. 112, 119, 233, 234.

(d.) Impey, C. P., 216; 1 Tidd. 238, 8th edit.

defendant, effected in the manner above described, both parties are considered as *in court*, (e.)

The appearance of either party may in general purport to be either in his own person or that of his attorney, (f:) but, when he appears by attorney, there ought regularly, and there is always supposed, to be a *warrant in writing* executed by him for that purpose, (g.)

The appearance, in common with all other subsequent proceedings supposed to take place in court, should (in accordance with the state of the ancient practice) *purport* to be in *term time*. It is to be observed, however, that though the proceedings are expressed as if occurring in the term, yet much business is now in *fact* done during the periods of *vacation*.

On appearance of the parties the *pleadings* commence, (h.)

These have long since ceased to be delivered *orally* or *in open court*. The present practice is to draw them up, *in the first instance, on paper*, and the attorneys of the opposite parties either mutually deliver them to each other out of court, or (according to the course of practice in the particular case) file them in the office of the proper officer of the court, from whence a copy of each pleading is furnished to the party by whom it is to be answered, (i.) These paper pleadings, at a subsequent period, are entered *on record* (according to a course of practice that will be afterwards stated) by transcribing them on a parchment roll.

At what exact period and by what gradations these alterations of the ancient system took place has not been accu-

(e.) Impey, C. P., 215.

(f:) See Appendix, note 12.

(g.) 1 Tidd, 88, 8th edit.

(h.) See Appendix, note 13.

(i.) 1 Sellon, 231, 294; 1 Arch. Prac., 110, 121, 1st edit.; 1 Tidd, 724, 8th edit., where it is explained in what cases they should be *filed* and in what *delivered*. They are filed in the common pleas, in the office of the prothonotaries. In the king's bench the declarations are filed with the clerk of the declarations, and the other pleadings with the clerk of the papers. (1 Sellon, 223, 295; 1 Tidd, 455, 724, 8th edit.; Impey, C. P., 69, 297.) As to the *Exchequer*, see 1 Manning's Prac., 283, 285.

rately determined. The most probable opinion seems to be, that the mode of departure from the old practice of making verbal statements in open court and entering them contemporaneously on record was, that the pleader (through an allowed relaxation of that proceeding) began to discontinue the oral delivery, and in lieu of it entered his statement, in the first instance, upon the parchment roll on which the record used to be drawn up; that the pleader of the other party had access to this roll, in order to concert his answer, which he afterwards entered in the same manner, and that the roll thus formed both the primary statement and the record; that this method being attended with some inconveniences, the expedient was at length adopted of putting the pleadings first *on paper*, delivering them in that form to either party, or filing them in the proper office of the court, and deferring the entry of them on record till a subsequent stage of the cause, (*k.*) It is supposed that the mode of entering in the first instance on the roll continued at least as late as the reign of Edward IV, (*l.*) When it began, that is, when the oral pleading was first abandoned, is a point of some uncertainty; but the probability seems to be that it took place in the middle of the reign of Edward III, (*m.*)

If the method of written pleading was introduced in the manner here described, a satisfactory explanation is thus afforded of a circumstance which it would be otherwise difficult to account for, viz, *that the paper pleadings thus filed or delivered between the parties pursue the style in which the record itself was drawn up.* Like it, they are expressed in the third person: "*A. B. complains,*" "*C. D. comes and defends,*" &c., and state the form of action, the appearance of the parties, and sometimes the continuances and other acts and proceedings in court, (*n.*) They are framed, in short, as if they were *extracts from the record,*

(*k.*) 3 Reeves, 427.

(*l.*) *Ib.*

(*m.*) *Ib.*, 95.

(*n.*) As to the form in which the record was drawn up, *vide supra*, p. 60.

though the record is, by the present practice, not drawn up till a subsequent period, and is then a transcript from *them*. Important effects belong to this peculiarity of style. Being conceived as *copies from the record*, the pleadings consequently imply previous statements by legal fiction, *supposed* to be still *verbally made in open court* and *contemporaneously recorded*, according to the ancient practice. The effect of this is, that they are framed upon the same principles as those which belonged to the method of oral allegation. The parties are made to come to *issue* exactly in the same manner as when really opposed to each other in verbal altercation at the bar of the court; and all the rules which the judges of former times prescribed to the actual disputants before them are, as far as possible, still enforced with respect to these paper pleadings, (*o.*)

As the oral pleading could formerly be delivered by none but regular advocates, so at the present day it is necessary that each paper pleading should be *signed* by a *barrister*, (some few of the most ordinary and simple kind and all declarations excepted;) and in the common pleas no barrister can sign a pleading, but one who has attained the degree of sergeant; but in the other courts there is no such restriction. On this head it may be further observed, that the pleadings, though thus signed, and sometimes, in fact, *drawn* by barristers, are also often *drawn* by the attorneys or by persons of learning who have not been admitted to the degree of barrister, but are employed by the attorneys in that department of practice exclusively, and are known by the name of *special pleaders*.

After these preliminary explanations as to the general practical form of the modern pleadings, it is time to consider their individual construction.

The pleading begins with the *declaration* or *count*, which is a statement on the part of the plaintiff of his cause of action, (*p.*) In a *real* action it is most properly called the

(*o.*) See Appendix, note 14.

(*p.*) See Appendix, note 15.

count; in a *personal* one, the *declaratio*, (q.) The latter, however, is now the general term, being that commonly used when referring to real and personal actions without distinction. In the declaration the plaintiff states the nature and quality of his case in general more fully than in the writ, but still in strict conformity with the tenor of that instrument; any substantial variance between them being a ground of objection. It will be convenient here to exhibit examples of the declaration, in the form which it wears in those more frequent actions, of which the original writs have already been laid before the reader.

COUNT ON A WRIT OF RIGHT, (r.)

In the Common Pleas, — Term, in the — year of the reign of King George the Fourth.

—, to wit, *A. B.*, by *E. F.*, his attorney, demands against *C. D.* four messuages, four gardens, and four acres of land, with the appurtenances, in the parish of —, in the county of —, as his right and inheritance, by writ of the lord, the king of right. And thereupon he saith that *G. B.*, father of him, the said *A. B.*, was seized of the tenements aforesaid, with the appurtenances in his demesne, as of fee and right in the time of peace, in the time of the lord George the Third, late king of Great Britain, to wit, within sixty years now last past, by taking the esplees thereof to the value, &c. And from the said *G. B.* the right descended to the said *A. B.*, who now demands, as son and heir of the said *G. B.*, his father. And that such is his right he offers, &c., (s.)

COUNT IN FORMEDON, (t.)

In the Common Pleas, — Term, in the — year of the reign of King George the Fourth.

—, to wit, *A. B.* demands against *C. D.* the manor of *N.*, with the appurtenances, which *E. F.* gave to *G. B.* and the heirs of his body issuing, and which, after the death of the said *G. B.*, ought to descend to the said *A. B.*, the son and heir of the said *G. B.*, by form of the gift aforesaid, as it is said. And thereupon he saith that *E. F.* gave the said manor, with the appurtenances, to the said *G. B.*, and the heirs of his body issuing, in form aforesaid. By virtue of which gift, the said *G. B.* was seized of the said manor, with the

(q.) Reg. Plac., 2, cites F. N. B., 16 a, 60 d.

(r.) See the original writ, *supra*, p. 44. N. B. In this and all the following examples, except where notice to the contrary is given, the declaration is purposely adapted to the preceding writ, so that, upon originals in the form above exhibited, declarations in the forms here supposed would be correct.

(s.) Tyssen v. Clarke, 3 Wils., 561; 3 Chitty, 640, 1st edit.

(t.) See the original writ, *supra*, p. 44.

appurtenances, in his demesne, as of fee and right, by form of the gift aforesaid, in the time of peace, in the time of our lord the now king, by taking the esplees thereof to the value of ten pounds. And from the said *G. B.* the right to the said manor, with the appurtenances, descended, by form of the gift aforesaid, to the said *A. B.*, who now demands the same, as son and heir of the said *G. B.*, his father. And which, after the death, &c.; and therefore he brings his suit, &c. (*u.*)

COUNT IN DOWER, (*x.*)

In the Common Pleas, — Term, in the — year of the reign of King George the Fourth.

—, to wit, *A. B.*, widow, who was the wife of *E. B.*, deceased, by —, her attorney, demands against *C. D.* the third part of ten messuages, ten barns, ten stables, four gardens, four orchards, two thousand acres of meadow, two thousand acres of pasture, and two thousand acres of other land, with the appurtenances, in the parish of —, in the county of —, as the dower of the said *A. B.* of the endowment of *E. B.*, deceased, heretofore her husband, whereof she hath nothing, &c., (*y.*)

DÉCLARATION IN QUARE IMPEDIT, (*z.*)

In the Common Pleas, — Term, in the — year of the reign of King George the Fourth

—, to wit, *T.*, bishop of —, *C. D.*, esquire, and *E. F.*, clerk, were summoned to answer *A. B.*, widow, of a plea (*a.*) that they permit the said *A. B.* to present a fit person to the rectory of the parish church of —, in the county of —, which is vacant, and belongs to her presentation. And thereupon the said *A. B.*, by —, her attorney, complains that whereas one *Sir J. D.*, baronet, now deceased, in his lifetime, to wit, on the — day of —, in the year —, was seized of the manor of *K.*, with its appurtenances, to which manor the advowson of the said rectory, with its appurtenances, then belonged, in his demesne as of fee. And being so seized thereof, as aforesaid, he, the said *Sir J. D.*, afterwards, to wit, on the — day of —, in the year —, at —, in the county of —, presented to the said church, being then vacant, one *E. G.*, his clerk, who, on the presentation of the said *Sir J. D.*, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our sovereign lord George the Third, late king of Great Britain. And he, the said *Sir J. D.*, being so seized of the said manor and the said advowson belonging thereto as aforesaid, afterwards, to wit, on the — day of —, in the year —, at —, aforesaid, in the county aforesaid, died so seized of such estate therein; upon whose death the

(*u.*) Booth, 144; see an ancient precedent, 2 edit., 3, 1.

(*x.*) See the original writ, *supra*, p. 45.

(*y.*) 3 Chitty, 597, 1st edit.; Booth, 166; Rast. Ent., 234 b.

(*z.*) See the original writ, *supra*, p. 45.

(*a.*) "Plea," in this and many other instances, is still used in its ancient sense of *suit* or *action*, *vide* Appendix, note 1. This, however, as will be seen hereafter, is not now its usual or ordinary meaning.

said manor, with the said advowson so belonging thereto, descended to the said *A. B.*, as daughter and heiress of the said Sir *J. D.*, whereby she became and was seized of the said manor, with the said advowson so belonging thereto, in her demesne as of fee. And being so seized, the said church afterwards, to wit, on the — day of —, at —, aforesaid, in the county aforesaid, became vacant by the death of the said *E. G.*, whereby it then and there belonged, and now belongs, to the said *A. B.*, to present a fit person to the said church, so being vacant as aforesaid; but the said bishop, *C. D.*, and *E. F.*, will not permit her, but unjustly hinder her; wherefore she, the said *A. B.*, saith that she is injured and hath sustained damage to the value of — pounds. And therefore she brings her suit, &c., (b.)

DECLARATION IN DEBT, (c.)

On a bond.

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

—, to wit, *C. D.* was summoned to answer *A. B.* of a plea, that he render to the said *A. B.* the sum of — pounds, of good and lawful money of Great Britain, which he owes to and unjustly detains from him. And thereupon the said *A. B.*, by —, his attorney, complains: For that whereas the said *C. D.* heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, by his certain writing obligatory, sealed with his seal and now shown to the court here, (the date whereof is the day and year aforesaid,) acknowledged himself to be held and firmly bound to the said *A. B.* in the sum of — pounds, above demanded, to be paid to the said *A. B.* Yet the said *C. D.* (although often requested) hath not as yet paid the said sum of — pounds above demanded, or any part thereof, to the said *A. B.*; but so to do hath hitherto wholly refused, and still refuses, to the damage of the said *A. B.* of — pounds; and therefore he brings his suit, &c.

DECLARATION IN DEBT, (d.)

On simple contract.

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

—, to wit, *C. D.* was summoned to answer *A. B.* of a plea that he render to the said *A. B.* the sum of — pounds, of good and lawful money of Great Britain, which he owes to and unjustly detains from him. And thereupon the said *A. B.*, by —, his attorney, complains: For that whereas the said *C.*

(b.) 3 Chitty, 586, 1st edit.; 1 Arch., 438; 16 Went., 67.

(c.) See the original writ, *supra*, p. 46.

(d.) See the original writ, *supra*, p. 46. That writ, it will be observed, is so general as to apply to all causes of action sufficient to constitute a debt in point of law. There is, accordingly, but one form of original writ in debt, though the form of the declaration will vary according to the nature of the cause of action, as in this and the preceding example.

D. heretofore, to wit, on the — day of —, in the year of our Lord — at —, in the county of —, was indebted to the said *A. B.* in the sum of — pounds, of lawful money of Great Britain, for divers goods, wares, and merchandise by the said *A. B.* before that time sold and delivered to the said *C. D.*, at his special instance and request, to be paid by the *C. D.* to the said *A. B.* when he, the said *C. D.*, should be thereto afterwards requested; whereby, and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said *A. B.* to demand and have of and from the said *C. D.* the said sum of — pounds above demanded. Yet the said *C. D.* (although often requested) hath not as yet paid the said sum of — pounds above demanded, or any part thereof, to the said *A. B.*; but so to do hath hitherto wholly refused, and still refuses, to the damage of the said *A. B.* of — pounds; and therefore he brings his suit, &c.

DECLARATION IN COVENANT, (e.)

On an indenture of lease for not repairing.

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

—, to wit, *C. D.* was summoned to answer *A. B.* of a plea, that he keep with him the covenant made by the said *C. D.* with the said *A. B.*, according to the force, form, and effect of a certain indenture in that behalf made between them. And thereupon the said *A. B.*, by —, his attorney, complains: For that whereas heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, by a certain indenture then and there made between the said *A. B.* of the one part, and the said *C. D.* of the other part, (one part of which said indenture, sealed with the seal of the said *C. D.*, the said *A. B.* now brings here into court, the date whereof is the day and year aforesaid,) the said *A. B.*, for the consideration therein mentioned, did demise, lease, set, and to farm let, unto the said *C. D.*, a certain messuage or tenement and other premises in the said indenture particularly specified, to hold the same, with the appurtenances, to the said *C. D.*, his executors, administrators, and assigns, from the twenty-fifth day of March next ensuing the date of the said indenture for and during and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended, at a certain rent, payable by the said *C. D.* to the said *A. B.*, as in the said indenture is mentioned. And the said *C. D.*, for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree, to and with the said *A. B.*, his heirs and assigns, (amongst other things,) that he, the said *C. D.*, his executors, administrators, and assigns, should and would, at all times during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain, and keep the said messuage or tenement and premises in good and tenantable repair, order, and condition; and the same messuage or tenement and premises, and every part thereof, should and would leave in such good repair, order, and condition, at the end or other sooner determination of the said term; as by the said indenture, reference being thereunto had, will, among other things, fully appear. By virtue of

(e.) See the original writ, *supra*, p. 47.

which said indenture the said *C. D.* afterwards, to wit, on the twenty-fifth day of March, in the year aforesaid, entered into the said premises, with the appurtenances, and became and was possessed thereof, and so continued until the end of the said term. And although the said *A. B.* hath always, from the time of the making of the said indenture, hitherto done, performed, and fulfilled all things in the said indenture contained on his part to be performed and fulfilled, yet protesting that the said *C. D.* hath not performed and fulfilled any thing in the said indenture contained on his part and behalf to be performed and fulfilled. In fact, the said *A. B.* saith that the said *C. D.* did not, during the continuance of the said demise, support, uphold, maintain, and keep the said messuage or tenement and premises in good and tenantable repair, order, and condition, and leave the same in such repair, order, and condition at the end of the said term; but for a long time, to wit, for the last three years of the said term, did permit all the windows of the said messuage or tenement to be, and the same during all that time were, in every part thereof, ruinous, in decay, and out of repair, for want of necessary reparation and amendment. And the said *C. D.* left the same, being so ruinous, in decay, and out of repair as aforesaid, at the end of the said term, contrary to the form and effect of the said covenant so made as aforesaid. And so the said *A. B.* saith that the said *C. D.* (although often requested) hath not kept the said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the said *A. B.* hath hitherto wholly refused, and still refuses, to the damage of the said *A. B.* of — pounds; and therefore he brings his suit, &c.

DECLARATION IN DETINUE, (*f*)

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

—, to wit, *C. D.* was summoned to answer *A. B.* of a plea, that he render to the said *A. B.* certain goods and chattels, of the value of — pounds, of lawful money of Great Britain, which he unjustly detains from him. And thereupon the said *A. B.*, by —, his attorney, complains: For that whereas the said *A. B.* heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, delivered to the said *C. D.* certain goods and chattels, to wit, forty bushels of wheat, of the said *A. B.*, of great value, to wit, the value of — pounds, of lawful money of Great Britain, to be redelivered by the said *C. D.* to the said *A. B.* when he, the said *C. D.*, should be thereto afterwards requested. Yet the said *C. D.*, although he was afterwards, to wit, on the — day of —, in the year aforesaid, at — aforesaid, in the county aforesaid, requested by the said *A. B.* so to do, hath not as yet delivered the said goods and chattels, or any of them, or any part thereof, to the said *A. B.*, but so to do hath hitherto wholly refused, and still refuses, and still unjustly detains the same from the said *A. B.*, to wit, at — aforesaid, in the county aforesaid, to the damage of the said *A. B.* of — pounds; and therefore he brings his suit, &c., (*g*)

(*f*) See the original writ, *supra*, p. 47.

(*g*) 2 Chitty, 235, 1st edit.

DECLARATION IN TRESPASS, (h.)

For an assault and battery.

*In the King's Bench, ——— Term, in the ——— year of the reign of King
George the Fourth.*

———, to wit, *C. D.* was attached to answer *A. B.* of a plea, wherefore he, the said *C. D.*, with force and arms, at ———, in the county of ———, made an assault upon the said *A. B.*, and beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to him there did, to the damage of the said *A. B.* and against the peace of our lord the now king. And thereupon the said *A. B.*, by ———, his attorney, complains: For that the said *C. D.* heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, with force and arms, at ——— aforesaid, in the county aforesaid, made an assault upon the said *A. B.*, and then and there beat, wounded and ill-treated him, so that his life was despaired of, and other wrongs to the said *A. B.* then and there did, against the peace of our said lord the king, and to the damage of the said *A. B.* of ——— pounds; and therefore he brings his suit, &c.

DECLARATION IN TRESPASS, (i.)

Quare clausum fregit.

*In the King's Bench, ——— Term, in the ——— year of the reign of King George
the Fourth.*

———, to wit, *C. D.* was attached to answer *A. B.* of a plea, wherefore he, the said *C. D.*, with force and arms broke and entered the close of the said *A. B.*, situate and being in the parish of ———, in the county of ———, and with his feet, in walking, trod down, trampled upon, consumed, and spoiled the grass and herbage of the said *A. B.* there growing, and being of great value, and other wrongs to the said *A. B.* there did, to the damage of said *A. B.* and against the peace of our lord the now king. And thereupon, the said *A. B.*, by ———, his attorney, complains: For that the said *C. D.* heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, with force and arms, broke and entered the close of the said *A. B.*, that is to say, a certain close called ———, situate and being in the parish aforesaid, in the county aforesaid, and with his feet, in walking, trod down, trampled upon, consumed, and spoiled the grass and herbage of the said *A. B.* then and there growing, and being of great value, to wit, of the value of ——— pounds of lawful money of Great Britain, and other wrongs to the said *A. B.* then and there did, against the peace of our said lord the king, and to the damage of the said *A. B.* of ——— pounds; and therefore he brings his suit, &c.

In a former place (*k*) some mention was made of the action of *ejectment*, and it was stated to be a species of the action of trespass. From the great importance and fre-

(h.) See the original writ, *supra*, p. 48.

(i.) See the original writ, *supra*, p. 48.

(k.) *Supra*, p. 43.

quency of this form of suit, which, as before observed, has nearly supplanted in practice the whole system of real and mixed actions, and is the almost universal remedy for the recovery of land, it will be proper now to present the reader with an example of the declaration in ejectment. The original writ, if drawn out, would of course vary in some degree in form from those in the two preceding species of trespass. In ejectment, however, though the proceeding is nominally by original or by bill, as in other actions, no original or writ of process is, in fact, ever used. The whole method of proceeding is anomalous, and depends on fictions invented and upheld by the courts for the convenience of justice. An ejectment commences by delivering to the tenant in possession of the premises a declaration framed as against a fictitious defendant, (for example, Richard Roe,) at the suit of a fictitious plaintiff, (for example, John Doe.) This declaration, when the action is brought as by original, is framed as if it had been preceded by original writ against Richard Roe, but is, in fact, the first step in the cause. Subscribed to this declaration is a notice in the form of a letter (*l*) from the fictitious defendant to the tenant in possession, apprizing the latter of the nature and object of the proceeding, and advising him to appear in court in the next term to defend his possession. Accordingly, in the next term the tenant in possession obtains a rule of court, allowing him to be made defendant instead of Richard Roe, upon certain terms prescribed by the court for the convenient trial of the title, among others, his appearing and receiving, without writ or process, a new declaration, like the first, but with his own name inserted as defendant, and pleading thereto. The form of such new declaration is as follows:

DECLARATION IN EJECTMENT.

In the King's Bench, ——— Term, in the ——— year of the reign of King George the Fourth.

———, to wit, *C. D.* was attached to answer John Doe of a plea, wherefore he, the said *C. D.*, with force and arms, entered into five messuages, five sta-

(*l*.) See the form of it, 2 Chitty, 397, 1st edit.

bles, five coach-houses, five yards, and five gardens, situate and being in the parish of ———, in the county of ———, which *A. B. (m)* had demised to the said John Doe for a term which is not yet expired, and ejected him from his said farm, and other wrongs to the said John Doe there did, to the damage of the said John Doe, and against the peace of our said lord the now king; and thereupon the said John Doe, by ———, his attorney, complains: For that whereas the said *A. B.* heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, in the parish aforesaid, in the county aforesaid, had demised the said tenements, with the said appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns, from the ——— day of ———, in the year aforesaid, for and during and unto the full end and term of ——— years from thence next ensuing, and fully to be complete and ended. By virtue of which said demise the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed for the said term so to him thereof granted as aforesaid. And the said John Doe being so thereof possessed, the said *C. D.*, afterwards, to wit, on the ——— day of ———, in the year aforesaid, with force and arms, entered into the said tenements, with the appurtenances, in which the said John Doe was so interested, in manner and for the term aforesaid, which is not expired, and ejected him, the said John Doe, out of his said farm, and other wrongs to the said John Doe then and there did against the peace of our said lord the king, and to the damage of the said John Doe of ——— pounds; and therefore he brings his suit, &c.

DECLARATION IN TRESPASS ON THE CASE, (n.)

In assumpsit—for goods sold and delivered.

In the King's Bench, ——— Term, in the ——— year of the reign of King George the Fourth.

———, to wit, *C. D.* was attached to answer *A. B.* of a plea of trespass on the case; and thereupon the said *A. B.*, by ———, his attorney, complains: For that whereas the said *C. D.* heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, at ———, in the county of ———, was indebted to the said *A. B.* in the sum of ——— pounds, of lawful money of Great Britain, for divers goods, wares, and merchandises, by the said *A. B.* before that time sold and delivered to the said *C. D.*, at his special instance and request; and, being so indebted, he, the said *C. D.*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, undertook and faithfully promised the said *A. B.* to pay him the said sum of money when he, the said *C. D.*, should be thereto afterwards requested. Yet the said *C. D.*, not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *A. B.* in this behalf, hath not yet paid the

(m.) This is the name of the party who really institutes the suit, called the "lessor of the plaintiff," and so distinguished from the nominal plaintiff, John Doe.

(n.) See the original writ, *supra*, p. 50.

said sum of money, or any part thereof, to the said *A. B.*, (although oftentimes afterwards requested;) but the said *C. D.*, to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said *A. B.* of — pounds; and therefore he brings his suit, &c.

DECLARATION IN TRESPASS ON THE CASE, (o.)

In trover.

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

—, to wit, *C. D.* was attached to answer *A. B.* of a plea of trespass on the case; and thereupon the said *A. B.*, by —, his attorney, complains: For that whereas the said *A. B.* heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, was lawfully possessed, as of his own property, of certain goods and chattels, to wit, twenty tables and twenty chairs, of great value, to wit, of the value of — pounds, of lawful money of Great Britain; and, being so possessed thereof, he, the said *A. B.*, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, came to the possession of the said *C. D.* by finding; yet the said *C. D.*, well knowing the said goods and chattels to be the property of the said *A. B.*, and of right to belong and appertain to him, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *A. B.* in this behalf, hath not as yet delivered the said goods and chattels, or any part thereof, to the said *A. B.*, (although often requested so to do;) but so to do hath hitherto wholly refused, and still refuses; and afterwards, to wit, on the — day of —, in the year, — at — aforesaid, in the county aforesaid, converted and disposed of the said goods and chattels to his, the said *C. D.*'s, own use, to the damage of the said *A. B.* of — pounds; and therefore he brings his suit, &c.

DECLARATION IN TRESPASS ON THE CASE, (p.)

For a libel.

In the King's Bench, —, Term, in the — year of the reign of King George the Fourth.

—, to wit, *C. D.* was attached to answer *A. B.* of a plea of trespass on the case; and thereupon the said *A. B.*, by —, his attorney, complains: For that whereas the said *A. B.* now is a good, true, and honest subject of this realm, and as such hath always conducted himself; and, until the committing of the grievance hereinafter mentioned, was always reputed to be a person of good fame and credit, and hath never been guilty, nor, until the committing of the said grievance, been suspected to have been guilty of perjury, or any other such crime; by means of which said premises he, the said *A. B.*, before the committing of the said grievance, had deservedly obtained the good opin-

(o.) See the original writ, *supra*, p. 50.

(p.) See the original writ, *supra*, p. 51.

ion of all his neighbors and of all other persons to whom he was known, to wit, at ———, in the county of ———; and whereas, before the committing of the said grievance, a certain action had been depending in the court of our lord the now king, before the king himself, at Westminster, in the county of Middlesex, wherein one *E. F.* was the plaintiff and one *G. H.* was the defendant; which said action had been then lately tried at the assizes in and for the county of ———; and on such trial the said *A. B.* had been examined on oath, and had given his evidence as a witness on the part of the said *E. F.*, to wit, at ——— aforesaid, in the county last aforesaid; yet the said *C. D.*, well knowing the premises, but greatly envying the happy condition of the said *A. B.*, and contriving and wickedly and maliciously intending to injure the said *A. B.* in his good fame and credit and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that the said *A. B.* had been guilty of perjury, heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, at ——— aforesaid, in the county last aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published, of and concerning the said *A. B.*, and of and concerning the said action, and the evidence so given by the said *A. B.*, a certain false, scandalous, malicious, and defamatory libel, containing (among other things) the false, scandalous, defamatory, and libellous matter following, of and concerning the said *A. B.*, and of and concerning the said action, and the evidence so given by the said *A. B.*, that is to say, he (meaning the said *A. B.*) was forsworn on the trial, (meaning the said trial, and thereby then and there meaning that the said *A. B.*, in giving his evidence as aforesaid, had committed willful and corrupt perjury;) by means of the committing of which grievances he, the said *A. B.*, hath been and is greatly injured in his said good fame and credit and brought into public scandal, infamy, and disgrace, insomuch that divers good and worthy subjects of this realm have, by reason of the committing of the said grievance, suspected and believed, and still do suspect and believe, the said *A. B.* to have been guilty of perjury; and have, by reason of the committing of the said grievance, from henceforth hitherto wholly refused to have any transaction or acquaintance with the said *A. B.*, as they otherwise would have had, to the damage of the said *A. B.* of ——— pounds; and therefore he brings his suit, &c.

With respect to REPLEVIN, we have already seen (*q*) that it is not commenced in the superior courts, and consequently that no original writ is sued out. The form of the declaration is as follows:

DECLARATION IN REPLEVIN.

In the King's Bench, ——— Term, in the ——— year of the reign of King George the Fourth.

———, to wit, *C. D.* was summoned to answer *A. B.* of a plea, wherefore he took the cattle of the said *A. B.*, and unjustly detained the same, against

(*q.*) *Supra*, p. 52.

sureties and pledges until, &c. And thereupon the said *A. B.*, by ———, his attorney, complains For that the said *C. D.* heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, at ———, in the county of ———, in a certain place there called ———, took the cattle, to wit, one mare of the said *A. B.*, of great value, to wit, of the value of ——— pounds, and unjustly detained the same, against sureties and pledges, until, &c.; wherefore the said *A. B.* saith that he is injured and hath sustained damage to the value of ——— pounds; and therefore he brings his suit, &c., (r.)

The nature and form of the declaration having been now considered, the opportunity has arrived for adverting to a method of proceeding mentioned at the commencement of the work, but not in its nature capable of satisfactory explanation till this period, viz, the proceeding *by bill* in lieu of *original writ*. This subject, therefore, at the expense of some digression, will, for a short time, demand the reader's attention.

Under this head two different species of proceeding present themselves for consideration. There is a proceeding by bill, more commonly so called, which is founded on *privilege on the part of the defendant*; and there is another proceeding, also without original writ, and in the nature of a proceeding by bill, though not usually so denominated, which is founded on *privilege on the part of the plaintiff*, (s.)

1. Of the proceeding by bill, founded on *privilege in the defendant*.

By practice of very ancient date, in all personal suits, where an *officer* (t) or *prisoner* of the king's bench, or an *officer* of the common pleas (u) is *defendant*, the course has

(r.) 8 Went., 24; see an ancient precedent, 10 Edward III, 24.

(s.) Hale, of the king's bench and common pleas, (among Hargrave's Law Tracts, ch. vi. Hale mentions another privilege, viz, that *ex parte curiæ*; but observes, that it is resolvable into that *ex parte defendantis*.)

(t.) The term *officer* in this case includes an *attorney* of the court, but it does not include *sergeants* or *barristers*. (Vin. Abr. Writ A, 25, cites Br. Bille pl. 31.) And it is said that sergeants and their clerks, and the clerks of the judges and prothonotaries, are privileged to be sued in the C. P. by original writ, and not by bill. (1 Tidd., 76, 8th edit.)

(u.) But in the C. P. where defendant is *prisoner*, the course is, not to declare against him, as in *custodia guardiani de la Fleet*, but the proceeding is

been to proceed against such defendant in the court in which he is officer or prisoner by *exhibiting, i. e., filing, (x,)* a bill against him, among the records of the court, without suing out any original writ. For when the defendant is in either of the privileged characters above mentioned, the two great purposes of the original writ are superseded. As he is actually present in court, or considered as being so, no original, of course, is requisite to enforce his appearance; and as he is already within the jurisdiction of the court, as its officer or prisoner, an instrument of that kind is not deemed necessary to give authority for the institution of the suit. This practice, however, is confined to personal actions, and it does not appear that actions real or mixed (y) have ever been allowed to be thus commenced. The bill filed in such cases is exactly equivalent to a declaration in a proceeding by original; the original writ and process, which are necessary preliminaries, according to one form of proceeding, being conveniently passed by in the other; and the plaintiff arriving, without these ceremonies, at the statement of his cause of action, immediately and in the first instance. Accordingly, the bill states the complaint exactly in the same terms as would be used in a declaration in a parallel case, by original writ, and is therefore considered as belonging to a certain form of action as strictly as if an original writ had issued to determine the form. Thus, if the cause of action be a debt or breach of covenant, the plaintiff, in his bill, pursues the same form that a declaration by original would pursue, founded on a writ in debt or covenant, and is accordingly said to proceed or bring his action in debt or covenant in the one case as well as in

by original, proper to the action. Per Holt, C. J., *Brown v. Babbington, Ld. Ray.*, 882.)

(x.) *Exhibiting* seems, in its original meaning, to have imported *showing to the court*; but the bill is not now actually shown to the court, but, in the king's bench, filed with the clerk of the declarations in the king's bench; in the common pleas, entered with the prothonotary. (1 Tidd., 454, 8th edit; 2 Sellon, 74.)

(y.) An *ejectment*, it is true, may be brought by bill, but in this work an *ejectment* is not considered as a mixed action.

the other. The bill differs, in short, from the declaration only in some slight variation of form at the commencement and conclusion.

As in the king's bench and common pleas, so in the *exchequer*, the like practice obtains of filing bills in personal suits against officers and prisoners, (z;) and such bill may also be filed in this court against *accountants*; that is, persons who have entered into account with the king in the court of exchequer, (a.) In this court, as was observed at the commencement of the work, there is no proceeding by original; but the practice of filing bills in personal suits against persons of the descriptions above mentioned has been from very ancient time allowed for similar reasons as in the king's bench and common pleas.

Such is the strict and primary application of the proceeding by bill, founded on privilege in the defendant; and to this extent *only* does it obtain in the practice of the common pleas and the exchequer, being confined in those courts to cases of actual privilege, as officer, prisoner, or accountant. But in the *king's bench* it has, for a great length of time past, been irregularly extended much beyond these its ancient limits, and been applied to defendants of almost every description, whether actually privileged or not. This has been the effect of a contrivance anciently devised by the practitioners of this court for the extension of its jurisdiction, the nature of which was as follows:

When an action was contemplated against a person not already privileged as officer or prisoner, the course was for the plaintiff to cause him to be arrested upon a fictitious charge (foreign to the proposed action) of a *trespass*; and this was effected by virtue of certain judicial writs which the court had power to issue in such cases, called *bill of Middlesex and latitat*, (b.) Upon such arrest the defend-

(z.) Hale, *ubi supra*; 1 Manning, 9, 143, 149; Appendix, p. 91.

(a.) Hale, *ubi supra*; 1 Manning, 9, 143.

(b.) A trespass, being alleged to be committed "with force and arms," was considered as partly of a *criminal* nature, and on that ground fell within the jurisdiction of this court; 3 Bl. Com., 43, 285, where the nature of the bill

ant, unless he gave bail, was committed to the prison of the court, or, according to the legal phrase, *the custody of the marshal of the marshalsea*; and the plaintiff then commenced the action by filing a bill against him, which, as he had become *prisoner*, was authorized, as has been shown, by the regular practice of the court. If, instead of being committed to actual custody, he gave bail, this was considered as of equal effect for the purpose of founding the jurisdiction, and he was still considered as being in the custody of the marshal (*c*) and liable to have a bill filed against him.

This method, having silently crept into usage, at length established itself as an avowed and regular course of proceeding, (*d*), and continues in force to the present day, subject, however, to the following important modification, that the defendant is not now *actually arrested* by virtue of the fictitious charge in the bill of Middlesex or latitat, unless the nature of the case be such as in itself authorizes the plaintiff to take his person. If the case be not of that description, no arrest takes place, and the defendant is committed to the custody of the marshal of the marshalsea only by *fiction* or *intendment of law*. Thus, by the aid of the bill of Middlesex and latitat, the king's bench is enabled to entertain personal actions by bill against unprivileged as well as privileged persons; for those who are not already officers or prisoners may be invested with the latter character by virtue of the real or supposed arrest and committal to the custody of the marshal, (*e*). And accordingly the proceeding by bill has long been in this court one of the *regular* and *ordinary* modes of commencing a personal action, co-

of Middlesex and latitat is more fully explained. (See the forms of these writs, Tidd's Appendix, 62, 63, 64, 65, 6th edit.)

(*c*.) 3 Reeves, 387.

(*d*.) See *Brown v. Babbington*, *Ld. Ray.*, 882, 883.

(*e*.) However, the proceeding by bill of Middlesex and latitat does not apply to parties not legally capable of arrest in a civil suit; and, consequently, not to *peers of the realm, corporations, hundredors, or members of the house of commons*. (1 Tidd., 143, 8th edit.)

ordinate with that by original. Each method has its particular recommendations, which lead the practitioner, according to the nature of the case, to its adoption.

Such being the origin and nature of the proceeding by bill in the king's bench, the following is a summary account of its practical course: If the defendant be already privileged, no writ to compel appearance, as already explained, is requisite, but the suit is begun at once by filing the bill. On the other hand, where the defendant is not already an officer or prisoner, the plaintiff begins his proceedings by suing out a bill of Middlesex or latitat. These writs command the sheriff to arrest the defendant's person, and to have him in court on a certain day in term; and, like an original writ, are themselves to be returned into court on that day. However, their return differs in this respect from that of an original writ, that it is not necessarily to be made on a *general return-day*, but may fall on *any day* of the term, Sundays and certain feast days excepted. Under these writs, either the defendant is arrested, if the cause of action authorize that proceeding, or, if not, his appearance to the writ is otherwise enforced in such manner as the practice of the court prescribes, (*f.*) The appearance to these writs, when effected, is expressed by a formal entry, if there have been no actual arrest, of fictitious bail, in the proper office of the court, (which is called *filing common bail* to the action,) or, in case of actual arrest, by giving actual bail. Upon this the plaintiff exhibits his bill; but it is to be observed, that where the defendant is not actually an officer or prisoner at the time of the bill exhibited, but merely in *supposed* custody, by virtue of the bill of Middlesex or latitat, though the plaintiff is, in strict legal language, said in this, as in other cases, to *exhibit his bill*, the instrument is in practice generally called, not a *bill*, but a *declaration*; nor is it always actually *exhibited*, *i. e.*, *filed*, but in some cases *filed*, in others *delivered*, according to the

(*f.*) For information on this subject, consult 1 Tidd., 163, 170, 238, 8th edit.; 1 Sel., ch. ii, iii, iv

course of practice formerly explained in treating of the manner of pleading in general, (g.)

Of the bill or declaration in the king's bench against a prisoner, whether real or supposed, the following is an example:

BILL—(against an actual prisoner.)

Or,

DECLARATION—(against a supposed prisoner.)

[In debt—on a bond.]

ELLENBOROUGH AND MARKHAM.

— Term, in the — year of the reign of King George the Fourth.

Middlesex, to wit, *A. B.* complains of *C. D.* being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea that he render to the said *A. B.* the sum of — pounds, of good and lawful money of Great Britain, which he owes to and unjustly detains from him. And thereupon the said *A. B.*, by *E. F.*, his attorney, complains: For that whereas the said *C. D.* heretofore, to wit, on the — day of —, in the year of our Lord —, at Westminster, in the county of Middlesex, by his certain writing obligatory, sealed with his seal and now shown to the court here, (the date whereof is the day and year aforesaid,) acknowledged himself to be held and firmly bound to the said *A. B.* in the sum of — pounds, above demanded to be paid to the said *A. B.* Yet the said *C. D.*, although often requested, hath not as yet paid the said sum of — pounds above demanded, or any part thereof, to the said *A. B.*, but so to do hath hitherto wholly refused, and still refuses, to the damage of the said *A. B.* of ten pounds. And therefore he brings his suit, &c.

Pledges to prosecute, { JOHN DOE and
RICHARD ROE.

2. The proceeding by bill, founded on *privilege in the plaintiff*, is apparently of the same antiquity as that founded on privilege in the defendant, and seems to rest on an analogous principle. In the king's bench and common pleas, in all personal suits where an *officer* of the court is *plaintiff*, he is allowed to file or deliver a declaration, (for it is in this case usually called by that name, and not by that of *bill*,) without having previously obtained an original writ; the defendant's appearance being first enforced by a writ of the judicial kind, returnable in the same manner as a bill of Middlesex or *latitat*, (h.) and called an *attachment of privilege*, (i.)

(g.) *Supra*, pp. 61, 62.

(h.) *Vide supra*, p. 79.

(i.) "An *attachment of privilege* is but as a *latitat*, and not as an original." Per Holt, C. J., *Rudd v. Berkenhead*, 1 Show., 376.

So, in the *exchequer*, an *officer* of the court, when plaintiff, is allowed, in any personal action, to enforce the defendant's appearance by judicial writs, returnable on any day in the term, (Sundays and certain feast days excepted,) and called *venire facias ad respondendum* and *capias of privilege*, (*k.*) and then to file or deliver a declaration against him; and in this court the king's *accountant* or *debtor* has a similar privilege, appearance at his suit being enforced by similar writs, though the *capias* is in that case commonly called a *quo minus*, (*l.*) And this was formerly the whole extent of this court's jurisdiction in respect of privilege in the plaintiff; but an irregular method was in course of time devised for its extension, analogous to that of the bill of Middlesex and *latitat* in the king's bench. The contrivance was simply that of suing out a *venire facias* or *quo minus*, containing a *fictitious* suggestion that the plaintiff was *debtor* to the king. In the character of such debtor he would be entitled, as already shown, to institute that method of proceeding; and the fiction by which he assumed the character was allowed to pass without scrutiny, (*m.*) The proceeding by *venire* and *quo minus* was thus surreptitiously extended to plaintiffs of every description; and the effect therefore is that, by means of those writs, a personal action may be, and is constantly brought in the *exchequer* at the suit of any plaintiff, whether really privileged or not; the course of proceeding being, first, to sue out a *venire* or *quo minus*, to compel appearance, containing either a true or a fictitious suggestion of the kind above mentioned, and, upon appearance, to file or deliver a declaration, the instrument being usually called, in practice, by that name, but, in more strict legal phrase, a bill.

(*k.*) Manning's *Exchequer*, 14, 58, 142. In strictness, however, these writs are not independent of each other; but the *capias* is supposed to issue on a precedent *venire*. (1 Manning, 58.)

(*l.*) 1 Manning, 58. It is so called from its containing, in this case, a clause of *quo minus sufficiens existit*; alleging that the plaintiff, in consequence of the injury committed by the defendant, is less able to pay his debt to the king.

(*m.*) *Vide* Appendix, note 16.

The subject of proceeding by bill being now sufficiently discussed, it is time to resume the consideration of the *manner of pleading*. And it is to be understood that what follows is equally applicable to an action by original and by bill; for, from the period of the bill or declaration, the subsequent course of the suit is the same in either method of proceeding, some slight and occasional variations of form only excepted.

The plaintiff having *declared*, (*i. e.*, filed or delivered his declaration,) it is for the defendant to concert the manner of his defense. For this purpose he considers whether, on the face of the declaration, and supposing the facts to be true, the plaintiff appears to be entitled, in point of *law*, to the redress he seeks, and in the form of action which he has chosen. If he appears to be not so entitled in point of law, and this by defect either in the *substance* or the *form* of the declaration, *i. e.*, as disclosing a case insufficient on the merits or as framed in violation of any of the rules of pleading, the defendant is entitled to except to the declaration on such ground. In so doing he is said to *demur*; and this kind of objection is called a *demurrer*, (*n.*)

A demurrer, (from the Latin *demorari*, or French *demorerer*, to "wait, or stay,") imports, according to its etymology, that the objecting party *will not proceed* with the pleading, because no sufficient statement has been made on the other side, but will wait the judgment of the court whether he is bound to answer. The form of a demurrer to a declaration will appear by the following examples:

DEMURRER TO THE DECLARATION.

For matter of substance.

[In debt.]

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

C. D. } And the said *C. D.*, by —, his attorney, comes and defends the
ats } wrong and injury, when, &c.; and says that the said declaration and
A. B. } the matters therein contained, in manner and form as the same are
 above stated and set forth, are not sufficient in law for the said *A. B.* to have
 or maintain his aforesaid action against him, the said *C. D.*; and that he, the

(*n.*) See Appendix note 17.

said *C. D.*, is not bound by the law of the land to answer the same. And this he is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said *C. D.* prays judgment, and that the said *A. B.* may be barred from having or maintaining his aforesaid action against him, &c.

DEMURRER TO THE DECLARATION.

For matter of form.

[In debt.]

In the King's Bench, ——— Term, in the ——— year of the reign of King George the Fourth.

C. D. } And the said *C. D.*, by ———, his attorney, comes and defends the
ats } wrong and injury, when, &c.; and says that the said declaration and
A. B. } the matters therein contained, in manner and form as the same are
above stated and set forth, are not sufficient in law for the said *A. B.* to have
or maintain his aforesaid action against the said *C. D.*; and that he, the said
C. D., is not bound by the law of the land to answer the same. And this he
is ready to verify. Wherefore, for want of a sufficient declaration in this
half, the said *C. D.* prays judgment, and that the said *A. B.* may be barred
from having or maintaining his aforesaid action against him, &c. And the
said *C. D.*, according to the form of the statute in such case made and pro-
vided, states and shows to the court here the following causes of demurrer to
the said declaration; that is to say, that no day or time is alleged in the said
declaration at which the said causes of action, or any of them, are supposed
to have accrued. And also that the said declaration is in other respects uncer-
tain, informal, and insufficient.

If the defendant does not demur, his only alternative method of defense is to oppose or answer the declaration by matter of *fact*. In so doing he is said to *plead*, (*o.*) (by way of distinction from *demurring*,) and the answer of fact so made is called the *plea*.

Pleas are divided into pleas DILATORY and PEREMPTORY; and this is the most general division to which they are subject, (*p.*)

Subordinate to this is another division. Pleas are either *to the jurisdiction of the court, in suspension of the action, in abatement of the writ, or in bar of the action*; the three first of which belong to the DILATORY class; the last is of the PEREMPTORY kind, (*q.*)

(*o.*) See Appendix, note 18.

(*p.*) See Appendix, note 19.

(*q.*) See Appendix, note 20.

A *plea to the jurisdiction* is one by which the defendant excepts to the jurisdiction of the court to entertain the action. The following is an example:

PLEA TO THE JURISDICTION.

In an action of ejectment for lands situate within a county palatine.

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

C. D. } And the said C. D., in his proper person, comes and defends the force
ats } and injury, and says that the said county of Chester is, and, from time
A. B. } whereof the memory of man is not to the contrary, hath been a county
palatine; and there now are and for all time aforesaid have been justices
there; and that all and singular pleas for the recovery of manors, messuages,
and tenements, lying and being within the said county, have been for all the
time aforesaid, and still are, pleaded and pleadable within the said county of
Chester, before the justices there for the time being, and not here in the court
of our lord the king, before the king himself. And this he is ready to verify.
Wherefore, since the plea aforesaid is brought for recovery of the possession
of the manors, messuages, lands, and hereditaments aforesaid, within the said
county palatine, the said C. D. prays judgment, if the court of our lord the
king here will or ought to have further cognizance of the plea aforesaid, (r.)

A *plea in suspension* of the action is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed until that ground be removed. The number of these pleas is small. Among them is that which is founded on the non-age of one of the parties, and is termed *parol demurrer*, (s.) Its form is as follows:

PAROL DEMURRER.

By an heir sued on the bond of his ancestor.

[In debt.]

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

C. D. } And the said C. D., by E. F., who is admitted by the court of our
ats } said lord the king here as guardian of the said C. D., to defend for the
A. B. } said C. D., who is an infant, under the age of twenty-one years, comes
and defends the wrong and injury, when, &c.; and saith that he, the said
C. D., is within the age of twenty-one years, to wit, of the age of — years,
to wit, at — aforesaid, in the county aforesaid. And this he is ready to
verify. Wherefore he does not conceive, that during his minority he ought

(r.) 1 Went., 49.

(s.) See Appendix, note 21.

to answer the said *A. B.* in his said plea. And he prays that the parol may demur (t) until the full age of him the said *C. D.*, (u.)

A *plea in abatement of the writ* is one which shows some ground for *abating* or *quashing* the original writ, and makes prayer to that effect, (x.)

The grounds for so abating the writ are any matters of fact tending to impeach the correctness of that instrument, *i. e.*, to show that it is improperly framed or sued out, without, at the same time, tending to deny the right of action itself. Thus, if there be variance between the declaration and the writ, this shows that the writ was not properly adapted to the action, and is, therefore, a ground for abating it. So, if the writ appear to have been sued out pending another action already brought for the same cause, if it name only one person as defendant, when it should have named several, or if it appear to have been defaced in a material part, it is for any of these reasons abatable, (y.)

Pleas in abatement relate either to the person of the plaintiff, to the person of the defendant, to the count or declaration, or to the writ, (z.)

A plea in abatement, to the *person* of the plaintiff or defendant, is such as shows some personal disability in one of these parties to sue or be sued, as that the plaintiff is an alien enemy. With respect to these pleas to the person, it is to be observed, that they do not fall strictly within the definition of pleas in abatement, as above given; for they do not pray "that the writ be quashed," but pray judgment "if the plaintiff ought to be answered." However, as such pleas offer an objection of form rather than

(t.) *Parol* is the French word for *loquela*, which was the most ancient appellation of the *pleading*; *vide supra*, 58. *Demur* is from *demorror*, "to stay." That the parol may demur, means, therefore, that the pleading may be stayed.

(u.) 2 Chitty, 472, 1st edit.; *Plasket v. Beeby*, 4 East., 435.

(x.) See Appendix, note 22.

(y.) The different grounds or subjects of pleas in abatement will be found enumerated, *Com. Dig.*, Abatement, E, H, 56.

(z.) 1 Chitty, 435, 1st edit.; *Com. Dig.*, Abatement, C.

substance, and do not deny the right of action itself, they are considered as in the nature of pleas in abatement, and classed among them, (a.) A plea in abatement to the *count* or declaration is such as is founded on some objection applying immediately to the declaration, and only by consequence, affecting the writ. The only frequent case in which this kind of plea has occurred is where the objection is that of a variance in the declaration from the writ, which was always a fatal fault, (b.) Even in this case, however, the plea is now out of use, in consequence of a change of practice relative to the original writ that will be presently explained. A plea in abatement to the *writ* is such as is founded on some objection that applies to the writ itself; for example, that in an action on a joint contract it does not name as defendants all the joint contractors, but omits one or more of them. Pleas of this latter kind have been very anciently divided into such as relate to the *form of the writ* and such as relate to the *action of the writ*; and those relating to its *form* have been again subdivided into such as are founded on objections *apparent on the writ itself*, and such as are founded on *matter extraneous*, (c.)

The following are examples of pleas in abatement:

PLEA IN ABATEMENT OF THE WRIT.

To the person of the plaintiff.

[In debt.]

In the King's Bench, ——— Term, in the ——— year of the reign of King George the Fourth.

C. D. } And the said *C. D.*, by ———, his attorney, comes and defends the
 ats } wrong and injury, when, &c.; and says that the said *A. B.* ought not
A. B. } to be answered to his writ and declaration aforesaid, because, he says,
 that the said *A. B.* is an alien, born, to wit, at Calais, in the kingdom of France, in parts beyond the seas, under the allegiance of the king of France,

(a.) See Appendix, note 23.

(b.) There were, however, other instances in which this kind of plea was used. See Co. Litt., 303, b., where it is said that "any imperfection in the count doth abate the writ." See also Com. Dig., Abatement, G 7, G 8.

(c.) 1 Chitty, 435; Com. Dig., Abatement, C. These divisions of pleas in abatement to the *writ* seem to be more subtle than useful, and do not in modern practice often come under consideration.

an enemy of our lord the now king, born of father and mother adhering to the said enemy; and that the said *A. B.* entered this kingdom without the safe conduct of our said lord the king; and this the said *C. D.* is ready to verify. Wherefore he prays judgment, if the said *A. B.* ought to be answered to his writ and declaration aforesaid, (*d.*) &c.

PLEA IN ABATEMENT OF THE WRIT.

To the writ.

[In *assumpsit.*]

In the King's Bench, ——— Term, in the ——— year of the reign of King George the Fourth.

C. D. } And the said *C. D.*, by ———, his attorney, comes and defends the
A. B. } ats } wrong and injury, when, &c.; and prays judgment of the said writ
and declaration, because, he says, that the said several supposed promises and undertakings in the said declaration mentioned (if any such were made) were made jointly with one *G. H.*, who is still living, to wit, at ———, and not by the said *C. D.* alone; and this the said *C. D.* is ready to verify. Wherefore, inasmuch as the said *G. H.* is not named in the said writ together with the said *C. D.*, he, the said *C. D.*, prays judgment of the said writ and declaration, and that the same may be quashed, (*e.*)

The effect of all pleas in abatement, if successful, is, that the particular action is defeated. But, on the other hand, the right of suit itself is not gone; and the plaintiff, on obtaining a better form of writ, may maintain a new action if the objection were founded on matter of abatement; or, if the objection were to the disability of the person, he may bring a new action when that disability is removed.

Such is, in its principle, the doctrine of pleas in abatement; but the actual power of using these pleas has been much abridged, and the whole law of original writs consequently rendered of less prominent importance than formerly by a rule of practice laid down in modern times.

(*d.*) *Lil. Ent.*, 1; *Mod. Ent.*, 9; 1 *Went.*, 42, 29.

[(*d.*) Pleas in abatement must be verified by affidavit. 1 *Chitty Plead.*, 462.]

Form of the Affidavit.

In the King's Bench.

Between { *A. B.*, plaintiff,
and
C. D., sued by the name of *E. D.*, defendant.

C. D., of, &c, ———, the defendant in this case, makes oath, and says that the plea hereunto annexed is true in substance and in fact. *C. D.*

Sworn, &c. [3 *Chitty Plead.*, 901.]

(*e.*) 2 *Chitty*, 415, 1st edit.

With respect to such pleas in abatement as were *founded on facts that could only be ascertained by examination of the writ itself*, as, for example, variance between the writ and declaration, or erasure of the writ, it was always held a necessary matter of form, preparatory to pleading them, to *demand oyer* of the writ, (*f*.) that is, to demand *to hear it read*; which, in the days of oral pleading, was complied with by reading it aloud in open court, and, after the establishment of written pleadings, by exhibiting and (if required) delivering a copy of the instrument to the party who makes the demand. The court of common pleas, however, in the 11 and 12 George II, and the king's bench, in the 19 George III, (*g*.) thought fit to establish it as a rule, that thenceforth oyer should not be granted of the original writ; and the indirect effect of this has consequently been to abolish in practice all pleas in abatement founded on objections of the kind here stated. But there are pleas in abatement which *do not require any examination of the writ itself*. For example, if in the declaration one only of two joint contractors is named defendant, this is sufficient to show that the same non-joinder exists in the writ; for, as a variance between the writ and declaration is a fault, (*h*.) the defendant is entitled to assume that they agree with each other; and he may, consequently, without production of the writ, plead this non-joinder as certainly existing in the latter instrument. So the plea that the writ was sued out pending another action, or pleas to the person of the plaintiff or defendant, require no examination of the writ itself; and there are many others to which the same remark applies. In all such cases no oyer is necessary; and, therefore, pleas of this latter description may be and are, in fact, still pleaded, notwithstanding the rule of practice which denies oyer of the writ.

(*f*.) Com. Dig., Pleader, P 2; 1 Saund., 318, note 3; Bragg v. Digby, Salk., 858. See precedents of oyer of the writ, Walford v. Savil, Lutw., 3; Simpson v. Garside, Lutw., 1642.

(*g*.) Boats v. Edwards, Doug., 227; 1 Saund., 318, note 3.

(*h*.) *Vide supra*, p. 65.

In this explanation of pleas in abatement the case of a proceeding by *original writ* has been hitherto exclusively supposed; the law relating to these pleas having been devised and originally applied at a period when proceedings by *bill* were either unknown or not in common use, and therefore having a more immediate and strict reference to proceedings by *original*. It is, however, to be understood that there are pleas in abatement of *the bill* also, by analogy to those in abatement of *the writ*. In form they differ from pleas in abatement of the writ only in praying judgment, if the plaintiff ought to be answered "to his *bill*" or "that the *bill* be quashed," instead of making the like prayer with respect to "*writ and declaration*," (i.)

A *plea in bar of the action* may be defined as one which shows some ground for barring or defeating the action, and makes prayer to that effect, (k.) A plea in bar is, therefore, distinguished from all pleas of the dilatory class, as impugning the right of action altogether, instead of merely tending to divert the proceedings to another jurisdiction, or suspend them, or abate the particular writ. It is, in short, a substantial and conclusive answer to the action, (l.) It follows from this property, that, in general, it must either deny all or some essential part of the averments of fact in the declaration; or, admitting them to be true, allege new facts, which obviate or repel their legal effect. In the first case, the defendant is said, in the language of pleading, to *traverse* (m) the matter of the declaration; in the latter, to *confess and avoid* it. Pleas in bar are consequently divided into pleas *by way of traverse*, and pleas *by way of confession and avoidance*.

Of pleas in bar, of each of these descriptions, the following are examples:

(i.) See Appendix note 24.

(k.) *Ib.*, note 25.)

(l.) The different grounds or subjects of pleas in bar, in each different form of action, will be found enumerated, Com. Dig., Pleader, 2 A; 3 O, 19.

(m.) See Appendix, note 26.

PLEA IN BAR, BY WAY OF TRAVERSE.

In covenant, on indenture of lease, for not repairing, (n.)

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

C. D. } And the said *C. D.*, by —, his attorney, comes and defends the
ats } wrong and injury when, &c.; and says that the said *A. B.* ought not
A. B. } to have or maintain his aforesaid action against him, the said *C. D.*,
because, he says, that the windows of the said messuage or tenement were not
in any part thereof ruinous, in decay, or out of repair, in manner and form
as the said *A. B.* hath above complained against him, the said *C. D.* And of
this he puts himself upon the country.

PLEA IN BAR, BY WAY OF CONFESSION AND AVOIDANCE.

In a like action.

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

C. D. } And the said *C. D.*, by —, his attorney, comes and defends the
ats } wrong and injury, when, &c.; and says that the said *A. B.* ought not
A. B. } to have or maintain his aforesaid action against him, the said *C. D.*,
because, he says, that after the said breach of covenant, and before the com-
mencement of this suit, to wit, on the — day of —, in the year of our
Lord —, at — aforesaid, in the county aforesaid, the said *A. B.*, by
his certain deed of release, sealed with his seal and now shown to the court
here, (the date whereof is the day and year last aforesaid,) did remise, release,
and forever quit-claim to the said *C. D.*, his heirs, executors, and administra-
tors, all damages, cause and causes of action, breaches of covenant, debts, and
demands whatsoever, which had then accrued to the said *A. B.*, or which the
said *A. B.* then had against the said *C. D.*, as by the said deed of release,
reference being thereto had, will fully appear. And this the said *C. D.* is
ready to verify. Wherefore he prays judgment if the said *A. B.* ought to
have or maintain his aforesaid action against him.

The nature of a demurrer to the declaration and of plea, and the different kinds of plea, being now explained, we will continue our examination of the process of pleading; and will first suppose that the defendant takes the course of pleading to the declaration in bar by way of *traverse*. In this case, it is evident that a question is at once raised between the parties; and it is a question of *fact*, viz, whether the facts in the declaration, which the *traverse* denies, be true. A question being thus raised, or, in other words, the parties having arrived at a specific point or

(n.) See the declaration, *supra*, p. 68.

matter, affirmed on the one side, and denied on the other, the defendant, as the party traversing, is, conformably to the ancient practice, (o.) in general obliged to offer to refer this question to some *mode of trial*, and does this by annexing to the traverse an appropriate formula, proposing either a trial by the *country*, *i. e.*, by a jury, as in the example, (p. 90,) or such other method of decision as by law belongs to the particular point. If this be accepted by his adversary, the parties are then, conformably to the language of the ancient pleading, (p.) said to be *AT ISSUE*, and the question itself is called the *ISSUE*. Consequently, a party who thus traverses, annexing such formula, is said to *tender issue*; and the issue so tendered is called an issue *in fact*. Thus, in the example at page 90, the defendant, by his plea, tenders an issue in fact on the want of repair.

If it be next supposed that, instead of traversing, the defendant chooses to *demur*, it is obvious that a question is in this case also raised between the parties; and it is a question of *law*, viz, whether the declaration be sufficient, in point of law, to maintain the action. The defendant, therefore, as the party demurring, by analogy to the mode observed with respect to an issue in fact, uses a formula referring that question to the proper mode of decision, viz, *the judgment of the court*, as in the example, (p. 82;) and as upon a traverse he tenders an issue in fact, so he is said, in this case, to tender an issue *in law*. Thus, in the same example, the defendant, by his demurrer, tenders an issue in law on the sufficiency of the declaration. And here it is to be observed, that while upon a traverse a party is in general obliged to *tender issue*, upon a demurrer he always necessarily does so, for the only known form of a demurrer contains an appeal to the judgment of the court; but, on the other hand, as will appear in a subsequent part of the work, a party may sometimes traverse or deny without offering any mode of trial.

(o.) *Vide supra*, p. 59.

(p.) *Vide supra*, p. 59.

The issue, whether in fact or law, being thus *tendered*, it is necessary, before the issue is complete, that it be *accepted*. And this subject shall be considered, first, as it respects the issue in *law*.

The tender of the issue in *law* is *necessarily* accepted by the plaintiff; for he has no ground of objecting either to the *question itself* or the proposed *mode of decision*. A question on the legal sufficiency of the declaration he cannot, of course, without abandoning his own form of proceeding, decline; and with respect to the mode of decision, viz, the judgment of the court, there is in matters of law no alternative method. He is, therefore, obliged to *accept* or *join* in the issue in law, and does so by a set form of words called *joinder in demurrer*, of which the following is an example:

JOINDER IN DEMURRER.

Upon the demurrer, (p. 82.)

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

A. B. } And the said A. B. says, that the said declaration and the matters
v. } therein contained, in manner and form as the same are above pleaded
C. D. } and set forth, are sufficient in law for him, the said A. B., to have and maintain his aforesaid action against him, the said C. D.; and the said A. B. is ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the said C. D. hath not answered the said declaration, nor hitherto in any manner denied the same, the said A. B. prays judgment, and his debt aforesaid, together with his damages by him sustained by reason of the detention thereof, to be adjudged to him.

But the tender of the *issue in fact* is *not* necessarily accepted by the plaintiff; for, first, he may consider the *traverse itself* as insufficient in law. It will be recollected, that by the traverse the defendant may deny either the *whole* or a *part* of the declaration; and, in the latter case, the traverse may, in the opinion of the plaintiff, be so framed as to involve a *part immaterial* or *insufficient to decide the action*. Again, he may consider the traverse as *defective in point of form*, and object to its sufficiency in law on that ground. So, in his opinion, the *mode of trial proposed* may, in point of law, be inapplicable to the particular kind of issue. On such grounds, therefore, he has an option to

demur to the traverse as insufficient in law. The effect of this demurrer, however, would only be to postpone the acceptance of issue by a single stage, for by the demurrer he tenders an issue in law; and his adversary, according to the principle already laid down, (q,) would be obliged to join in demurrer; that is, to accept the issue in law in the next pleading. On the other hand, supposing a demurrer not to be adopted, the alternative course will be to accept the tendered issue of fact and also the mode of trial which the traverse proposes; and this is done, in case of trial by jury, by a set form of words, called a *joinder in issue*, or a *similiter*, in the following form:

JOINDER IN ISSUE; OR, SIMILITER.

Upon the traverse, (in p. 90.) ✓

In the King's Bench, ——— Term, in the ——— year of the reign of King George the Fourth.

A. B. } And the said A. B., as to the plea of the said C. D. above pleaded,
 v. }
 C. D. } and whereof he hath put himself upon the country, doth the like.

The issue in law or fact being thus tendered, and accepted on the other side, the parties are *at issue*, and the pleading is at an end.

Hitherto it has been supposed that the defendant either *pleads in bar*, by way of *traverse*, or *demurs* to the declaration; but we will now suppose him to plead either one of the kinds of *dilatory plea*, or a *plea in bar*, by way of *confession and avoidance*. In either case the plaintiff has the option of *demurring* to the plea, as being, in substance or form, an insufficient answer, in point of *law*, to the declaration, or of *pleading* to it by way of *traverse*, or by way of *confession and avoidance* of its allegations. Such *pleading*, (r,) on the part of the plaintiff, is called *the replication*.

If the replication be by way of *traverse*, it is in general necessary (as in the case of the plea) that it should *tender issue*. So, if the plaintiff *demur*, an issue in law is necessarily tendered; and in either case the result is a *joinder in*

(q.) *Supra*, p. 92.

(r.) See Appendix, note 27.

issue, upon the same principles as above explained with respect to the plea. But if the replication be in *confession and avoidance*, the defendant may then, in his turn, either *demur*, or, by a *pleading, traverse or confess and avoid* its allegations. If such pleading take place, it is called *the rejoinder*.

In the same manner and subject to the same law of proceeding, viz, that of *demurring or traversing* or pleading in *confession and avoidance*, is conducted all the subsequent altercation to which the nature of the case may lead; and the order and denominations of the alternate *allegations of fact* or *pleadings* throughout the whole series are as follows: *Declaration, plea, replication, rejoinder, sur-rejoinder, rebutter, and sur-rebutter*. After the sur-rebutter the pleadings have no distinctive names, for beyond that stage they are very seldom found to extend, (*s.*)

To whatever length of series the pleadings may happen to lead, it is obvious that, by adherence to the plan here described, one of the parties must, at some period of the process more or less remote, be brought either to *demur* or to *traverse*; for, as no case can involve an inexhaustible store of new relevant matter, there must be somewhere a limit to pleading in the way of *confession and avoidance*. Examples have already been given of the demurrer and traverse occurring at the *second* stage of the pleading, viz, in the plea. In those which here follow they are not produced till after a longer series.

Let the plaintiff be supposed to declare in *assumpsit*, (as in p. 72,) and the defendant to plead in *abatement*; for example, the non-joinder of a joint contractor, (as in p. 87.) The plaintiff may then be supposed to *reply* thus:

REPLICATION, BY WAY OF TRAVERSE.

Upon the plea, (p. 87.)

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

A. B. } And the said A. B. says that his said writ and declaration, by reason
v. } of anything in the said plea alleged, ought not to be quashed, because,
C. D. } he says, that the said promises and undertakings were made by the said

(*ε*) see Appendix, note 28.

C. D. alone, in manner and form as the said *A. B.* hath above complained, and not by the said *C. D.* jointly with the said *G. H.*, in manner and form as the said *C. D.* hath above in his said plea alleged. And this the said *A. B.* prays may be inquired of by the country.

Again, let the plaintiff be supposed to declare in covenant on an indenture of lease, (as in p. 68,) and the defendant to plead in bar by way of confession and avoidance, (for example, a release, as in p. 90;) the plaintiff may then be supposed to reply thus:

REPLICATION, BY WAY OF CONFESSION AND AVOIDANCE.

Upon the plea, (p. 90)

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

A. B. } And the said *A. B.* says that, by reason of anything in the said plea
v. } alleged, he ought not to be barred from having and maintaining his
C. D. } aforesaid action against the said *C. D.*, because, he says, that he, the said *A. B.*, at the time of the making of the said supposed deed of release, was unlawfully imprisoned and detained in prison by the said *C. D.*, until, by force and duress of that imprisonment, he, the said *A. B.*, made the said supposed deed of release, as in the said plea mentioned; and this the said *A. B.* is ready to verify. Wherefore he prays judgment and his damages by him sustained by reason of the said breach of covenant to be adjudged to him, (*t.*)

To this the defendant may be supposed to *rejoin*, as follows:

REJOINDER, BY WAY OF TRAVERSE.

Upon the above replication.

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

C. D. } And the said *C. D.* saith that, by reason of anything in the said
ats } replication alleged, the said *A. B.* ought not to have or maintain his
A. B. } aforesaid action against him, the said *C. D.*, because, he says, that the said *A. B.* freely and voluntarily made the said deed of release, and not by force and duress of imprisonment, in manner and form as by the said replication alleged. And of this the said *C. D.* puts himself upon the country, (*u.*)

In these examples the parties ultimately arrive at a *traverse*; but it may happen that in any part of the series a *demurrer*, instead of a *traverse*, may take place. Thus, if the defendant, in the last example, choose to dispute the sufficiency, in point of law, of the substance of the matter

(*t.*) See a similar replication, 2 Rich. K. B., p. 60; 8 Edward III. s. pl., 20.

(*u.*) See a similar rejoinder, 2 Rich. K. B., p. 60.

in the replication, he would, instead of a rejoinder, *demur* to the replication, thus:

DEMURRER.

To the replication, (in p. 95.)

In the King's Bench, ——— Term, in the ——— year of the reign of King George the Fourth.

C. D. } And the said *C. D.* says that the said replication of the said *A. B.*
ats } to the said plea of him, the said *C. D.*, and the matters therein con-
A. B. } tained, in manner and form as the same are above pleaded and set
 forth, are not sufficient in law for the said *A. B.* to have or maintain his
 aforesaid action against the said *C. D.*; and that he, the said *C. D.*, is not
 bound by the law of the land to answer the same; and this the said *C. D.*
 is ready to verify. Wherefore, for want of a sufficient replication in this be-
 half, the said *C. D.* prays judgment if the said *A. B.* ought to have or main-
 tain his aforesaid action against him.

As the parties will at length arrive at demurrer or traverse, so, whenever a traverse is at length produced, it comprises in general a *tender of issue*, (as in the above examples;) and a *demurrer* necessarily involves a tender of issue, the consequence of which is, in either case, a joinder in issue, exactly upon the same principle as above explained with respect to the plea; so that the parties arrive at *issue*, after a long series of pleading, precisely in the same manner as when the process terminates at the earliest possible stage. Such is, in a general view, the nature of the process of pleading and the manner of coming to issue, (*x.*)

And here we may take occasion to notice an important corollary or inference, resulting from the preceding explanations, as to the nature of demurring and of pleading, viz, that a demurrer is never founded on matter collateral to the pleading which it opposes, but arises on the face of the statement itself; a pleading is always founded on matter collateral. This consideration will serve as a guide to determine whether a given objection should be brought forward by way of pleading or of demurrer. Thus, if the declaration omit to name the plaintiff, it is an objection to which that statement, on the face of it, is subject, and which should, consequently, be taken by way of demurrer;

(z.) See Appendix, note 29.

but if he is improperly named in the declaration, as William, instead of John, the fact that his name is John is one of a collateral nature, not disclosed by the declaration itself, and must be brought forward, therefore, by way of plea, viz, a plea in abatement.

The pleading has been hitherto supposed to take its direct and simple course. There are, however, some *pleas and incidents* of occasional occurrence by which its progress is sometimes broken or varied; and of these it will now be proper to give some account.

The *pleas* here referred to are called *pleas puis darreign continuance*.

It will be remembered (*y*) that under the ancient law there were *continuances*, *i. e.*, adjournments of the proceedings, for certain purposes, from one day or one term to another; and that, in such cases, there was an entry made on the record, expressing the ground of the adjournment, and appointing the parties to reappear at the given day. In the intervals between such continuances and the day appointed the parties were of course *out of court*, and consequently not in a situation to plead. But it sometimes happened that, after a plea had been pleaded and while the parties were out of court in consequence of such a continuance, a new matter of defense arose which did not exist, and which the defendant had consequently no opportunity to plead *before* the last continuance. This new defense he was therefore entitled, at the day given for his reappearance, to plead as a matter that had happened *after* the last continuance, (*puis darreign continuance—post ultimam continuationem.*) In the same cases as occasioned a continuance in the ancient law, but in no other, a continuance still takes place. At the time, indeed, when the pleadings are filed and delivered, no record actually exists, and there is therefore no entry at that time made on record of the award of a continuance; but the parties are, from the day when, by the ancient practice, a continuance would have

(*y*.) *Supra*, p. 80.

been entered, supposed to be out of court, and the pleading is suspended till the day arrives to which, by the ancient practice, the continuance would extend. At that day the defendant is entitled, if any new matter of defense has arisen in the interval, to plead it according to the ancient plan, *puis darreign continuance*. The following is an example of the form:

PLEA PUIS DARREIGN CONTINUANCE.

In the King's Bench, — next after —, in — Term, in the — year of the reign of King George the Fourth.

C. D. } And now at this day, that is to say, on — next after —, }
ats } in this same term, until which day the plea aforesaid was last con- }
A. B. } tinued, come as well the said *A. B.* as the said *C. D.*, by their respect- }
 ive attorneys aforesaid; and the said *C. D.* says that the said *A. B.* ought }
 not further to have or maintain his aforesaid action against him, because, he }
 says, that after the last continuance of this cause, that is to say, — next }
 after —, in this same term, from which day this cause was last continued, }
 and before this day, to wit, on the — day of —, in the year of our }
 Lord —, at — aforesaid, in the county aforesaid, the said *A. B.*, by his }
 certain deed of release, sealed with his seal [the release may be here stated, }
 as *supra*, p. 90:] and this the said *C. D.* is ready to verify. Wherefore he }
 prays judgment if the said *A. B.* ought further to have or maintain his aforesaid }
 action against him, &c., (z.)

A plea *puis darreign continuance* is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had. It may be either in bar or abatement, (a;) and is followed, like other pleas, by a replication and other pleadings, till issue is attained upon it, (b.)

Of the *incidents* of occasional occurrence, by which the progress of the pleading is sometimes varied, some of the principal shall here be noticed; and, first,

1. The *demand of view*.

In most real and mixed actions, in order to ascertain the identity of the land claimed with that in the tenant's possession, the tenant is allowed, after the demandant has counted, to *demand a view* of the land in question; or, if the subject of claim be a rent, a right of advowson, a right

(z.) 2 Chitty, 676, 1st edit.; 1 Arch., 323.

(a.) Com. Dig., Abatement, I, 24.

(b.) See an example in *Lyttleton v. Cross*, 3 Barn. & Cress., 317.

of common, or the like, a view of the land out of which it issues, (c.) This, however, is confined to real or mixed actions. For in actions personal, the view does not lie, (d.) In the action of dower, *unde nihil habet*, it has been much questioned whether the view be demandable or not, (e;) and there are other real and mixed actions in which it is not allowed.

The view being granted, the course of proceeding is to issue a writ, commanding the sheriff to cause the defendant to have view of the land. It being the interest of the demandant to expedite the proceedings, the duty of suing out the writ lies upon *him*, and not upon the tenant, (f;) and when, in obedience to its exigency, the sheriff causes view to be made, the demandant is to show to the tenant, in all ways possible, the thing in demand, with its metes and bounds, (g.)

On the return of the writ into the court, the demandant must count *de novo*, that is, declare again, (h,) and the pleading proceeds to issue, (i.)

2. Another incident that deserves notice is *voucher to warranty*.

A warranty is a covenant real, annexed to lands and tenements, whereby a man is bound to defend such lands and tenements for another person; and in case of eviction by title paramount, to give him lands of equal value, (k.) Voucher to warranty (*vocatio ad warrantizandum*) is the call-

(c.) Vin. Ab., View.; Com. Dig., (View;) Booth, 37; 2 Saund., 44, 45, d, n. 4; 1 Reeves, 433.

(d.) 1 Reeves, 435.

(e.) The better opinion seems to be that it is not demandable, 2 Saund., 44, n. 4.

(f.) Booth, 40.

(g.) 1 Reeves, 436.

(h.) Com. Dig., Pleader, 2 Y, 3; Booth, *ubi supra*.

(i.) Both this proceeding of *demanding a view*, and the *voucher to warranty*, afterwards mentioned, are, in the present rarity of real actions, unknown in practice. They seem, however, to deserve notice, as illustrating the principle of pleading.

(k.) Co. Litt., 365; Com. Dig., Guaranty, A.

ing of such warrantor into court by the party warranted, (when tenant in a real action, brought for recovery of such lands,) to defend the suit for him, (*l*;) and the time of such voucher is after the defendant has counted. It lies in most real and mixed actions, but not in personal, (*m*.)

Where the voucher has been made and allowed by the court, the vouchee either voluntarily appears, or there issues a judicial writ, called a *summons ad warrantizandum*, commanding the sheriff to summon him.

When he, either voluntarily or in obedience to this writ, appears, and offers to warrant the land to the tenant, it is called *entering into the warranty*; after which he is considered as tenant in the action, in the place of the original tenant. The demandant then counts against him *de novo*, (*n*.) the vouchee pleads to the new count, and the cause proceeds to issue.

3. A party in pleading may also have occasion to make *demand of oyer*, (*o*.)

Where either party alleges any deed, he is in general obliged, by a rule of pleading that will be afterwards considered in its proper place, to make *profert* of such deed, that is, to produce it in court simultaneously with the pleading in which it is alleged. This, in the days of oral pleading, was of course an actual production in court. Since then it consists of a formal allegation that he shows the deed in court, it being, in fact, retained in his own custody. An example of this allegation will be found in the declaration of debt on a bond, as above given, (*p*.)

Where *profert* is thus made by one of the parties, the other, before he pleads in answer, is entitled to *demand oyer*, that is, to *hear it read*. For it is to be observed that the

(*l*.) Co. Litt., 101 b; Com. Dig., Voucher, A 1; Booth, 43; 2 Saund., 32, n 1.

(*m*.) Com. Dig., Voucher, A 1; 2 Saund., 32, n. 1.

(*n*.) 2 Inst., 241 a, 2 Saund., 32, n.; Booth, 46.

(*o*.) See the whole law and practice of *oyer* stated, 1 Sellon, 261; 1 Tidd, 635, 8th edit; 1 Chitty, 414, 1st edit. 1 Arch., 164; 2 Arch. Pract., 1st edit., 194, 196.

(*p*.) *Supra*, p. 67

forms of pleading do not in general require that the whole of any instrument which there is occasion to allege should be set forth. So much only is stated as is material to the purpose, of which the example last cited will also serve for illustration. The other party, however, may reasonably desire to hear the whole, and this either for the purpose of enabling him to ascertain the genuineness of the alleged deed, or of founding on some part of its contents, not set forth by the adverse pleader, some matter of answer. He is therefore allowed this privilege of hearing the deed read *verbatim*.

When the *profert* was actually made in *open court*, the demand of oyer, and the oyer given upon it, took place in the same manner, and the course was, that on demand by one of the pleaders the deed was read aloud by the pleader on the other side, (*q.*) By the present practice, the attorney for the party by whom it is demanded, before he answers the pleading in which the *profert* is made, sends a note to the attorney on the other side, containing a demand of oyer, on which the latter is bound to carry to him the deed, and deliver to him a copy of it, if required, at the expense of the party demanding; and this is considered as oyer, or an actual reading of the deed in court, (*r.*)

Oyer is demandable in all actions, real, personal, and mixed.

Oyer is said to have been formerly demandable not only of *deeds*, but of *records* (*s.*) alleged in pleading, and (as has

(*q.*) Semb. Com. Dig., Pleader, P 1; *Simpson v. Garside*, Lutw., 1644. In *Jevons v. Harridge*, 1 Sid., 308, the reading of the deed is said to be the *act of the court*; but the true doctrine is probably that laid down in *Lutwyche*. The rule seems to have been, that *writs* were read by the court, but *deeds* by the pleader. (See Com. Dig., Pleader, P 1.)

(*r.*) *Page v. Divine*, 2 T. R., 40; 1 Tidd., 635, 8th edit.; 1 Sel., 264. And the party demanding is entitled to a copy of the attestation and names of the witnesses. (1 Saund., 9 b, n. e.) There is no settled time for the plaintiff to give oyer. The defendant must give it in two days exclusive after the demand. (1 Tidd., 637, 638, 8th edit.)

(*s.*) Com. Dig., Pleader, P 2; *Ward v. Griffith*, *Ld. Ray.*, 83; see, however, the remark on this subject in 1 Arch., 164; and see *The King v. Amery*, 1 T. R., 149.

been before stated in this work) of the *original writ* also, (*t.*) but, by the present practice, it is not now granted either of a record or an original writ, (*u.*) and can be had only in the cases of *deeds*, *probates*, and *letters of administration*, &c., of which profert is made on the other side; of *private writings not under seal*, oyer has never been demandable, (*x.*)

Oyer can be demanded only where profert is made, (*y.*) In all cases where profert is necessary, and where it is also, in fact, made, the opposite party has a right, if he pleases, to demand oyer; but if it be unnecessarily made, this does not entitle to oyer; and so, if profert be omitted when it ought to have been made, the adversary cannot have oyer, but must demur, (*z.*)

When a deed is pleaded with profert, it is supposed to *remain in court* during all the term in which it is pleaded, but no longer, unless the opposite party, during that term, plead in denial of the deed, in which case it is supposed to remain in court till the action is determined. Hence it is a rule, that oyer cannot be demanded *in a subsequent term to that in which profert is made*, (*a.*)

A party having a right to demand oyer is yet not obliged,

(*t.*) *Vide supra*, p. 88.

(*u.*) As to the original writ, *vide supra*, p. 88. As to records, see *The King v. Amery*, 1 T. R., 150. But if a judgment or other matter on record in the *same* court be pleaded, the party pleading it must give a note in writing of the term and number roll on which it is entered and filed, or his plea will not be received. (1 Tidd., 636, 8th edit.)

(*x.*) But where an action is founded on a written instrument not under seal, though the defendant cannot pray oyer, yet the court will in some cases make an order for delivery of a copy of it to the defendant or his attorney, and that all proceedings in the meantime be stayed. (1 Tidd., 639, 8th edit.; 1 Saund., 9 d. n., g.) It seems that oyer is not demandable of an act of Parliament, (1 Tidd., 637;) nor of letters patent, (1 Arch., 164;) nor of a recognition, (*Ibid.*) But it is demandable of a deed enrolled, or of the exemplification of the enrollment, according to the terms of the profert. (*Ibid.*)

(*y.*) Therefore in an action on a bond conditioned for performance of the covenant in another deed, the defendant cannot crave oyer of such deed, but must himself plead it with a *profert*. (1 Chitty, 415, 1st edit.)

(*z.*) Arch., 164; 1 Saund., 9 a. n. d.

(*a.*) 1 Tidd, 636, 8th edit.; 1 Chitty, 418, 1st edit.

in all cases, to exercise that right, (b.) nor is he obliged, in all cases, after demanding it, to notice it in the pleading that he afterwards files or delivers, (c.) Sometimes, however, he is obliged to do both, viz, where he has occasion to found his answer upon any matter contained in the deed of which profert is made, and not set forth by his adversary. In these cases the only admissible method of making such matter appear to the court is to demand oyer, and from the copy given set forth the whole deed *verbatim* in his pleading, (d.) The following is an example of the manner in which the demand of oyer is thus entered and the deed set forth in the pleading.

PLEA IN BAR.

To debt on bond, (e.)

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

C. D. } And the said C. D., by —, his attorney, comes and defends the
 ats } wrong and injury when, &c., and craves oyer of the said writing
 A. B. } obligatory, and it is read to him, &c. He also craves oyer of the condition of the said writing obligatory, and it is read to him in these words: "Whereas," (here the condition of the bond, which shall be supposed to be for payment of one hundred pounds on a certain day, is set forth *verbatim*;) which, being read and heard, the said C. D. says that the said A. B. ought not to have or maintain his aforesaid action against him, because, he says, that he, the said C. D., on the said — day of —, in the year aforesaid, in the said writing obligatory mentioned, paid to the said A. B. the said sum of one hundred pounds in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition, to wit, at — aforesaid, in the county aforesaid; and this, the said C. D. is

(b.) Arch., 164, 165.

(c.) 1 Tidd, 638, 8th edit. Where it is said that if the defendant omits to set forth the oyer in his plea, the plaintiff, in C. P., may insert it for him at the head of his plea in making up the issue; but, in K. B., can only avail himself of the deed by praying that it be enrolled at the head of his own replication. And see Com. Dig., Pleader, p. 1.

(d.) Com. Dig., Pleader, 2 V, 4; 2 Saund., 410, n. 2; 1 Saund., 9 b, n. 1, *Stibbs v. Clough*, 1 Stra., 227; *Ball v. Squarry*, Fort., 354; *Colton v. Goodridge*, 2 Black, 1108. If he does not set forth the whole deed, or misrecites it, plaintiff may either sign judgment for want of a plea, or by his replication may pray that the deed be enrolled. (*Jevons v. Harridge*, 1 Saund., 9 b; and see Com. Dig., p. 1.)

(e.) See the declaration, *supra*, p. 67.

ready to verify. Wherefore he prays judgment, if the said *A. B.* ought to have or maintain his aforesaid action against him, (*j.*)

When oyer is demanded and the deed set forth, as above explained, the effect is as if it had been set forth in the first instance by the opposite party, and the tenor of the deed as it appears upon oyer, is consequently considered as forming a part of the precedent pleading. Therefore, if the deed, when so set forth by the plea, be found to contain in itself matter of objection or answer to the plaintiff's case, as stated in the declaration, the defendant's course is to *demur*, as for matter apparent on the face of the declaration, (*g.*) and it would be improper to make the objection the subject of *plea*.

4. The last of these incidents that need be mentioned is the *prayer of an imparlance*.

By the ancient practice, if a party found himself unprepared to answer the last pleading of his adversary immediately, his course was to pray the court to allow him a further day for that purpose; which was accordingly granted by the court to any day that, in their discretion, they might award, either in the same or the next succeeding term, (*h.*) The party was, in this case, said to pray, and the court to grant, an *imparlance*, (*interlocutio*, or *interloquela*,) a term derived from the supposition that in this interval the parties might *talk together* and amicably settle their controversy, (*i.*)

An imparlance, when granted, was one of the cases of *continuance*; of which general doctrine some explanation has been before given, (*k.*)

It was grantable in almost all actions, real, personal, and mixed, (*l.*)

The prayer of imparlance, when made by the defendant

(*f.*) 2 Chitty, 473, 1st edit.

(*g.*) Jeffrey *v.* White, Doug., 475; Snell *v.* Snell, 4 Barn & Cres., 741.

(*h.*) Booth, 36; Com. Dig., Pleader, D 1.

(*i.*) 3 Bl. Com., 299.

(*k.*) *Supra*, p. 60.

(*l.*) Com. Dig., Pleader, D 2.

prior to his plea, was either *general* or *special*. The first was simply a prayer for leave to imparl. Of such *general* imparlance it was a consequence that the defendant was afterwards precluded from certain proceedings of a dilatory tendency, which might before have been competent to him. Thus he could not, after a general imparlance, demand *oyer*, (*m*.) nor (according to some authorities) a *view*, (*n*.) nor could he plead a plea *to the jurisdiction* or *in abatement*, (*o*.) Accordingly, if he wished to preserve his right to these advantages, he varied the form of his prayer, and made it with a reservation of such right. If his object was to preserve the right of pleading in *abatement*, he prayed what is called a *special* imparlance. The nature of the imparlance, general and special, will more fully appear by examples of the style in which this kind of continuance was entered on the record.

ENTRY OF GENERAL IMPARLANCE TO THE DECLARATION.

(*In the king's bench, by original.*)

[*After the entry of the declaration, the record proceeds thus:*]

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury when, &c., and prays a day thereupon to imparl to the said declaration of the said *A. B.*, and it is granted to him, &c. And upon this a day is given to the parties aforesaid, before our lord the king, until the morrow of All Souls, wheresoever, &c., that is to say, for the said *C. D.* to imparl to the declaration aforesaid, and then to answer the same, (*p*.)

ENTRY OF SPECIAL IMPARLANCE TO THE DECLARATION.

(*In the king's bench, by original.*)

[*After the entry of the declaration, the record proceeds thus:*]

And the said *C. D.*, in his proper person, comes, and, saving to himself all advantages and exceptions, as well to the writ as to the declaration aforesaid, prays leave to imparl thereunto here until, &c. And it is granted to him, &c. The same day is given to the said *A. B.* here, &c., (*q*.)

(*m*.) 2 Saund., 2, n. 2.

(*n*.) 2 Saund., 45 b; Booth, 39.

(*o*.) Com. Dig., Abatement, I 20; 2 Saund., 2, n. 2.

(*p*.) 2 Chitty, 405, 1st edit. (See the form in common pleas, Booth, 36.) In proceedings by *bill* in king's bench there was no formal entry of a prayer, but a short notice on the record *retrospectively* that an imparlance *had been* granted. (Chitty, *ib*.)

(*q*.) 2 Chitty, 407, 1st edit. (See the form in proceeding by *bill* in king's bench, Lib. P. ac., 2, pl. 15; 2 Saund., 2, n. 2.)

The latter form would entitle the party to plead in *abatement* afterwards, but not to the *jurisdiction*, and therefore if he wished to preserve the power of doing this also, he resorted to another kind of special imparlance, differing from the former only in this: that it contained a saving of "all advantages and exceptions whatsoever," (r.) This is called in the books a *general special imparlance*; and it would seem that the effect of an imparlance of this description is to preserve the power not only of pleading all dilatory pleas, but of demanding *oyer* and a *view*, (s.)

The law and practice on the subject of imparlance still remains in the same state as here described, subject to the following remarks:

By the practice of the present day, a party is either obliged to answer the last antecedent pleading in the same term, or is entitled *as of course* to an imparlance to the next term, according to the period of the existing term at which it becomes his turn to plead, and the course of the previous proceedings. The rules on this subject are too various and merely practical to be here stated. An imparlance, when not grantable *as of course*, may yet be obtained upon application for some particular cause, at the *discretion of the court*.

When an imparlance is grantable *as of course*, and a general imparlance will suffice, no actual prayer or application for it is now made, but the party entitled takes the imparlance for himself by suspending his pleading till the next term. And on a general imparlance, no notice of the proceeding is usually taken in the pleadings filed and delivered between the parties, (t.) But if the defendant, being entitled *as of course* to an imparlance, wishes at the same time to preserve his right of pleading dilatory pleas and taking other advantages, and consequently to obtain a special or general special imparlance, he must make an actual

(r.) 2 Saund., 2, n. 2.

(s.) *Vide* 1 Chitty, 418, 1st edit.

(t.) 1 Chitty, 421, 1st edit.

application to the court (*u*) for this purpose; and where a special or general special imparlance is thus obtained, the defendant makes an entry of it in his plea filed or delivered, (*x*.) This is done exactly in the form of the ancient entry on record, (*y*), and it stands as a commencement to his plea.

These, and other incidents of a similar kind, may occur in pleading. If they take their course without opposition, they do not, as we have seen, long interrupt the main series of the allegations. But, with respect to most of them, the opposite party has a right, if he pleases, to oppose the prayer made on the other side; and for this purpose he was entitled, in the ancient practice of pleading, to *demur* or *plead* to it, as if it were a statement of fact made in the direct course of the pleading. Thus, if a party demanded oyer in a case where, upon the face of the pleading, his adversary conceived it to be not demandable, the latter might *demur*, (*z*;) or, if he had any matter of fact to allege as a ground why the oyer could not be demanded, he might *plead* such matter, (*a*.) If he pleaded, the allegation was called a *counterplea to the oyer*. So the demandant might have occasion, in the same manner, to *counterplead* the *voucher* or *counterplead* the *view*; all pleadings of this incidental kind diverging from the main series of the allegations being termed *counterpleas*, (*b*.) And in the latter instances, as well as upon oyer, it would seem there might be demurrer instead of counterplea, if the objection appeared on the face of the proceedings. Again, on the counterplea, in all these cases, there might happen to be a replication and other subsequent pleadings; and so the parties might come to *issue* in law or in fact on this collat-

(*u*.) But the special imparlance in the common pleas may be granted by the prothonotary. (2 Saund., 2, n. 2; 1 Tidd, 467, 8th edit.)

(*x*.) 2 Chitty, 423, 1st edit.; 2 Saund., 2, n. 2.

(*y*.) As in the example, *supra*, p. 105.

(*z*.) 1 Saund., 9 b., n. 1.

(*a*.) *Ib*.

(*b*.) In Reg. Plac., 118, *counterplea* is defined to be "a kind of replication"

eral subject, in the same manner as upon the principal matters in controversy, (c.) It is to be observed, however, that these collateral or incidental pleadings, though according to the principle of the science they may occur, (d,) have now fallen into complete disuse in point of practice.

Supposing the cause to be *at issue*, the next proceeding is to make a transcript upon paper of the whole pleadings that have been filed or delivered between the parties. This transcript, when the issue joined is an issue of law, is called the *demurrer-book*; when an issue in fact, it is called, in the king's bench, in some cases, the issue, (e,) in others the *paper-book*, and in the common pleas *the issue*. It contains not only the pleadings, but also entries, according to the ancient forms used in recording, (f,) of the appearance of the parties, the continuances, and other acts supposed to be done in court up to the period of issue joined, even though such entries have not formed part of the pleadings as filed or delivered; and it concludes with an entry of an award by the court of the mode of decision tendered and accepted by the pleadings. The making of this transcript upon an issue in law is called *making up the demurrer-book*; upon an issue in fact, *making up the issue* or *paper-book*. The demurrer-book, issue, or paper-book, when *made up*, (g,) is delivered to the defendant's attorney, who, if it contains

(c.) See an example of an issue upon counterplea to the voucher in *Formedon*, Bro. Ent., 174.

(d.) With respect to *oyer*, it is stated to be still the regular course, where *oyer* is refused, that the party insisting upon it should move the court to have the prayer of *oyer* entered upon record; and the other party is then at liberty either to counterplead it or strike out the rest of the pleading, and demur; upon which the judgment of the court is, either that his adversary have *oyer*, or answer without it. On the latter judgment a writ of error may be brought, but not on the former. (1 Tidd, 637, 8th edit.)

(e.) Viz, when the *general issue* only has been pleaded, or where the pleadings have been *delivered*, not *filed*. (1 Arch. Pract., 131, 1st edit.)

(f.) *Vide supra*, p. 60.

(g.) In what cases the paper-book or issue is made up by the attorneys, and in what cases by the clerk of the papers, is explained in 2 Tidd, 774, 8th edit. It is in general the duty of the *plaintiff* to get it made up. (1 Arch. Pract. 131, 1st edit.)

what he admits to be a correct transcript, returns it unaltered, (*h.*) but, if it varies from the pleadings that were filed or delivered, he makes application to the court to have it set right, (*i.*) Before dismissing the subject of this transcript, it will be proper to notice the following point of practice with respect to the manner in which the demurrer-book, issue, or paper-book, is made up and delivered. Whenever the *defendant* demurs, or traverses with a *conclusion to the country* (that is, with an offer of trial *by jury*,) instead of returning a regular joinder in demurrer or similiter on the part of the plaintiff, before making up the demurrer-book, issue, or paper-book, in the manner formerly described, (*k.*) the usual course, (in a view to expedite the proceedings,) is to make up and deliver to the defendant the demurrer-book, issue, or paper-book at once; inserting in it, however, a joinder in demurrer, or a similiter, for the plaintiff, (*l.*) And this, in the case of an issue in fact, is done, not in the full and regular form of a joinder in issue, as formerly given, (*m.*) but in the following abbreviated style, viz: "And the said *A. B.* does the like." Again, whenever the *plaintiff* demurs or traverses, concluding to the country, the demurrer-book, issue, or paper-book is in like manner made up at once and delivered to the defendant, with a joinder in demurrer or similiter inserted for *him*, the similiter being in the same abbreviated form, "And the said *C. D.* does the like." The defendant, however, having an option, as above explained, (*n.*) with respect to the acceptance of an issue in fact, is of course entitled, if he pleases, to strike out the similiter, and demur.

(*h.*) The *issue* in the K. B. is merely accepted and retained by the defendant's attorney. It is only the paper-book or demurrer-book which is returned. (1 Arch. Pract., 132, 1st edit.

(*i.*) *Shepley v. Marsh*, Str., 1131.

(*k.*) *Supra*, pp. 92, 93.

(*l.*) 1 Arch. Pract., 131, 1st edit.

(*m.*) *Supra*, p. 93.

(*n.*) *Supra*, p. 92.

During the course of the pleading, if either party perceives any mistake to have been committed in the manner of his allegation, or if, after issue joined on demurrer for matter of form, he should think the issue likely to be decided against him, he ought to apply, without delay, for leave to *amend*. It is proper, therefore, now to take some notice of the law of *amendment*.

Under the ancient system, the parties were allowed to correct and adjust their pleadings during the oral altercation, and were not held to the form of statement that they might first advance, (*o.*) So, at the present day, until the *judgment is signed*, (*p.*) in the manner to be afterwards mentioned, either party is, in general, at liberty to *amend* his pleading as at *common law*; the leave to do which is granted, as of course, (*q.*) upon proper and reasonable terms, including the payment of the costs of the application, and sometimes the whole costs of the cause up to that time. And, even after the judgment is signed, and up to the latest period of the action, amendment is, in most cases, allowable at the discretion of the court, under certain *statutes* passed for allowing amendments of the record; and in late times the judges have been much more liberal than formerly in the exercise of this discretion, (*r.*) Amendments are, however, always limited by due consideration of the rights of the opposite party; and where, by the amendment, he would be prejudiced or exposed to unreasonable delay, it is not allowed, (*s.*)

(*o.*) 2 Reeves, 349; *Rush v. Seymour*, 10 Mod., 88.

(*p.*) 2 Arch. Pract., 231, 1st edit.; 2 Tidd, 767, 8th edit.

(*q.*) *Rush v. Seymour*, 10 Mod., 88; 2 Tidd, 767, 8th edit. But not as of course in a *real* action; and, in general, the court will not allow an amendment in an action of that class. (2 Tidd, 755, 8th edit.; *Dumday v. Hughes*, 3 Bos. & Pul., 453; *Charlwood v. Morgan*, 1 N. R., 64, 233; *Hull v. Blake*, 4 Taunt., 572.) Nor will an amendment be allowed of a plea in *abatement*. (*The King v. Cooke*, 2 Barn. & Cres., 871; 1 Manning, Excheq., 257.)

(*r.*) They will even allow an amendment in some cases after a demurrer has been argued; but, in general, amendments are not allowed after argument. (*Carr v. Hinchliff*, 3 Barn. & Cres., 547.)

(*s.*) For the practice as to amendment, consult 2 Tidd, 753, 8th edit.

To return to the main course of proceeding. The pleadings and issue being adjusted by the making up, delivery, and return of the demurrer-book, issue, or paper-book, the next step is to *enter the issue on record*. It will be remembered that the pleadings are framed as if they were copied from a roll of the oral pleadings. Such a roll, as has been shown, (*t*), did, in the time of oral pleading, exist, and still exists in contemplation of law; but no roll is now actually prepared or record made till after issue joined and made up, in manner above described. At that period, however, a record is drawn up on a parchment roll. This proceeding is called *entering the issue*, (*u*;) and the roll on which the entry is made is called *the issue roll*. The issue roll contains an entry of *the term*, of which the demurrer-book, issue, or paper-book is entitled, (*x*;) and (in the king's bench) the *warrants of attorney* supposed to have been given by the parties at the commencement of the cause, authorizing their attorneys to appear for them respectively, (*y*;) and then proceeds with a transcript of the declaration and subsequent pleadings, continuances, and award of the mode of decision, as contained in the demurrer-book, issue, or paper-book. When drawn up, it is filed in the proper office of the court, (*z*.) Of the manner of thus entering the issue on record, the following are examples:

(*t*.) *Supra*, pp. 59, 60; *et vide* Sel. Intro., lxiv.

(*u*.) The issue is generally entered by the *plaintiff*. (1 Arch. Pract., 133, 1st edit.)

(*x*.) That is, the term in which issue is joined. (2 Tidd, 775, 779, 791, 792, 8th edit.)

(*y*.) 2 Tidd, 792, 8th edit.; Impey, C. P., 363, and *vide supra*, p. 62.

(*z*.) 2 Tidd, 785, 8th edit.; 1 Sel., 335, 403. Such is the course of proceeding, when strictly and formally pursued. But the statement is not quite practically true, it being the general practice not to complete the issue roll, by transcribing the whole of the proceedings into it, but to enter only what is called an *incipitur*; that is, the mere commencement or initial words of the issue, paper-book, or demurrer-book. (2 Arch. Pract., 34, 1st edit.; Tidd, 792, 8th edit.; Impey, C. P., 403; *Dickinson v. Plaisted*, 7 T. R., 494.) It did not seem worth while to embarrass the statement in the text by noticing this circumstance.

ENTRY OF ISSUE ON DEMURRER, WITH AN IMPARLANCE.

In the king's bench, by original. In an action of covenant.

As yet of — Term, in the — year of the reign of King George the Fourth.

Witness Sir Charles Abbott, knight.

——, to wit, *A. B.* puts in his place *E. F.*, his attorney, against *C. D.*, in a plea of breach of covenant.

——, to wit, *C. D.* puts in his place *G. H.*, his attorney, at the suit of the said *A. B.*, in the plea aforesaid.

——, to wit, *C. D.* was summoned to answer, (as in the declaration, *supra*, p. 68.)

And the said *C. D.*, by ——, his attorney, comes and defends the wrong and injury when, &c., and prays a day thereupon to imparl to the said declaration of the said *A. B.*; and it is granted to him, &c. And upon this a day is given to the parties aforesaid, before our lord the king, until ——, where-soever, &c., that is to say, for the said *C. D.* to imparl to the declaration aforesaid, and then to answer the same. At which day, before our said lord the king, at Westminster, come the parties aforesaid, by their attorneys aforesaid; and the said *C. D.* says that the said *A. B.* ought not to have or maintain, &c., (as in the plea, *supra*, p. 90.)

And the said *A. B.* says that, by reason of anything in the said plea alleged, he ought not to be barred, &c., (as in the replication, *supra*, p. 95.)

And the said *C. D.* says that the said replication of the said *A. B.* to the said plea of him, the said *C. D.*, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law, &c., (as in the demurrer, *supra*, p. 96.)

And the said *A. B.* says that the said replication, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law for him, the said *A. B.*, to have and maintain his aforesaid action against the said *C. D.*; and the said *A. B.* is ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the said *C. D.* hath not answered the said replication, nor hitherto in any manner denied the same, the said *A. B.* prays judgment and his damages by him sustained by reason of the said breach of covenant, to be adjudged to him. But because the court of our said lord the king, now here, are not yet advised (a) what judgment to give of and upon the premises, a day is given to the parties aforesaid before our lord the king, on ——, wheresoever, &c., to hear judgment thereon, for that the said court of our said lord the king, now here, are not yet advised thereof, (b.)

(c.) This concluding part of the entry, beginning, *But because, &c.*, is called an entry of *curia advisare vult*, which were the words used when the record was in Latin. It is an award of the mode of decision, viz, that by the judgment of the court. This, as well as the imparlance, is one of the kinds of *continuance*, as to which, *vide supra*, p. 60.

(b.) For the form of entering the issue, as above given, see Tidd's Appendix, ch. xxx, 6th edit.; 1 Arch. Pract., 134, 1st edit.

ENTRY OF ISSUE ON AN ISSUE IN FACT, TO BE TRIED BY A JURY WITHOUT AN IMPARLANCE.

In the king's bench, by original. In an action of covenant.

As yet of—— Term, in the —— year of the reign of King George the Fourth:

Witness Sir Charles Abbott, knight.

——, to wit, *A. B.* puts in his place *E. F.*, his attorney, against *C. D.*, in a plea of breach of covenant.

——, to wit, *C. D.* puts in his place *G. H.*, his attorney, at the suit of the said *A. B.*, in the plea aforesaid.

——, to wit, *C. D.* was summoned to answer, (as in the declaration, *supra*, p. 68.)

And the said *C. D.*, by ——, his attorney, comes and defends the wrong and injury when, &c., and says, (as in the plea, *supra*, p. 90.)

And the said *A. B.* says that, by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said *C. D.*, because, he says, (as in the replication, *supra*, p. 95.)

And the said *C. D.* saith that, by reason of anything in the said replication alleged, the said *A. B.* ought not to have or maintain his aforesaid action against him, the said *C. D.*, because, he says, (as in the rejoinder, *supra*, p. 95.)

And the said *A. B.* does the like, (c.) Therefore it is commanded to the sheriff (d) that he cause to come before our lord the king, on ——, wheresoever our said lord the king shall then be in England, twelve, &c., by whom, &c., and who neither, &c., to recognize, &c., because as well, &c. The same day is given to the parties aforesaid, &c. (e.)

The action being now brought to that stage at which the issue is recorded, the next subject for consideration is the manner in which the issue is *decided*.

The decision of issues *in law* is vested, as it always has been, (f,) exclusively in the judges of the court. Therefore, when, upon a demurrer, the issue in law has been entered on record in the manner above described, the next step is to *move for a concilium*; that is, to move to have a day appointed on which the court will hear the counsel of the

(c.) As to this abbreviated form of the similitur, see *supra*, p. 109.

(d.) The concluding clause, beginning, *Therefore it is commanded, &c.*, is an entry of the award of the mode of decision. Where this is by jury, the award is that of a writ of *venire facias* to summon a jury; to which the language of the above entry refers.

(e.) For the form of entering the issue, as above given, see Tidd's Appendix, ch. xxxi, 6th edit; 1 Arch. Pract., 134, 1st edit.

(f.) *Supra*, p. 59.

parties argue the demurrer, (*g.*) And such day being appointed, the cause is then entered for argument accordingly, (*h.*) On that day, or as soon afterwards as the business of the court will permit, it is accordingly argued *viva voce* in court by the respective counsel for the parties; and the judges, in the same manner and place, pronounce their decision according to the majority of voices.

The manner of deciding issues *in fact* will require explanation at greater length.

The decision of the issue in fact is called the *trial*, (*i.*) The different methods of trial now in force are the following: The trial by *jury*, by the *grand assize*, by the *record*, by *certificate*, by *witnesses*, by *inspection*, and by *wager of law*, (*k.*)

These occur, however, in very different degrees of frequency in practice. Every mode of trial, except that by jury, is of rare admissibility, being not only confined to a few questions of a *certain nature*, but in general also, if not universally, to such questions when arising in a *certain form of issue*, (*l.*) And to all issues not thus specially provided for, the trial by jury applies, as the ordinary and only legitimate method, (*m.*) On the other hand, however, it

(*g.*) This motion may be made by either party, (2 Tidd, 794, 8th edit.; 2 Arch. Pract., 35, 1st edit.) and is a motion of course requiring only counsel's signature. (2 Tidd, 796; 1 Arch., 35.)

(*h.*) It is entered for argument in the K. B. with the clerk of the papers. (2 Tidd, 796; 1 Arch., 35.) In the C. P. it is set down for argument by one of the secondaries in the court book. (2 Tidd, 797.)

(*i.*) See Appendix, note 30.

(*k.*) Vide 3 Bl. Com., 330, where the enumeration is the same, with only the nominal difference that the grand assize is there classed as a species of trial by jury. The *wager of battel*, included in this enumeration, is not now in force, being abolished by the stat. 59 George III, c. 46.

(*l.*) Thus, whether certain persons have been *accoupled in lawful matrimony*, (*accouple en loial matrimonie*,) is triable by certificate of the ordinary; but if the issue be whether the plaintiff *married the defendant's daughter rite et legitime*, this shall be tried by jury. So, whether a church is *full or not full*, is triable by certificate; but *void or not void*, by jury. (See Fletcher v. Pynsett, Cro. Jac., 102; Machell v. Garret, 3 Salk., 64; 12 Mod., 976; S. C. Vin. Trial, O. 6, 7, where the last of these distinctions is said to have been adjudged, and the year-books are cited.)

(*m.*) Ilderton v. Ilderton, 2 H. Bl., 156.

is to be observed, with respect to these occasional modes of trial, that, *when competent*, they are in general *exclusively appropriate*; so that the party by whom they are proposed in the pleading, has a right to insist on their being applied, to the exclusion of the trial by jury.

First shall be considered the ordinary method, or trial by jury, (*n.*)

It will be remembered, that when the parties have mutually referred the issue to decision by jury, or (as it is technically termed) have *put themselves upon the country*, there is entered upon the roll (as in all other cases) the award of the mode of decision so adopted. In the case of the trial by jury, that award directs the issuing of the writ of *venire facias*, commanding the sheriff of the county where the facts are alleged by the pleading to have occurred to summon a jury to try the issue, (*o.*) and such writ is accordingly sued out. The following is an example of its modern form:

VENIRE FACIAS, IN KING'S BENCH.

Upon the issue, (supra, p. 113.)

George the Third, &c., to the sheriff of ——— greeting:

We command you that you cause to come before us, on ———, wheresoever we shall then be in England, twelve good and lawful men of the body of your county, qualified according to law, by whom the truth of the matter may be better known, and who are in no wise of kin either to *A. B.*, the plaintiff, or to *C. D.*, late of ———, esquire, the defendant, to make a certain jury of the country between the parties aforesaid of a plea of breach of covenant, because as well the said *C. D.* as the said *A. B.*, between whom the matter in variance is, have put themselves upon that jury; and have there the names of the jurors and this writ.

Witness Sir Charles Abbott, knight, at Westminster, the ——— day of ———, in the ——— year of our reign, (*p.*)

The *venire facias*, it will be observed, directs the jury to be summoned to appear in *the superior court*. This is because the trial was, in fact, anciently had there. But, except

(*n.*) The whole law relative to jurors and juries has been consolidated and amended under a recent act of Parliament. (6 Geo. IV, c. 50.)

(*o.*) *Vide* the form of this award, *supra*, p. 113.

(*p.*) See Tidd's Appendix, 316, 6th edit., and 6 Geo. IV, c. 50, sec. 13, which now regulates the form of this writ.

in some few cases, to be presently noticed, the trial by jury no longer takes place before the superior court. It is now usually conducted in the county where the facts are alleged, in pleading, to have occurred, and into which the *venire facias* issues, and before certain judges called the *justices of assize and nisi prius*. The trial is, in such cases, said to be had at *nisi prius*, (q;) and when it is to be so had the course of proceeding is, after an issue to be tried by jury has been entered on record on the issue roll, to sue out the *venire facias*, together with another writ, for compelling the attendance of the jury, called the *distringas* in the king's bench; in the common pleas the *habeas corpora*, (r.) The next step is to make up and pass, at the proper offices, another record, on a parchment roll, called *the record of nisi prius*, which is a transcription from the issue roll, (s,) and contains a copy of the pleadings and issue. This *nisi prius* record is then delivered to the judges of assize and *nisi prius*, and serves for their guidance as to the nature of the issue to be tried. The trials at *nisi prius* now take place, in London and Middlesex, several times in the course of each term, and also during a considerable part of each vacation; in every other county they are held twice a year, and always in time of vacation. The justices of assize and *nisi prius*, for trials in London and Middlesex, consist of the chief justices of the three courts respectively, each trying only the issues from his own court. For trials in the other counties, they consist of such persons as are appointed for the purpose by temporary commission from the crown, among whom are usually, for each circuit, two of the judges of the superior courts, the whole kingdom being divided into six circuits for the purpose.

Though the trial by jury is thus, in general, had at *nisi prius*, this is not universally the case; for in causes of great

(q.) See Appendix, note 31

(r.) As to these writs and the whole subject of the jury process, see 2 Tidd ch. xxxv, 8th edit., and the recent statute for consolidating and amending the law relative to jurors and juries. (6 Geo. IV, c. 50.)

(s.) 2 Tidd, 867, 8th edit.

difficulty and consequence these inquests are allowed to be taken before the four judges in the superior court in which the pleading took place, as in the ancient practice. The proceeding is then technically said to be a trial *at bar*, by way of distinction from the trial *at nisi prius*.

After these explanations as to the time and place of trial by jury, the next subject for consideration is the course of the proceeding itself.

The whole proceeding of trial by jury takes place under the superintendence of the presiding judge or judges, who usually decide all points as to the admissibility of evidence, and direct the jury on all such points of law arising on the evidence as is necessary for their guidance in appreciating its legal effect, and drawing the correct conclusion in their verdict.

After hearing the evidence of the witnesses, the addresses of counsel, and the charge of the judge, the jury pronounce their *verdict*, which the law requires to be *unanimously* given. The verdict is usually in general terms, "for the plaintiff," or "for the defendant;" finding, at the same time, (in case of verdict for the plaintiff, and where *damages* are claimed by the action,) the amount of *damages* to which they think him entitled.

The principles upon which the law requires the jury to form their decision, are these:

1. They are to take no matter into consideration but the question *in issue*; for it is to try the issue, and that only, that they are summoned. Thus, upon pleadings such as are recorded in the issue roll, (*supra*, p. 113,) they would only have to consider whether the release was executed by duress or not. Of the execution of the indenture of lease, they could not inquire, for it is not *in issue*. So, where to an action of *assumpsit* the defendant pleaded that he did not promise within six years, to which there was a replication that he did promise within six years, on which issue was joined, it was held not to be competent to the plaintiff to offer evidence that the action was grounded on a fraudulent receipt of money by the defendant, and that

the fraud was not discovered till within six years of the action, for the issue was merely upon the promise within six years, (*t.*)

2. They are bound to give their verdict for the party who, upon the proof, appears to them to have succeeded in establishing his side of the issue. Thus, in the same example, the verdict must be given for the plaintiff, if the jury think the duress is established in proof; otherwise, for the defendant.

3. The burden of proof, generally, is upon that party who, in pleading, maintained the *affirmative* of the issue; for a *negative* is, in general, incapable of proof. Consequently, unless he succeed in proving that affirmative, the jury are to consider the opposite proposition, or negative of the issue, as established. Thus, in the same example, it would be for the plaintiff to prove the duress; for it is he who affirms it; and if, on such proof, he fails, or offers *no* proof, the jury must find for the defendant, (*u.*)

Under this head comes to be considered the doctrine of *variance*. The proof offered may, in some cases, *wholly* fail to support the affirmative of the issue; but in others, it may fail by a *disagreement in some particular point or points only* between the allegation and the evidence. Such disagreement, when upon a material point, is called a *variance*, and is as fatal to the party on whom the proof lies as a total failure of evidence, the jury being bound, upon *variance*, to find the issue against him. For example: The plaintiff declared in covenant for not repairing, pursuant to the covenant in the lease, and stated the covenant as a covenant to "repair when and as need should require;" and issue was joined on a traverse of the deed alleged

(*t.*) *Clark v. Hougham*, 2 Barn & Cres., 149; and see *Green v. Crane*, 11 Mod., 37.

(*u.*) And see an example in *Catherwood v. Chabaud*, 1 Barn. & Cres., 150. But to this rule there are some exceptions: thus, upon an issue whether a party is living or not, the party asserting the *negative*, viz, that he is *not living*, must prove the death. (*Wilson v. Hodges*, 2 East., 312.) The reason is, that the presumption is in favor of life till the contrary be shown. (See other exceptions in *Phillips on Ev.*, p. 185, 6th edit.)

The plaintiff, at the trial, produced the deed in proof, and it appeared that the covenant was thus: to repair "when and as need should require, *and at farthest after notice,*" the latter words having been omitted in the declaration. This was held to be a variance, because the additional words were material, and qualified the legal effect of the contract, (x.) So, where the plaintiff declared in assumpsit that for certain hire and reward the defendants undertook to carry goods from London and deliver them safely at Dover, and the contract was proved to have been to carry and deliver safely, *fire and robbery excepted*, this was held to be a variance, (y.) On the other hand, however, the principle is not so rigorously observed as to oblige the party on whom the proof lies to make good his allegation to the *letter*. It is enough if the *substance* of the issue is exactly proved, (z;) and a variance in *mere form*, or in *matter quite immaterial*, will not be regarded. Thus, in debt on bond conditioned for payment of money, where the defendant pleaded payment of principal and interest, and the plaintiff replied that he had not paid all the principal and interest, and issue was joined thereon, and the proof was that the whole interest was not, in fact, paid, but that the defendant paid a sum in gross, which was accepted in full satisfaction of the whole claim, the issue was considered as sufficiently proved on the part of the defendant, (a.)

The verdict, when given, is afterwards drawn up *in form*, and entered on the back of the record of *nisi prius*. This is done, upon trials in K. B. in London and Middlesex, by

(x.) *Horsefall v. Testar*, 7 Taunt., 385.

(y.) *Latham v. Rutley*, 2 Barn. & Cres., 20; and see *Kearney v. King*, 2 Barn. & Ald., 301; *Vansandau v. Burt*, 5 Barn. & Ald., 42; *Browne v. Knill*, 2 Brod. & Bing., 395; *Sprole v. Legge*, 1 Barn. & Cres., 16; *West v. Andrews*, *ibid.*, 77; *Draper v. Garratt*, 2 Barn. & Cres., 2; *Amory v. Meryweather*, *ibid.*, 573; *Weaver v. Lloyd*, *ibid.*, 678.

(z.) Com. Dig., Pleader, S. 26: Vin. Ab., Evidence, n. a, 10; B. N. P., 299; Doct. Pl., 191, 205; *Price v. Brown*, Str., 690; 1 Wils., 116, S. C.; *Coare v. Giblett*, 4 East., 85; and see the cases cited, 1 Arch., 336; Phillips on Ev., 190, 6th edit.

(a.) *Price v. Brown*, Str., 690; 1 Wils., 116, S. C.

the attorney for the successful party; in other cases by an officer of the court, (b.) Such entry is called the *postea*, from the word with which, at a former period, (when the proceedings were in Latin,) it commenced. The *postea* is drawn up *in the negative or affirmative of the issue*, as will appear by the following example:

POSTEA.

For the plaintiff, on the issue, at page 113, if tried at nisi prius in London or Middlesex.

Afterwards, that is to say, on the day and at the place within contained, before the right honorable Sir Charles Abbott, knight, the chief justice within mentioned, (John Henry Abbott, esquire, being associated to the said chief justice, according to the form of the statute in such case made and provided,) come as well the within-named *A. B.* as the said *C. D.*, by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried, and sworn, say, upon their oath, that the said *A. B.* was, at the time of the making of the said deed of release within mentioned, unlawfully imprisoned and detained in prison by the said *C. D.*, until, by force and duress of that imprisonment, he, the said *A. B.*, made the said deed of release, in manner and form as the said *A. B.* hath within alleged. And they assess the damages of the said *A. B.*, by reason of the said breach of covenant within assigned, over and above his costs and charges by him about his suit in this behalf expended, to fifty pounds; and for those costs and charges to forty shillings. Therefore, &c., (c.)

Such is the course of trial at *nisi prius*, in its direct and simple form; and the practice of a trial *at bar* is, in a general view, the same. Trials by jury, however, whether at bar or *nisi prius*, are subject to certain varieties of proceeding, some of which require to be here noticed.

If, at the trial, a point of law arises, either as to the *legal effect* or the *admissibility* of the *evidence*, the usual course (as already stated) is for the judge to decide these matters. But it may happen that one of the parties is dissatisfied with the decision, and may wish to have it revised by a superior jurisdiction. If he is content to refer it to the superior court in which the issue was joined, and out of which it is sent, (called, by way of distinction from the

(b.) 2 Tidd, 931, 932, 8th edit.

(c.) Tidd's Appendix, ch. xxxvii, 6th edit.; 5 Went., 52.

court at nisi prius, the court *in banc*,) his course is to move in that court for a *new trial*; a proceeding of a future or subsequent period, which will be considered hereafter in its proper place. But, as the nisi prius judge himself frequently belongs to that court, a party is often desirous, under such circumstances, to obtain the revision of some court of error, *i. e.*, some court of appellate jurisdiction, having authority to correct the decision. For this purpose it becomes necessary to put the question of law *on record* for the information of such court of error; and this is to be done pending the trial, in a form marked out by an old statute, (Westminster 2, 13 Edward I, c. 31.) The party excepting to the opinion of the judge, *tenders* him a *bill of exceptions*; that is, a statement, in writing, of the objection made by the party to his decision, to which statement, if truly made, the judge is bound to set his seal in confirmation of its accuracy. The cause then proceeds to verdict, as usual, and the opposite party, for whom the verdict is given, is entitled, as in the common course, to judgment upon such verdict in the court *in banc*, for that court takes no notice of the bill of exceptions, (*d.*) But, the whole record being afterwards removed to the appellate court by *writ of error*, (a proceeding to be hereafter explained,) the bill of exceptions is then taken into consideration in the latter court, and there decided, (*e.*)

Though the judge usually gives his opinion on such points of law as above supposed, yet it may happen that, for various reasons, he is not required by the parties, or does not wish to do so. In such case several different courses may be pursued for determining the question of law.

First, a party disputing the legal effect of any evidence

(*d.*) 1 Sel., 470.

(*e.*) See the whole course of proceeding on a bill of exceptions minutely stated, *Money v. Leach*, 3 Burr., 1692; and, on the subject of bill of exceptions generally, see *Enfield v. Hills*, 2 Lev., 236; *Wright v. Sharp*, Salk., 288; *Fabrigas v. Mostyn*, 2 Black., 929; *Davies v. Pierce*, 2 T. R., 125; *Gardner v. Baillie*, 1 Bos. and 1 Pul., 32; *Bell v. Potts*, 5 East., 49.

offered may *demur to the evidence*, (*f.*) A *demurrer to evidence* is analogous to a demurrer in pleading; the party from whom it comes declaring that he will not proceed because the evidence offered on the other side is not sufficient to maintain the issue. Upon joinder in demurrer by the opposite party, the jury are in general discharged from giving any verdict, (*g.*) and the demurrer, being entered on record, is afterwards argued and decided in the court in banc, and the judgment there given upon it may ultimately be brought before a court of error, (*h.*)

A more common, because more convenient, course than this to determine the legal effect of the evidence is, to obtain from the jury a *special verdict*, in lieu of that *general* one, of which the form has been already described; for the jury have an option, instead of finding the *negative or affirmative of the issue*, as in a general verdict, to find *all the facts of the case as disclosed upon the evidence before them*, and, after so setting them forth, to conclude to the following effect: "That they are ignorant, in point of law, on which side they ought, upon these facts, to find the issue; that if, upon the whole matter, the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, &c.; but if the court are of an opposite opinion, then *vice versa*." This form of finding is called a *special verdict*, (*i.*) However, as on a general verdict the jury do not themselves actually frame the *postea*, so they have, in fact, noth-

(*f.*) 2 Tidd, 914, 8th edit. But where the question is on the *admissibility* of the evidence, the course is not by demurrer, but by bill of exceptions. "Where a judge admits that for evidence which is not evidence, there the party must not demur; for if he doth, he admits the evidence to be good, but denieth the effects of it; and therefore, in such cases, he must bring his bill of exceptions. And so it is if the judge will not admit that for evidence which is evidence." Per Holt, C. J. (*Thruston v. Slatford*, 3 Salk., 355.

(*g.*) 1 Arch. Pract., 186, 1st edit.

(*h.*) For full information on the subject of demurrer to evidence, see *Gibson v. Hunter*, 2 H. Bl., 187; 2 Tidd, 914, 8th edit.

(*i.*) See the form of it. (*Wittersheim v. Lady Carlisle*, 1 H. Bl., 631; *Cook v. Gerrard*, 1 Saund., 171 a.)

ing to do with the formal preparation of the special verdict. When it is agreed that a verdict of that kind is to be given, the jury merely declare their opinion as to any fact remaining in doubt, and then the verdict is adjusted without their further interference. It is settled, under the correction of the judge, by the counsel and attorneys on either side, according to the state of facts as found by the jury, with respect to all particulars on which they have delivered an opinion, and with respect to other particulars, according to the state of facts which it is agreed that they *ought* to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered *on record*; and the question of law arising on the facts found is argued before the court in banc, and decided by that court as in case of demurrer. If the party be dissatisfied with their decision, he may afterwards resort to a court of error.

It is to be observed that it is a matter entirely in the *option of the jury* whether their verdict shall be general or special, (*k.*) The party objecting in point of law cannot therefore *insist* on having a special verdict, and may consequently be driven to *demur to the evidence*, at least if he wishes to put the objection *on record*, without which no writ of error can be brought nor the decision of a *court of error* obtained. But if the object be merely to obtain the decision of the court in banc, and it is not wished to put the legal question *on record*, in a view to a *writ of error*, then the more common, because the cheaper and shorter, course is, neither to take a *special verdict* nor *demur to the evidence*, but to take a *general verdict, subject* (as the phrase is) *to a special case*; that is, to a written statement of all the facts of the case, drawn up for the opinion of the court in banc, by the counsel and attorneys on either side, under correction of the judge at nisi prius, according to the principle of a special verdict, as above explained. The party for whom the general verdict is so given is of course not en-

(*k.*) 1 Arch. Fract., 189, 1st edit.

titled to judgment till the court in banc has decided on the special case; and, according to the result of that decision, the verdict is ultimately entered either for him or his adversary. A special case is not (like a special verdict) entered *on record*, and consequently a writ of error cannot be brought on this decision.

We must now return to the course of proceeding, after trial by jury, in what has been here called its direct or simple form.

The proceedings on trial by jury, at *nisi prius* or *at bar*, terminate with the verdict.

In case of trial at *nisi prius*, the return day of the last jury process, the *distringas* or *habeas corpora*, (which, like all other judicial writs, is made returnable into the court from which it issues,) always falls on a day in term subsequent to the trial, and forms the next *continuance* of the cause. On the day given by this continuance, therefore, (which is called the *day in banc*), the parties are supposed again to appear in the court in banc, and are in a condition to receive judgment. On the other hand, in case of trial at bar, the trial takes place on or after the return day of the last jury process; and therefore, immediately after the trial, the parties are in court, so that judgment might be given. In either case, however, a period of four days elapses before, by the practice of the court, judgment can be actually obtained, (*l.*) And during this period certain proceedings may be taken by the unsuccessful party to avoid the effect of the verdict. He may move the court to grant a *new trial*, or to *arrest the judgment*, or to *give judgment non obstante veredicto*, or to *award a repleader*, or to *award a venire facias de novo*, (*m.*) Of these briefly, in their order:

1. With respect to a *new trial*. It may happen that one

(*l.*) But, after a non-suit, judgment may be signed immediately after the day in banc. (1 Arch. Pract., 200, 1st edit.; 2 Tidd, 934, 8th edit.)

(*m.*) 2 Tidd, 935, 8th edit. So the defendant, if upon the trial he obtained leave to do so, may move to *enter a nonsuit*, or the plaintiff, upon leave given at the trial, may move to *set aside a nonsuit and enter a verdict for plaintiff*. (*Ibid.*)

of the parties may be dissatisfied with the opinion of the *nisi prius* judge, expressed on the trial, whether relating to the effect or the admissibility of evidence, or may think the evidence against him insufficient in law, where no adverse opinion has been expressed by the judge, and yet may not have obtained a special verdict, or demurred to the evidence, or tendered a bill of exceptions. He is at liberty, therefore, after the trial, and during the period above mentioned, to move the court in banc to grant a *new trial*, on the ground of the judge's having *misdirected the jury*, or having *admitted or refused evidence contrary to law*, or (where there was no adverse direction of the judge) on the ground that the jury gave their verdict *contrary to the evidence*, or on *evidence insufficient in law*. And resort may be had to the same remedy in other cases, where justice appears not to have been done on the first trial, as where the verdict, though not wholly contrary to evidence, or on insufficient evidence in point of law, is manifestly wrong in point of discretion, as *contrary to the weight of the evidence*, and on that ground disapproved by the *nisi prius* judge, (n.) So, a new trial may be moved for where *a new and material fact has come to light* since the trial, which the party did not know, and had not the means of proving before the jury, or where the damages given by the verdict are *excessive*, or where the jury have *misconducted themselves*, as by casting lots to determine their verdict, &c. In these and the like instances the court will, on motion, and in the exercise of their discretion, under all the circumstances of the case, grant a new trial, that opportunity may be given for a more satisfactory decision of the issue. A new jury process consequently issues, (o,) and the cause comes on to be

(n.) But not unless the finding is *manifestly* wrong; for where there is a contrariety of evidence, which brought the question fairly within the discretion of the jury, the court will not disturb the verdict, though disapproved by the judge who tried the cause. And "the court in granting new trials does not interfere, unless to remedy some manifest abuse or to correct some manifest error in law or fact." (*Carstairs v. Stein*, 4 M. & S. 192; and see *Swinerton v. Marquis of Stafford*, 3 Taunt., 91, 232.)

(o) 2 Arch. Pract., 229, 1st edit. The former *nisi prius* record will answer,

tried *de novo*. But except on such grounds as these, tending manifestly to show that the discretion of the jury has not been legally or properly exercised, a new trial can never be obtained; for it is a great principle of law, that the decision of a jury, upon an issue in fact, is in general irreversible and conclusive, (*p.*)

2. Again, the unsuccessful party may move in *arrest of judgment*; that is, that the judgment for the plaintiff be arrested or withheld, on the ground that there is some *error appearing on the face of the record*, which vitiates the proceedings. In consequence of such error, on whatever part of the record it may arise, from the commencement of the suit to this period, the court are bound to arrest the judgment. It is, however, only with respect to objections apparent on the *record* that such motions can be made. Nor can it be made, generally speaking, in respect of *formal* objections. This was formerly otherwise, and judgments were constantly arrested for errors of mere form, (*q.*) but this abuse has been long remedied by certain statutes, passed at different periods, to correct inconveniences of this kind, and commonly called *the statutes of amendments* and *jeofails*, (*r.*) by the effect of which, judgment, at the present day, cannot in general be arrested for any objection of *form*.

3. If the verdict be for the defendant, the plaintiff, in some cases, *moves for judgment non obstante veredicto*: that is, that judgment be given in his own favor, *without regard to the verdict* obtained by the defendant. This motion is made in cases where, after a pleading by the defendant in confession and avoidance, as, for example, a plea in bar and issue joined thereon, and verdict found for the defendant,

unless the *postea* has been indorsed, in which case there must be a new nisi prius record. And in cases where the former record is used, the *jurata* must be altered. Upon the judgment-roll no notice is taken of the first verdict, but the record proceeds as if the second verdict was the only one that had been given. (*Ibid.*)

(*p.*) See Appendix, note 32.

(*q.*) See 3 Reeves, 448; 3 Bl. Com., 407.

(*r.*) See Appendix, note 33.

the plaintiff, on retrospective examination of the record, conceives that such plea was bad in substance, and might have been made the subject of demurrer on that ground. If the plea was itself substantially bad in law, of course the verdict, which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment; while, on the other hand, the plea, being in confession and avoidance, involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. In such case, therefore, the court will give judgment for the plaintiff *without regard to the verdict*; and this, for the reason above explained, is also called a judgment *as upon confession*, (s.) Sometimes it may be expedient for the plaintiff to move for judgment *non obstante*, &c., even though the verdict be *in his own favor*; for in such a case, as above described, he takes judgment *as upon the verdict*, it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession*, (t.)

4. The motion for a *repleader* is made where the unsuccessful party, on examination of the pleadings, conceives that the issue joined was an *immaterial* issue, that is, not taken on a point proper to decide the action. It has been shown (u) that the issue joined is always some question raised between the parties, and mutually referred by them to judicial decision; but that point may nevertheless, on examination, be found *not proper to decide the action*. For either of the parties may, from misapprehension of law, or oversight, have passed over without demurrer a statement on the other side insufficient and immaterial in law;

(s.) *Gilb.*, C. P., 126; *Lacy v. Reynolds*, Cro. Eliz., 214; *Staple v. Heydon*, 6 Mod., 10; *The King v. Philips*, Str., 394; *Pitts v. Polehampton*, 1 Ld. Ray., 390; *Clears v. Stevens*, 8 Taunt., 413; *Lewis v. Clement*, 3 Barn. & Ald., 702; *Rickards v. Bennet*, 1 Barn. & Cres., 223; *Drayton v. Dale*, 2 Barn. & Cres., 293; *Earl of Lonsdale v. Nelson*, *ibid.*, 302; *Lambert v. Taylor*, 4 Barn. & Cres., 138; and see the forms of such judgments, *Rast. Ent.*, 625; 2 Roll. Ab., 99; *Jones v. Bodinner*, Carth., 370; *Wilkes v. Broadbent*, 1 Wils., 63.

(t.) *Wilkes v. Broadbent*, 1 Wils., 63; *Dighton v. Bartholomew*, Cro. Eliz., 778; 2 Roll. Ab., 99.

(u.) *Vide supra*, pp. 90-96;

and an issue in fact may have been ultimately joined or such immaterial statement; and so the issue will be immaterial, though the parties have made it the point in controversy between them. For example, if in an action of debt on bond, conditioned for the payment of ten pounds ten shillings at a certain day, the defendant pleads payment of *ten pounds*, according to the form of the condition, and the plaintiff, instead of demurring, tenders issue upon such payment, it is plain that, whether this issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled or not to maintain his action; for in an action for the penalty of a bond, conditioned to pay a certain sum, the only material question is, whether the exact sum were paid or not, and a payment in part is a question quite beside the legal merits, (x.) In such cases, therefore, the court, not knowing for whom to give judgment, will *award a repleader*, that is, will order the parties to plead *de novo*, for the purpose of obtaining a better issue, (y.)

5. A *venire facias de novo*, that is, a new writ of *venire facias*, will be awarded when, by reason of some irregularity or defect in the proceedings on the first *venire*, or the trial, the proper effect of that writ has been frustrated, or the verdict become void in law; as, for example, where the jury has been improperly chosen, or given an uncertain, or ambiguous, or defective verdict. The consequence and object of a new *venire* are of course to obtain a new trial; and accordingly this proceeding is, in substance, the same with a *motion for a new trial*. Where, however, the unsuccessful party objects to the verdict, in respect of some *irregularity or error in the practical course of proceeding*, rather

(x.) Kent v. Hall, Hob., 113; and see another instance, 5 Taunt., 386.

(y.) 2 Saund., 319 b, n. 6; Bac. Ab., Pleas, &c., M.; Com. Dig., Pleader, R. 18; see examples of cases in which a repleader has been awarded or refused, Anon., 2 Vent., 196; Stephens v. Cooper, 3 Lev., 440; Enys v. Mohun, 2 Str., 847; Plomer v. Ross, 5 Taunt., 386; Clears v. Stephens, 8 Taunt., 413; Lambert v. Taylor, 4 Barn & Cres., 138; and the form of entering an award of repleader on record, Co. Ent., 677. 42. 151; Jefferson v. Morton, 5 Saund., 20

than on the merits, the form of the application is a motion for a *venire de novo*, and not for a new trial, (z.)

The proceedings relative to trial by jury (a) having been now considered, *the other modes of trial*, which, as has been already observed, (b,) are of rare and limited application, may be dismissed in few words.

The trial by the grand assize is very similar to the common trial by jury. There is only one case in which it appears ever to have been applied, and there it is still in force. In a *writ of right*, if the defendant, by a particular form of plea, appropriate to that purpose, (c,) denied the right of the demandant, as claimed, he had the option, till the recent abolition of the extravagant and barbarous method of the wager of battel, (d,) of either *offering battel* or *putting himself on the grand assize*, to try whether he or the demandant had "the greater right." The latter course he may still take; and, if he does, the court awards a writ for summoning four knights to make election of twenty other recognitors. These knights and twelve of the recognitors so elected, together making a jury of sixteen, constitute what is called the *grand assize*; and, when assembled, they proceed to try the issue, or, as it is called in this case, the *mise*, upon the question of right. The trial, as in the case of a common jury, may be either at bar or *nisi prius*; and, if at *nisi prius*, a *nisi prius record* is made up; and the proceedings are in either case in general the same as above explained with respect to a common jury, (e.)

Upon the issue or *mise* of right, the wager of battel or the *grand assize* was, till the abolition of the former, and the latter still is, the only legitimate method of trial; and

(z.) The nature of a *venire facias de novo* is fully explained in *Witham v Lewis*, 1 Wils., 48.

(a.) See Appendix, note 34.

(b.) *Supra*, p. 114.

(c.) See the plea, 3 Chitty, 652, 1st edit.

(d.) By stat. 59 Geo. III, c. 46.

(e.) See *Tyssen v. Clarke*, 3 Wils., 419, 541; *Hardman v. Clegg*, 1 Holt, N. P. R., 657; 3 Chitty, 635, 1st edit.; 2 Saund., 45 e.; 1 Arch., 402; for full information on the subject of trial by the *grand assize*.

the question cannot be tried by a jury in the common form, (f.)

The trial by the record applies to cases where an issue of *nul tiel record* is joined in any action. If a record be asserted on one side to exist, and the opposite party deny its existence, under the form of traverse, that *there is no such record* remaining in court, as alleged, and issue be joined thereon, this is called an issue of *nul tiel record*, (g.) and the court awards, in such case, a trial by *inspection and examination of the record*, (h.) Upon this, the party affirming its existence is bound to produce it in court, on a day given for the purpose; and, if he fail to do so, judgment is given for his adversary. The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate mode of trying such issue, and the parties cannot put themselves *upon the country*, (i.)

The trial by certificate is now of very rare occurrence, but is still in force upon certain issues, (k,) one of the most important of which is, the issue of *ne unques accouple en loial matrimonie*. This arises in the *action of dower*, in which the tenant may plead, in bar, that the demandant "*was never accoupled to her alleged husband in lawful matrimony.*" Issue being joined upon this, the court awards that it be tried by the diocesan of the place where the parish church in which marriage is alleged to have been had is situate, and that the result be certified to them by the ordinary at a given day, (l.) It is said that this is a form of issue

(f.) Galton *v.* Harvey, 1 Bos. and Pul., 195. (See Appendix, note 35.)

(g.) This is the proper form of issue whenever a question arises as to what has judicially taken place in a superior court of record; for the law presumes that if it took place there will remain a record of the proceeding. But if the court be not of record, the issue should be directly upon the fact whether any such proceeding took place, and not upon the existence of any judicial memorial. (See Dyson *v.* Wood, 3 Barn. & Cres., 449.)

(h.) See the form of the issue, 2 Chitty, 602.

(i.) Co. Litt., 117 b.; Br. Trials. pl. 40.

(k.) The kinds of issue on which this trial may occur are enumerated, 3 Bl. Com., 333.

(l.) See the form of the issue, 3 Chitty, 599, 1st edit.; Co. Ent., 181 a

which can arise only in *dower*, (*m.*) The trial by certificate is, when competent, the *only legitimate mode*, and the issue cannot be tried by jury.

The *trial by witnesses* and that *by inspection* are in very few instances legally competent, and are not now known in practice. It seems, however, that the former is still applicable, as anciently, to an issue *arising on the death of the husband, in an action of dower*, (*n.*) and in some other cases; and that the proof *by inspection* is also, in some instances, still admissible; for example, if in any action, upon a plea of *parol demurrer*, issue be taken on the nonage, (*o.*) In case of trial by *witnesses*, the court, upon issue joined, awards that both parties produce in court, at a given day, their respective witnesses; (*p.*) on trial by *inspection*, that the subject to be inspected be brought into court; for example, that the guardian of the infant bring him into court on a certain day to be viewed, (*q.*) In either case, the judges examine and decide, and the judgment is pronounced accordingly. It is to be observed, however, with respect to trial by *inspection*, that, even when competent, it seems to be not a mode so exclusively appropriate but that the parties may, by consent, refer the question to a jury, (*r.*) and both with respect to this trial and that by *witnesses* it is laid down, that if, after the evidence, the judges are still unable to satisfy themselves on the fact, they have, in general, a discretion then to send the parties *to the country*, (*s.*)

The trial by wager of law has also fallen into complete disuse; but, in point of law, it seems to be still competent

(*m.*) Bac. Ab., Bastardy, 516, cites 11 Hen. IV, 78. It is not allowed in personal actions. (Jones's Case, Comb., 473; Machell v. Garrett, 3 Salk., 64.; 12 Mod., 276, S. C.; Vin., Tit. Baron and Feme, D. b., 39.)

(*n.*) Abbot of Strata Mercella's Case, 9 Rep., 30 b.; Grace Faux v. Barnes, Lord Raym., 174.

(*o.*) Vin. Ab., Trial, B. 2, 10, cites 29 Ass., 37, 19, E. 2.

(*p.*) On this trial the affirmative must be proved by *two* witnesses at the least. (3 Bl. Com., 336.)

(*q.*) Vin. Ab., Trial, C.

(*r.*) Bac. Ab., T.t. Infancy, L. 10, p. 634, 5th edit.

(*s.*) Vin. Ab., Trial, C. 9, 10; Bac Ab., Trial, A., 2, 3; 3 Bl. Com., 333.

in most of the cases to which it anciently applied. The most important and best established of these cases is the issue of *nil debet*, arising in an action of *debt on simple contract*, or the issue of *non detinet* in an action of *detinue*. In the declaration in these actions, as in almost all others, the plaintiff concludes by offering *his suit*, (of which the ancient meaning was *followers* or *witnesses*, though the words are now retained as a mere form,) to prove the truth of his claim. On the other hand, if the defendant, by a plea of *nil debet* or *non detinet*, deny the debt or detention, he may conclude by offering to establish the truth of such plea, “*against the plaintiff and his suit, in such manner as the court shall direct.*” Upon this the court awards the *wager of law*, (t;) and the form of this proceeding, when so awarded, is, that the defendant brings into court with him eleven of his neighbors, and for himself makes oath that he does not owe the debt or detain the property, as alleged; and then the eleven also swear that they believe him to speak the truth; and the defendant is then entitled to judgment, (u.)

It is to be observed, with respect to this mode of trial, that though the defendant has thus the power of resorting to it, he is not *obliged* to do so. He is at liberty, if he pleases, to put himself *upon the country*; the trial by jury being a mode of decision always applicable to the same questions on which *law* may be *waged*, and the mode, in fact, always applied to them in the modern practice, (x.)

It has now been shown in what manner the issue, whether in law or fact, is decided. It has been explained, too, by what means the unsuccessful party may, upon an issue in fact, avoid, in some cases, by motion in court, the effect of the decision. Supposing, however, that such means are not adopted, or do not succeed, or that the issue be an issue in law, the next step is *the judgment*.

(t.) See the form of such issue and award of trial, Co. Ent., 119 a., Jil. Ent., 467; 3 Chitty, 479, 1st edit.

(u.) 3 Bl. Com., 343. (See Appendix note 36.)

(x.) See Appendix, note 37.

As the issue is the question which the parties themselves have, by their pleading, mutually selected for decision, they are in general considered as having *mutually put the fate of the cause upon that question*; and as soon, therefore, as the issue is decided in favor of one of them, that party in general becomes victor in the suit; and nothing remains but to award the judicial consequence which the law attaches to such success. The award of this judicial consequence is called *the judgment*, and is the province of the judges of the court.

The nature of the judgment varies according to the nature of the action, the plea, the issue, and the manner and result of the decision.

It shall be first supposed that the issue is decided *for the plaintiff*.

In this case, if it be an issue in *law*, arising on a *dilatory plea*, the judgment is only that the defendant *answer over*, (*y*), which is called a judgment of *respondeat ouster*. The pleading is accordingly resumed, and the action proceeds. This judgment, therefore, does not fall within the definition of the term just given, but is of an anomalous kind. Upon all other issues in *law*, and, in general, all issues in *fact*, the judgment is *that the plaintiff do recover*, (*z*), which is called a judgment *quod recuperet*. The nature of such judgment, more particularly considered, is as follows: It is of two kinds, *interlocutory* and *final*. If the action *sound in damages*, (according to the technical phrase,) that is, be brought, not for specific recovery of lands, goods, or sums of money, (as is the case in real and mixed actions or the personal actions of debt and detinue,) but for *damages only*, as in covenant, trespass, &c.; and if the issue be an issue in *law*, or any issue *in fact not tried by jury*, then the judgment is only that the *plaintiff ought to recover his damages*, without specifying their amount; for, as there has been no trial by jury in the case, the *amount* of damages is not yet ascertained. The judg-

(y.) Bac Ab., Pleas, &c., n. 4; 2 Arch. Pract., 3, 1st edit.

(z.) Com. Dig., Abatement, I 14, I 15; 2 Arch. Pract., 3, 1st edit.

ment is then said to be *interlocutory*. On such interlocutory judgment the court does not, in general, itself undertake the office of assessing the damages, but issues a *writ of inquiry*, directed to the sheriff of the county where the facts are alleged by the pleading to have occurred, commanding him to inquire into the amount of the damage sustained, "by the oath of twelve good and lawful men of his county," and to return such inquisition, when made, to the court. Upon the return of the inquisition, the plaintiff is entitled to another judgment, viz, *that he recover the amount of the damages so assessed*; and this is called *final judgment*, (a.) But if the issue be in *fact*, and was *tried by a jury*, then the jury, at the same time that they tried the issue, assessed the damages, (b.) In this case, therefore, no writ of inquiry is necessary; and the judgment is final in the first instance, and to the same effect as just mentioned, viz, *that the plaintiff do recover the damages assessed*. Again, if the action do not *sound in damages*, the judgment is in this case also (in general) in the first instance final; and to this effect, *that the plaintiff recover seizin of the land, &c., or recover the debt, &c.* But there is, besides this, in *mixed actions*, a judgment for *damages* also; and this is either given at the same time with that for recovery of seizin, if the damages have been assessed by a jury, or, if not so assessed, a writ of inquiry issues, and a second judgment is given for the amount found by the inquisition, (c.)

The issue shall next be supposed to be decided *for the defendant*.

In this case, if the issue, whether of fact or law, arise on a *dilatory plea*, the judgment is, that the *writ* (or *bill*) be *quashed, quod breve* (or *billa*) *cassetur*, upon such pleas as are in abatement of the writ or bill, and that *the pleading remain without day, until, &c.*, (d.) upon such pleas as are in *suspen-*

(a.) As to the proceedings on a writ of inquiry, see 2 Arch. Pract., 19, 1st edit.

(b.) *Vide supra*, p. 117.

(c.) 2 Saund., 44, n. 4; Booth, 19, 74, 75, 76.

(d.) John Trollop's Case, 3 Rep., 69; Reg. Pl., 180; 1 Chitty, 458, 1st edit; 2 Arch. Pract., 3, 1st edit.

sion only; the effect, in the first case, of course being, that the suit is defeated, but with liberty to the plaintiff to prosecute a better writ or bill; in the second, that the suit is suspended until the objection be removed. If the issue arise upon a *declaration* or *peremptory plea*, the judgment is, in general, *that the plaintiff take nothing by his writ, (or bill,) and that the defendant go thereof without day, &c.*, which is called a judgment of *nil capiat per breve* or *per billam*.

What has been said as to the different forms of judgment relates to those on *direct* issues. Upon an issue of the *collateral* or *incidental* kind, (*e.*) (which is a case that does not occur in modern practice,) the judgment is sometimes *respondeat ouster*; in other cases, *quod recuperet*; but the law, with respect to the judgment on issues of this kind, does not seem to be, in every instance, clearly settled, (*f.*)

Judgment has hitherto been supposed to be awarded only upon the decision of an issue. There are several cases, however, in which judgment may be given though no issue have arisen, and these cases will now require notice. In the description given in this chapter of the manner of suit, it will be observed that the action has been uniformly supposed to *proceed to issue*, and this has been done to prevent digression and complexity. But an action may be cut off in its progress and come to premature termination by the fault of one of the parties in failing to pursue his litigation; and this may happen either with the intention of abandoning the claim or defense, or from failing to follow them up within the periods which the practice of the court in each particular case prescribes. In such cases the opposite party becomes victor in the suit, as well as where an issue has been joined and is decided in his favor, and is at once entitled to judgment. Thus, in a real (though not in a personal) action, if *the defendant* holds out against the process, judgment may be given against him for *default of*

(*e.*) *Vide supra*, p. 107.

(*f.*) Co. Ent., 319; Com. Dig., Voucher, B. 2; 2 Saund., 44, n. 4 Bac. Ab., Pleas, &c., n. 4.

appearance, (g.) So, in actions real, mixed, or personal, if after appearance he neither pleads nor demurs, or if after plea he fails to maintain his pleading till issue joined, by rejoinder, rebutter, &c., judgment will be given against him for *want of plea*, which is called judgment by *nūl dicit*. So if, instead of a plea, his attorney says he is not informed of any answer to be given to the action, judgment will be given against him; and it is in that case called a judgment by *non sum informatus*. Again, instead of a plea, he may choose to *confess* the action; or, after pleading, he may at any time before trial both *confess* the action and *withdraw his plea or other allegations*; and the judgment against him in these two cases is called a judgment *by confession* or by *confession relicta verificatione*. On the other hand, judgment may be given against the *plaintiff*, in any class of actions, for not declaring or replying or surrejoinder, &c., or for not entering the issue; and these are called judgments of *non pros.*, (from *non prosequitur*.) So, if he chooses, at any stage of the action after appearance and before judgment, to say that he “will not further prosecute his suit,” or that he “withdraws his suit,” or (in case of plea in abatement) prays that his “writ” or “bill” “may be quashed, that he may sue or exhibit a better one,” there is judgment against him of *nolle prosequi, retraxit, or cassetur breve, or billa*, in these cases respectively. Again, judgment of *nonsuit* may pass against the plaintiff, which happens when, on trial by jury, the plaintiff, on being called or demanded, at the instance of the defendant, to be present in court while the jury give their verdict, fails to make his appearance. In this case no verdict is given, but judgment of *nonsuit* passes against the plaintiff. So if, after issue is joined, the plaintiff neglects to bring such issue on to be tried in due time, as limited by the course and practice of the court in the particular case, judgment will also be given against him for this default; and it is called judgment *as in case of nonsuit*.

These judgments by default, confession, &c., when given

(g.) Booth, 19, 73, Com. Dig., Pleader, Y. 1; 2 Saund. 45, n. 4.

for the *plaintiff*, are generally *quod recuperet*, and may be either *interlocutory* or *final*, according to a distinction already explained. For the *defendant*, the form generally is *nil capiat*.

Upon judgment in most personal and mixed actions, whether upon issue, or by default, confession, &c., it will be observed that it forms part of the adjudication that the plaintiff or defendant *recover his costs* of suit or defense, which costs are taxed by an officer of the court at the time when the judgment is given.

There is generally an addition, too, when the judgment is for the *plaintiff*, that the defendant "*be in mercy*" (*in misericordia*,) that is, be *amerced* or fined for his delay of justice; when for the *defendant*, that the plaintiff be *in mercy*, for his false claim, (*h.*) The practice, however, of imposing an actual amercement has been long quite obsolete.

Judgments, like the pleadings, were formerly pronounced in *open court*, and are still always *supposed* to be so; and they are consequently always considered as taking place in *term time*. But, by a relaxation of practice, there is now, in general, except in the case of an issue in law, no actual delivery of judgment, either in court or elsewhere. The plaintiff or defendant, when the cause is in such a state that by the course of practice he is entitled to judgment, obtains the signature or allowance of the proper officer of the court, expressing generally that judgment is given in his favor, and this is called *signing judgment*, and stands in the place of its actual delivery by the judges themselves, (*i.*)

(*h.*) As to this amercement, see Griesley's Case, (8 Rep., 39;) Beecher's Case, (*ibid.*, 59.)

(*i.*) "The *signing* of the judgment is but the leave of the master of the office for the attorney to *enter* the judgment for his client." Styles' Pract., Reg., Tit. Judgment.—On judgments by *nil dicit*, in the king's bench and common pleas, the way of signing judgment is, to make an *incipitur* of the declaration on stamped paper, and get it signed by the clerk of the judgments in the king's bench; and, in the common pleas, at the prothonotaries office. (2 Arch. Pract., p. 10, 1st edit.) Impey, C. P., 453.—On judgments after verdict, in the king's bench, the master signs the *postea* in taxing costs, and this is the signing of judgment. (1 Manning's Exchequer, 352, note o.)

And though supposed to be pronounced during *term*, judgments are frequently signed in time of *vacation*, (k.)

Regularly, the next proceeding is *to enter the judgment on record*. Where it has been signed after *trial* or *demurrer*, it will be remembered that the proceedings up to the time of issue and the award of *venire*, or the continuance by *curia advisari vult*, have already been recorded, (l.) It will remain, however, to enter the subsequent proceedings to the judgment inclusive, which is called *entering the judgment*. This is done by drawing them up with continuances, &c., on the same roll on which the issue was entered, by way of continuation, or further narrative, of the proceedings there already recorded; and the judgment is entered in such form as the attorney for the successful party conceives to be legally appropriate to the particular case, supposing that it were actually pronounced by the court. The roll, when complete by the entry of final judgment, is no longer called the issue roll, but has the name of the *judgment roll*, (m,) and is deposited and filed of record in the treasury of the court. It is believed, however, that this whole proceeding of entering the judgment on record is, in practice, usually *neglected*. Yet there are several cases in which, by the practice of the court, it becomes essential, after final judgment, to do so, and in which it is, therefore, actually done, (n.)

When judgment is signed, not after trial or demurrer, but as by *default*, *confession*, &c., there having been no issue roll yet made up, the whole proceedings, to the judgment inclusive, are to be entered for the first time on record. This is accordingly done by the attorney upon a parchment roll, and upon the same principles, as to the form of entry, that have been already stated with respect to recording the issue and judgment thereon, (o.)

(k.) *Lyttleton v. Cross*, 3 Barn. & Cres., 317.

(l.) But see *supra*, p. 111, note z, as to the actual practice, in most cases, of making an *incipitur* only.

(m.) 2 Arch. Pract., 206, 1st edit.

(n.) See these cases enumerated, 2 Arch Pract. 205, 206.

(o.) However, instead of pursuing this, the strict and regular course the

Of the form of entry, after judgment upon issues, both in *law* and *fact*, and also after judgment by *default*, the following are examples:

ENTRY OF JUDGMENT.

For the defendant, upon the issue in law, (supra, p. 112.)

(After the entry of the issue, as in p. 112, the proceedings are to be continued on the roll as follows:)

At which day, before our said lord the king, at Westminster, come the parties aforesaid, by their respective attorneys aforesaid. Whereupon, all and singular the premises being seen, and by the court of our said lord the king, now here, fully understood, and mature deliberation being thereupon had, it appears to the said court here that the replication aforesaid, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said *A. B.* to have or maintain his aforesaid action against the said *C. D.*

Therefore it is considered that the said *A. B.* take nothing by his said writ, but that he and his pledges to prosecute be in mercy, (*p.*) and that the said *C. D.* do go thereof without day, &c. And it is further considered by his majesty's court here, that the said *C. D.* do recover against the said *A. B.* — pounds, for his costs and charges by him laid out about his defense in this behalf, by the court of our said lord the king now here adjudged to the said *C. D.*, and with his assent, according to the form of the statute in such case made and provided; and that the said *C. D.* have execution thereof, &c., (*q.*)

ENTRY OF JUDGMENT.

For the plaintiff, upon the issue in fact, (supra, p. 113,) after trial by jury in London.

(After the entry of the issue, as in page 113, the proceedings are to be continued on the roll, as follows:)

Afterwards the process thereof is continued between the parties aforesaid, of the plea aforesaid, by the jury being respited between them, before our said lord the king, at Westminster, until ———, wheresoever our said lord the king shall then be in England, unless the right honorable Sir Charles Abbott, knight, his majesty's chief justice, assigned to hold pleas in the court of our said lord the king, before the king himself, shall first come on ———, the ——— day of ———, at the Guildhall of the city of London, according to the form of the statute in such case made and provided, by reason of the default of the jurors, because none of them did appear, (*r.*) At which day,

usual practice is only to enter an *incipitur* on the roll, as in the case of entering an issue. (*Vide supra*, p. 111, note z; 1 Sel., 342; 2 Arch. Pract., 10, 1st edit.)

(*p.*) *Vide supra* as to mercy, p. 137.

(*q.*) Tidd's Appendix, ch. xxxix., 6th edit.

(*r.*) This commencement of the entry refers to the award of the *districus*; as to which, see *supra*, p. 116.

before our said lord the king, at Westminster, aforesaid. And the said chief justice, before whom the said issue was tried, hath sent hither his record had before him, in these words: to wit, (s.) afterwards, that is to say, on the day and at the place within contained, before the right honorable Sir Charles Abbott, the chief justice within mentioned, (&c., *as in the postea, supra*, p. 120, to the words "forty shillings.") Therefore it is considered, that the said A. B. do recover against the said C. D. the damages, costs, and charges, by the said jury in form aforesaid assessed, and also — pounds for his costs and charges, by the court of our said lord the king now here adjudged, of increase to the said A. B., and with his assent; which said damages, costs, and charges in the whole amount to — pounds; and the said C. D. in mercy, &c., (t.)

ENTRY OF JUDGMENT.

For the plaintiff, on nil dicit, upon the declaration in covenant, (supra, p. 68.)

As yet of — Term, in the — year of the reign of King George the Fourth.
Witness Sir Charles Abbott, knight.

——, to wit, A. B. puts in his place E. F., his attorney, against C. D., in a plea of breach of covenant.

——, to wit, C. D. puts in his place G. H., his attorney, at the suit of the said A. B., in the plea aforesaid.

——, to wit, C. D. was summoned to answer, (&c., *as in the declaration, supra*, p. 68.)

And the said C. D., by ——, his attorney, comes and defends the wrong and injury when, &c., and says nothing in bar or preclusion of the said action of the said A. B.; whereby the said A. B. remains therein undefended against the said C. D. Wherefore the said A. B. ought to recover against the said C. D. his damages on occasion of the premises. But because it is unknown to the court of our said lord the king, now here, what damages the said A. B. hath sustained by reason of the premises, the sheriffs are commanded (u) that, by the oath of twelve good and lawful men of their bailiwick, they diligently inquire what damages the said A. B. hath sustained, as well by reason of the premises, as for his costs and charges by him about his suit in this behalf expended; and that they send the inquisition which they shall thereupon take to our said lord the king, on ——, wheresoever our said lord the king shall then be in England, under their seal, and the seals of those by whose oath they shall take that inquisition, together with the writ of our said lord the king to them thereupon directed. The same day is given to the said A. B., at the same place. At which day, before our said lord the king, at Westminster, comes the said A. B., by his attorney aforesaid; and the sheriffs of London, to wit, ——, esquire, and ——, esquire, now here, return a certain inquisition indented, taken before them at the Guildhall of the city of London, in

(s.) This is a transcript of the *postea* from the back of the nisi prius record As to the *postea*, *vide supra*, p. 120.

(t.) Tidd's Appendix, ch. xxxix, 6th edit.; 3 Bl. Com., Appendix, No. II; 5 Went., 52.

(u.) This is the award of the *writ of inquiry*; as to which, *vide supra*, p. 134

the parish of ———, in the ward of ———, in the same city, on the — day of ———, in the — year of the reign of our said lord the king, by the oath of twelve good and lawful men of their bailiwick; by which it is found that the said *A. B.* hath sustained damages by means of the premises to fifty pounds, over and above his costs and charges by him about his suit in this behalf expended, and for those costs and charges to forty shillings. Therefore it is considered that the said *A. B.* do recover against the said *C. D.* his damages aforesaid, by the said inquisition above found; and also — pounds for his said costs and charges, by the court of our said lord the king now here adjudged, of increase, to the said *A. B.*, and with his assent; which said damages, costs, and charges, in the whole amount to — pounds; and the said *C. D.*, in mercy, &c., (x.)

The course of the action, till the entry on record of the final judgment, has now been described, but the reader will not have a complete view of the history of a suit without taking some notice of two other subsequent proceedings. These are the *writ of execution* and the *writ of error*.

Upon judgment, the successful party is, in general, entitled to *execution*, to put in force the sentence that the law has given. For this purpose he sues out a writ, addressed to the sheriff, commanding him, according to the nature of the case, either to give the plaintiff possession of the lands, or to enforce the delivery of the chattel which was the subject of the action, or to levy for the plaintiff the debt or damages and costs recovered, or to levy for the defendant his costs; and that, either upon the body of the opposite party, his lands, or goods, or, in some cases, upon his body, lands, and goods; the extent and manner of the execution directed always depending upon the nature of the judgment, (y.) Like the judgment, writs of execution are *supposed* to be actually awarded by the judges in court, but no such award is in general actually made. The attorney, after signing final judgment, sues out of the proper office a writ of execution in the form to which he conceives he would be entitled upon such judgment *as he has entered*, if such entry has been actually made, and, if not made, then upon such *as he thinks he is entitled to enter*; and he

(x.) Tidd's Appendix, ch. xxxix, 6th edit. (1 Went., p. 244.)

(y.) For further information on this subject, see 3 Bl. Com., 4.3.

does this, of course, upon peril that if he takes a wrong execution the proceeding will be illegal and void, and the opposite party entitled to redress.

After final judgment is signed, the unsuccessful party may bring a *writ of error*; and this, if obtained and *allowed* before execution, suspends (generally speaking) the latter proceeding till the former is determined, (z.) A writ of error, like an original writ, is sued out of *chancery*, directed to the judges of the court in which judgment was given, and commanding them, in some cases, themselves to examine the record; in others, to send it to another court of appellate jurisdiction to be examined, in order that some alleged error in the proceedings may be corrected. The first form of writ, called a writ of error *coram nobis* [or *vobis*,] (a,) is where the alleged error consists of matter of *fact*; the second, called a writ of error generally, where it consists of matter of *law*.

When a writ of error is obtained, the whole proceedings, to final judgment inclusive, are then always actually *entered* (if this has not before been done) on record; and the object of the writ of error is to reverse the judgment for some *error of fact or law* that is supposed to exist in the proceedings *as so recorded*. It will be proper here to explain in what such error may consist.

Where an *issue in fact* has been decided, there is (as formerly observed) no appeal in the English law from its

(z.) As to the *allowance* of a writ of error, see 2 Tidd, 1191, 8th edit.

It is also in general necessary, for the purpose of staying execution, that *bail* in error should be given. By certain statutes (3 Jac. I, c. 8; 3 Car. I, c. 4; 13 Car. II, c. 2; 16 and 17 Car. II, c. 8, sec. 3, and 22 and 23 Car. II, c. 4) it was provided that no execution should be stayed by writ of error in certain cases, unless the plaintiff in error should enter into recognizance, with two sufficient sureties, to prosecute the same with effect, and pay the debt and costs, if judgment be affirmed, &c. And by a recent statute, (6 Geo. IV, c. 96,) upon *any* judgment thereafter to be given in any personal actions in the courts of record at Westminster, or in the counties palatine or courts in great session in Wales, execution shall not be stayed by writ of error, without special order of the court or of some judge thereof, unless a recognizance shall first be acknowledged to the effect above stated.

(a.) As to these terms, *vide* 2 Tidd, 1191, 8th edit.

decision, (b.) except in the way of motion for a new trial; and its being wrongly decided is not *error* in that technical sense to which a writ of error refers. So, if a matter of fact should exist, which was not brought into issue, but which, if brought into issue, would have led to a different judgment, the existence of such fact does not, after judgment, amount to *error* in the proceedings. For example, if the defendant has a release, but does not plead it in bar, its existence cannot, after judgment, on the ground of error or otherwise, in any manner be brought forward. But there are certain facts which affect the *validity and regularity of the legal decision itself*; such as the defendant having, while *under age*, appeared in suit by *attorney*, and not by *guardian*, (c.) or, the plaintiff or defendant having been a *married woman* when the suit was commenced, (d.) Such facts as these, however late discovered and alleged, are *errors in fact*, and sufficient to traverse the judgment upon writ of error. To such cases the writ of error *coram nobis* applies; "because the error in fact is not the error of the judges, and reversing it is not reversing their own judgment," (e.)

But the most frequent case of error is when, upon the face of the record, the judges appear to have committed a mistake *in law*. This may be by having *wrongly decided an issue in law* brought before them by demurrer, but it may also happen in other ways. As formerly stated, (f.) the judgment will in general follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound, before in any case they give judgment, to *examine the whole record*,

(b.) *Supra*, p. 126.

(c.) But if judgment is given *in favor* of the infant, his infancy cannot in that case be assigned for error by the plaintiff. (*Bird v. Pegg*, 5 Barn. & Ald, 418.)

(d.) *King v. Jones*, 2 Lord Raym., 1525.

(e.) 2 Tidd, 1191, 8th edit.; 1 Manning, 490.

(f.) *Supra*, p. 133.

and then to adjudge either for the plaintiff or defendant, according to the legal right as it may on the whole appear, notwithstanding, or without regard to, the issue in law or fact that may have been raised and decided between the parties; and this, because the pleader may, from misapprehension, have passed by a material question of law without taking issue upon it. Therefore, whenever, *upon examination of the whole record*, right appears on the whole not to have been done, and *judgment appears to have been given for one of the parties, when it should have been given for the other*, this will be *error in law*. And it will be equally error, whether the question was raised on *demurrer*, or the issue was an issue in *fact*, or there was *no issue*; judgment having been taken by default, confession, &c. In all these cases, indeed, except the first, the judges have *really* committed no error; for it may be collected from preceding explanations, that no record, or even copy of the proceedings, is actually brought before them, except upon demurrer; but, with respect to a writ of error, the effect is the same as if the proceedings had all actually taken place and been recorded in open court, according to the fiction and supposition in law. So, on the same principle, there will be error in law if *judgment has been entered in a wrong form*, inappropriate to the case; although, as we have seen, the judges have in practice nothing to do with the entry on the roll. But, on the other hand, nothing will be error in law that does not appear *on the face of the record*; for matters not so appearing are not supposed to have entered into the consideration of the judges, (*g.*) Upon error in *law*, the remedy is not by writ of error *coram nobis*, (for that would be merely to make the same judges reconsider their own judgment,) but by a writ of error, requiring the record to be sent into some other court of appellate jurisdiction, that the error may be there corrected, and called a writ of error generally.

With respect to the writ of error of this latter description,

(*g.*) 2 Inst., 426.

it is further to be observed, that it cannot be supported unless the error in law be of a *substantial kind*. For as, by the effect of the statutes of amendments and jeofails, errors of *mere form* are no ground for *arresting the judgment*, (*h.*) so, by the effect of the same statutes, such objections are now insufficient to found a *writ of error*; though at common law the case was otherwise, (*i.*)

When, on the ground of some error in law, the record is removed by writ of error, the following is the course of appeal among the different courts: From the common pleas the record may be removed into the court of king's bench, and from thence, by a new writ of error, into the house of lords; from the exchequer into the court of exchequer chamber, held before the lord chancellor, lord treasurer, and the judges of the court of king's bench and common pleas, and from thence into the house of lords; from the king's bench, in proceedings by bill, in most of the usual actions, into the court of exchequer chamber, held before the judges of the common pleas, the barons of the exchequer, and from thence into the house of lords; in proceedings by original, into the house of lords in the first instance. (*k.*)

By what course of proceeding the error in the record is discussed and corrected in the appellate court, and the judgment reversed or affirmed, it is not material to the purpose of the present treatise to explain. The reader who wishes for information on that subject may be referred generally to the many valuable books of practice, (*l.*)

(*h.*) *Supra*, p. 126.

(*i.*) On this subject, see 3 Bl. Com., 406, 407.

(*k.*) 3 Bl. Com., 411.

(*l.*) *Vide* 2 Tidd, ch. xlv, &c., 8th edit

CHAPTER II.

OF THE PRINCIPAL RULES OF PLEADING.

The account of the course of an action being now concluded, and a view thus obtained of the general form and manner of pleading, and its connection with other parts of the suit, it is next proposed to investigate its principal or fundamental rules, and to explain their scope and tendency as parts of an entire system. For this purpose some observations shall be premised, relative to the manner in which that system was formed, and the objects which it contemplates.

The manner of allegation in our courts may be said to have been first methodically formed and cultivated as a science in the reign of Edward I. From this time the judges began systematically to prescribe and enforce certain *rules of statement*, of which some had been established at periods considerably more remote, and others, apparently, were then, from time to time, first introduced, (*a.*) None of them seem to have been originally of legislative enactment, or to have had any authority except usage or judicial regulation; but, from the general perception of their wisdom and utility, they acquired the character of fixed and positive institutions, and grew up into an entire and connected *system of pleading*. This system, which, in its essential parts, still remains in practice unaltered, appears to have been originally devised in a view to certain objects or results, which it will be necessary, to the right apprehension of the subject of this chapter, here to explain.

The pleadings (as appears in the preceding chapter) are so conducted as always to evolve some question, either of fact or law, disputed between the parties, and mutually pro-

(*a.*) See Appendix, note 38.

posed and accepted by them as the subject for decision, and the question so produced is called *the issue*, (b.)

As the object of all pleading or judicial allegation is to ascertain the subject for decision, (c,) so the main object of that system of pleading established in the common law of England is to ascertain it by the production of an *issue*; and this appears to be peculiar to that system. To the best of the author's information, at least, it is unknown in the present practice of any other plan of judicature. In all courts, indeed, the particular subject for decision must of course be in some manner developed before the decision can take place; but the methods generally adopted for this purpose differ widely from that which belongs to the English law.

By the general course of all other judicatures the parties are allowed to make their statements *at large*, (as it may be called,) and with no view to the extrication of the precise question in controversy; and it consequently becomes necessary, before the court can proceed to *decision*, to review, collate, and consider the opposed effect of the different statements, when completed on either side, to distinguish and extract the points mutually admitted, and those which, though undisputed, are immaterial to the cause, and thus, by throwing off all unnecessary matter, to arrive at length at the required selection of the point to be decided. This retrospective development is, by the practice of most courts, privately made by each of the parties for himself, as a necessary medium to the preparation and adjustment of his *proofs*, and is also afterwards virtually effected by the judge in the discharge of his general duty of *decision*, while in some other styles of proceeding the course is different; the point for decision being selected from the pleadings by an act of the court or its officer, and judicially promulgated prior to the proof or trial. The common law of England differs (it will be observed) from both methods,

(b) See Appendix, note 39.

(c.) *Vide supra*, p. 37.

by obliging the parties to come to issue; that is, so to plead as to develop some question (or issue) *by the effect of their own allegations*, and to *agree upon this question as the point for decision* in the cause, thus rendering unnecessary any retrospective operation on the pleadings for the purpose of ascertaining the matter in controversy.

The author is of opinion that this peculiarity of coming to issue took its rise in the practice of *oral* pleading. It seems a natural incident of that practice, to compel the pleaders to short and terse allegations, applying to each other by way of answer, in somewhat of a logical form, and at length reducing the controversy to a precise point. For while the pleading was *merely* oral, and not committed by any contemporaneous record to writing, (a state of things which may be distinctly traced among the yet extant archives of the early continental jurisprudence,) the court and the pleaders would have to rely exclusively on their memory for retaining the tenor of the discussion; and the development of some precise question or issue would then be a very convenient practice, because it would prevent the necessity of reviewing the different statements, and leave no burden on the memory but that of retaining the question itself so developed. And even after the practice of recording was introduced, the same brief and logical forms of allegation would naturally continue to be acceptable, while the pleadings were still *viva voce*, and committed to record on the inconvenient plan of contemporary transcription, (*d.*)

A co-operative reason for coming to issue was the variety of the modes of decision which the law assigned to different kinds of question. The various modes enumerated in the first chapter, as still recognized in practice, were, in the days of oral pleading, in full vigor and observance, and evidently made it necessary to settle publicly between the parties the precise point on which their controversy turned; for on the nature of this depended the very manner of

(*d.*) See Appendix, note 40.

the subsequent decision and the form of proceeding to be instituted for that purpose. As questions of law were decided by the *court*, and matters of fact referred to other kinds of investigation, it was, in the first place, necessary to settle whether the question in the cause or issue was a matter of *law* or *fact*. Again, if it happened to be a matter of fact, it required to be developed in a form sufficiently specific to show what was the method of trial appropriate to the case. And, unless the state of the question were thus adjusted between the parties, it is evident that they would not have known whether they were to put themselves on the judgment of the court or to go to trial; nor, in the latter case, whether they were to prepare themselves for trial by jury or for one of the other various modes of deciding matter of fact.

To the opinion that this distinctive feature of the English pleading was derived from the practice of oral allegation, and from that of applying different forms of trial to the determination of different kinds of question, it may perhaps be objected that both these practices anciently prevailed, not only in England, but among the continental nations, among whom, nevertheless, the method of coming to issue is now unknown. This objection, however, is capable of a satisfactory answer. On the continent, the ancient system of judicature, of which these practices formed a part, was, at early periods, supplanted by the methods of the *civil law*, in which the pleadings were *written*, (*e.*) and there was but *one form of trial*, viz, a trial by the judge himself, upon examination of instruments and witnesses adduced in evidence before him, (*f.*) On the other hand, in the courts of Westminster, the law of trial still remains almost without a change; and, with respect to oral pleading, though it at length grew out of fashion there, it gave place, not to allegations formed upon the principles of the imperial practice, but to supposed transcriptions from the

(*e.*) See Appendix, note 41.

(*f.*) Fortescue de Laud., c. 20.

record, the effect of which, (as explained in the first chapter,) (*g*.) has been to preserve, in these written pleadings, the style and method of those which were delivered *viva voce* at the bar of the court.

But, whatever may be the origin and reason of the method of coming to issue, it is at least certain that that method has been substantially practiced in the English pleading from the earliest period to which any of the now existing sources of information refer, and, from the work of Glanville on the Laws of England, it may clearly be shown to have existed, in effect, in the reign of Henry II. The term itself, of "*issue*," though perhaps somewhat less ancient, yet occurs as early as the commencement of the Year-Books, viz, in the first year of Edward II, (*h*.) and from the same period at least, if not an earlier one, the production of the issue has been not only the constant effect, but the professed aim and object, of pleading.

It was not, however, the *only* object. It was found that, though the parties should arrive at an issue, that is, at some point affirmed on one side and denied on the other, and mutually proposed and accepted by them as the subject for decision, it might yet happen that the point was *immaterial*, that is, *unfit to decide the action*. This of course rendered the issue useless. When it occurred, the proper remedy, as in the practice of the present day, was a *repleader*, (*i*.) But it was also naturally an object to avoid its occurrence, and so to direct the pleadings as to secure the production, not only of an issue, but a *material* one.

Again, it was found to be in the nature of many controversies to admit of *more than one* question fit to decide the action, or, in other words, actions would often tend to more than one material issue. This might happen, in the first place, in causes which involved *several distinct claims*. Thus, if an action be brought, founded on two separate

(*g*.) *Vide supra*, pp. 63, 64.

(*h*.) See Year-Book, 1 Edward II, 14; see Appendix, note 42.

(*i*.) *Vide supra*, 127.

demand, for example, two bonds, executed by the defendant in favor of the plaintiff, the issue may arise, as to one of them, whether it be not discharged by a subsequent release; as to the other, whether it were not executed under duress of imprisonment, which would make it voidable in law. So, there may be more than one material issue in causes which involve only a *single claim*. Thus, in an action brought upon one bond only, two issues of the same kind may arise, viz, whether it were not executed under duress of imprisonment, or whether, at any rate, it were not after its execution released by the plaintiff. In the case of *several* claims, justice clearly requires that, if the cause tend to several issues, distinctly applicable to each, these several issues should all be raised and decided; for otherwise there would be no determination of the whole matters in demand. But, in the case of a *single claim*, the same consideration does not apply, for the decision of any one of the material issues that may arise upon it will be sufficient to dispose of the entire claim. Thus, in the first example given, the finding that one bond was released, or that it was not released, would leave the demand on the other wholly untouched. On the other hand, in the second example, if the party be put to his election, either to rely on the fact of the execution under duress or on the release, either of the questions which he so elects will lead to an issue sufficient to decide the whole claim. While several issues, therefore, must of necessity be allowed, in respect of *several subjects of suit*, the allowance of more than one issue in respect of *each subject of suit* is, in some degree, a question of expediency. Those who founded the system of pleading took the course of not allowing more than one, and the motives which led to this course are sufficiently obvious. For reasons assigned in another place, (*k*.) it was of considerable importance to the judges, in those remote times, when the contention was conducted orally, to simplify and abbreviate the process as much as possible; and

(*k*.) *Supra*, p. 149.

it was in this view, no doubt, that it was found expedient to establish the principle of confining the pleaders to a *single* issue, in respect of each single claim, allowing, at the same time, from necessity, of several issues, when each related to a distinct subject of demand. But, whatever the reason, it is clear that, in point of fact, this principle was very early recognized in pleading, and that the issue was required not only to be *material*, but *single*.

There was still another quality essential to the issue—that of *certainty*. This word is technically used in pleading in the two different senses of *distinctness* and *particularity*. It is here employed in the latter sense only; and, when it is said that the issue must be *certain*, the meaning is, that it must be *particular* or *specific*, as opposed to undue generality.

One of the causes which have been above assigned for the practice of coming to issue made it also necessary to come to issue with some degree of certainty. The *variety in the modes of decision* required that the issue should be sufficiently certain to show whether the point in controversy consisted of *law* or *fact*; and, if the latter, so far to show its nature, as to ascertain by what form of trial it ought to be decided, (*l.*) But a certainty still greater than this was required by a cause of another kind, viz, the *nature of the original constitution of the trial by jury*. It is a matter clear beyond dispute (but one that has, perhaps, been too little noticed in works that treat of the origin of our laws) that the jury anciently consisted of persons who were *witnesses* to the facts, or at least in some measure *personally cognizant* of them; and who, consequently, in their verdict, gave, not (as now) the conclusion of their judgment upon facts proved before them in the cause, but their testimony as to facts which they had antecedently known, (*m.*) Accordingly, the *venire facias*, issued to summon a jury

(*l.*) An illustration of this occurs in a recent case, *The King v. Cook*, 2 Barn & Cres., 371.

(*m.*) See Appendix, note 43.

in those days, did not (as at present) (*n*) direct the jurors to be summoned from the *body of the county*, but from the *immediate neighborhood* where the facts occurred, and from among those persons *who best knew the truth of the matter*. And the only means that the sheriff himself had of knowing what was the matter in controversy, so as to be in a condition to obey the writ, appears to have been the *venire facias* itself, which then stated the *nature of the issue*, instead of being confined (as now) to a short statement of the form of the action, (*o*.) In this state of things, it was evidently necessary that the issue should be sufficiently *certain*, to show specifically the nature of the question of fact to be tried. Unless it showed (for example) at what *place* the alleged matter was said to have occurred, it would not appear into what county the *venire* should be sent, nor from what neighborhood the jury were to be selected. So, if it did not specify the *time* and other particulars of the alleged transaction, the sheriff would have no sufficient guide for summoning, in obedience to the *venire*, persons able, of their own knowledge, to testify upon that matter. For all these reasons, and probably for others also, connected with the general objects of precision and clearness, (*p*.) it was considered as one of the essential qualities of the issue that it should be *certain*; and the certainty was generally to be of the degree indicated by the preceding considerations. In modern times, as the jurors have ceased to be of the nature of *witnesses*, and are taken, generally, from the body of the county, it is no longer necessary to shape the issue for the information of the summoning officer; and, accordingly, the *venire facias* no longer even sets the issue forth. But as the parties now prove their facts by the adduction of evidence before the jury, and have conse-

(*n*.) *Vide supra*, p. 115.

(*o*.) *Vide Bract.*, p. 309 b, 310 a, &c.

(*p*.) It is laid down by Bracton, oportet quod potens rem designet quam petit; videlicet, qualitatem, &c., item quantitatem, &c. Certam enim rem oportet deducere in iudicium, ne contingat iudicium esse delusorium vel obsecrum, &c. (*Bract.*, 431 a.)

quently to provide themselves with the proper documents and witnesses, it is as essential that they should each be apprized of the specific nature of the question to be tried, as it formerly was that the sheriff should be so instructed; and the particularity which was once required, for the information of that officer, now serves for the guidance of the parties themselves in preparing their proofs, (*q.*)

On the whole, therefore, the author conceives the chief objects of pleading to be these: *That the parties be brought to issue*, and that the issue so produced be *material, single, and certain* in its quality. In addition to these, however, the system of pleading has always pursued those general objects also which every enlightened plan of judicature professes to regard: the avoidance of *obscurity and confusion*, of *prolixity and delay*. Accordingly, the whole science of pleading, when carefully analyzed, will be found to reduce itself to certain principal or primary rules, the most of which tend to one or other of the objects above enumerated, and were apparently devised in reference to those objects, while the remainder are of an anomalous description, and appear to belong to other miscellaneous principles. It is proposed, in this chapter, to collect and investigate these principal rules, and to subject them to a distribution, conformable to the distinctions that thus exist between them in point of origin and object. The chapter will therefore treat—

I. Of rules which tend simply to *the production of an issue*.

II. Of rules which tend to secure the *materiality* of the issue.

III. Of rules which tend to produce *singleness* or unity in the issue.

IV. Of rules which tend to produce *certainty* or particularity in the issue.

(*q.*) As to this latter, or modern reason, for certainty, see *Collett v. Lord Keith*, 2 East., 280; *J'Anson v. Stuart*, 1 T. R., 748; *Holmes v. Catesby*, 1 Taunt., 543.

V. Of rules which tend to prevent *obscurity* and *confusion* in pleading.

VI. Of rules which tend to prevent *prolixity* and *delay* in pleading.

VII. Of certain *miscellaneous* rules, (r.)

The discussion of these principal rules will incidentally involve the consideration of many other rules and principles, of a kind subordinate to the first, but extensive, nevertheless, and important in their application; and thus will be laid before the reader an entire, though general, view of the whole system of pleading, and of the relations which connect its different parts with each other.

SECTION I.

OF RULES WHICH TEND SIMPLY TO THE PRODUCTION OF AN ISSUE.

Upon examination of the process or system of allegation by which the parties are brought to issue, as that process is described in the first chapter, (s,) it will be found to resolve itself into the following fundamental rules or principles: First, *that after the declaration the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance; secondly, that upon a traverse, issue must be tendered, (t;)* lastly, *that the issue, when well tendered, must be accepted.* Either, by virtue of the first rule, a demurrer takes place, which is a tender of an issue in law, or, by the joint operation of the two first, the tender of an issue in fact; and then, by the last of these rules, the issue so tendered, whether in fact or in law, is accepted, and becomes finally complete. It is by these rules, therefore, that the production of an issue is effected; and these will consequently form the subject of the following section.

(r.) See Appendix, note 44.

(s.) *Vide supra*, pp. 82-96.

(t.) With respect to *demurrer*, it will be remembered that it necessarily implies a tender of issue. (*Supra*, pp. 91, 93.)

RULE I.

AFTER THE DECLARATION, THE PARTIES MUST AT EACH STAGE DEMUR, OR PLEAD BY WAY OF TRAVERSE, OR BY WAY OF CONFESSION AND AVOIDANCE.

This rule has two branches—

1. The party must *demur* or *plead*. One or other of these courses he is bound to take (while he means to maintain his action or defense) until issue be tendered. If he does neither, but confesses the right of the adverse party, or says nothing, the court immediately gives judgment for his adversary; in the former case, as by confession; in the latter, by *non pros.* or *nil dicit*, (*u.*)

2. If the party *pleads*, it must either be by way of *traverse* or of *confession and avoidance*. If his pleading amount to neither of these modes of answer, it is open to demur on that ground, (*x.*)

Such is the effect of this rule generally and briefly considered. But, for its complete illustration, it will be necessary to enter much more deeply into the subject, and to consider at large the doctrines that relate both to *demurrers* and to *pleadings*.

I. Of *demurrer*.

Under this head it is intended to treat, 1, of the nature and properties of a demurrer; 2, of the effect of passing a fault by without demurrer, and pleading over; 3, of the considerations which determine the pleader in his election to demur or plead.

1. Of the nature and properties of a demurrer.

A demurrer may be for insufficiency either in *substance* or in *form*; that is, it may be either on the ground that the case shown by the opposite party is *essentially insufficient*, or on the ground that it is stated in an *inartificial manner*; for "the law requires in every plea" (and the observation equally applies to all other pleadings) "two things: the one

(*u.*) As to the nature of these judgments, *vide supra*, p. 136.

(*x.*) Reg. Plac., 59; 21 Hen. VI, 12; 5 Hen. VIII, 23 a, 14 a b.; 1 Tidd, 665, 5th edit.; *Mercer on v. Dowdon*, 5 Barn. & Cres. 479.

that it be in matter sufficient, the other that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting, it is cause of demurrer," (*y.*) And we may here take occasion to remark, that a violation of any of the rules of pleading that will be hereafter stated is, in general, *ground for demurrer*; and such fault occasionally amounts to matter of *substance*, but usually to matter of *form* only.

A demurrer, as in its *nature*, so also in its *form*, is of two kinds: it is either *general* or *special*. A general demurrer excepts to the sufficiency in general terms, without showing specifically the nature of the objection; a special demurrer adds to this a specification of the particular ground of exception, (*z.*) Of both these forms the reader has already had examples in the first chapter, (*a.*) A general demurrer is sufficient where the objection is on a matter of *substance*. A special demurrer is necessary where it turns on matter of *form* only; that is, where, notwithstanding such objection, enough appears to entitle the opposite party to judgment, as far as relates to the merits of the cause. For, by two statutes, 27 Elizabeth, c. 5, and 4 Anne, c. 16, passed in a view to the discouragement of merely formal objections, it is provided, in nearly the same terms, that the judges "shall give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect, or want of form, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same;" the latter statute adding this proviso: "So as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause." Since these statutes, therefore, no mere matter of form can be objected on a general demurrer; but the demurrer must

(*y.*) Per Lord Hobart, *Colt v. Bishop of Coventry*, Hob., 164.

(*z.*) Co. Litt., 72 a; Reg. Plac., 125, 126; Bac. Ab., Pleas, &c., n. 5

(*a.*) *Vide supra*, pp. 82, 83.

be in the special form, and the objection specifically stated, (b.) But, on the other hand, it is to be observed that, under a special demurrer, the party may, on the argument, not only take advantage of the particular faults which his demurrer specifies, but also of all such objections in substance, or regarding "the very right of the cause" (as the statutes express it) as do not require, under those statutes, to be particularly set down, (c.) It follows, therefore, that unless the objection be clearly of this substantial kind, it is the safer course, in all cases, to demur specially, (d.) Yet, where a general demurrer is plainly sufficient, it is more usually adopted in practice; because, the effect of the special form being to apprize the opposite party more distinctly of the nature of the objection, it is attended with the inconvenience of enabling him to prepare to maintain his pleading in argument, or of leading him to apply the earlier to amend. With respect to the *degree* of particularity with which, under these statutes, the special demurrer must assign the ground of objection, it may be observed, that it is not sufficient to object, in general terms, that the pleading is "uncertain, defective, informal," or the like; but it is necessary to show *in what respect* uncertain, defective, or informal, (e.) The concluding words, therefore, in the example formerly given, (f), "And also that the said declaration is, in other respects, uncertain, informal, and insufficient," (though these, or some others of similar import, are usually added,) are inoperative and useless, (g.)

With respect to the *effect* of a demurrer, it is, first, a rule that a demurrer admits all such matters of fact as are suffi-

(b.) For examples of cases where a special demurrer is considered as necessary, and where, on the other hand, a general one is sufficient, see Buckley v. Kenyon, 10 East., 139; Bowdell v. Parsons, *id.*, 359, 593; Bolton v. Bishop of Carlisle, 2 H. Bl., 229; Bach v. Owen, 5 T. R., 409. A demurrer to a plea in *abatement* never needs to be special. (2 Saund., 2 b., n. k.)

(c.) 1 Chitty, 642, 1st edit.

(d.) 1 Arch., 313; Clue v. Baily, 1 Vent., 240.

(e.) 1 Saund., 161, n. 1; 337 b, n. 3.

(f.) *Vide supra*, p. 83.

(g.) See Appendix, note 45.

ciently pleaded, (h.) The meaning of this rule is, that the party, having had his option whether to *plead* or *demur*, shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse; which (as formerly shown) (*i*) is one of the kinds of *pleading*. A demurrer is consequently an admission that the facts alleged are true; and therefore the only question for the court is, whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged. It will be observed, however, that the rule is laid down with this qualification, that the matter of fact be *sufficiently pleaded*. For, if it be not pleaded in a formal and sufficient manner, it is said that a demurrer, in this case, is no admission of the fact, (*k*.) But this is to be understood as subject to the alterations that have been introduced into the law of demurrer by the statutes already mentioned; and therefore, if the demurrer be *general*, instead of *special*, it amounts, as it is said, to a confession, though the matter be informally pleaded, (*l*.)

Again, it is a rule, *that on demurrer the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it, (m.)* Thus, on demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the *plea*, they will give judgment, not for the defendant, but the plaintiff, (*n*.) provided the *declaration* be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant, (*o*.) This rule belongs

(*h.*) Bac. Ab., Pleas, &c., n. 3; Com. Dig., Pleader, Q. 5; Nowlan v. Geddes, 1 East., 634; Gundry v. Feltham, 1 T. T., 334.

(*i.*) *Vide supra*, p. 89.

(*k.*) Com. Dig., Pleader, Q. 6.

(*l.*) 1 Saund., 337 b, n. 3; 1 Arch., 318.

(*m.*) Com. Dig., Pleader, M. 1, M. 2; Bac. Ab., Pleas, &c., A. n. 3; 5 Rep., 29 a.; 1 Saund., 285, n. 5; Foster v. Jackson, Hob., 56; Anon., 2 Wils., 150; Le Bret v. Papillon, 4 East., 602.

(*n.*) Anon., 2 Wils., 150; Thomas v. Heathorn, 2 Barn. & Cres., 477.

(*o.*) Piggot's Case, 5 Rep., 29 a.; Bates v. Cort, 2 Barn & Cres., 474.

to the general principle stated in the first chapter, (*p.*) that when judgment is to be given, whether the issue be in law or fact, and whether the cause have proceeded to issue or not, the court is always bound to examine the whole record, and adjudge for the plaintiff or defendant, according to the legal right, as it may on the whole appear. It is, however, subject to the following exceptions: First, if the plaintiff demur to a *plea in abatement*, and the court decide against the plea, they will give judgment of *respondeat ouster*, without regard to any defect in the declaration, (*q.*) Secondly, though on the whole record the right may appear to be with the plaintiff, the court will not adjudge in favor of such right, unless the plaintiff have himself put his action upon that ground. Thus, where, on a covenant to perform an award, and not to prevent the arbitrators from making an award, the plaintiff declared in covenant, and assigned as a breach that the defendant would not pay the sum awarded, and the defendant pleaded that, before the award made, he revoked, by deed, the authority of the arbitrators, to which the plaintiff demurred, the court held the plea good, as being a sufficient answer to the breach alleged, and therefore gave judgment for the defendant, although they also were of opinion that the matter stated in the plea would have entitled the plaintiff to maintain his action, if he had alleged, by way of breach, that the defendant prevented the arbitrators from making their award, (*r.*) Lastly, the court, in examining the whole record, to adjudge according to the apparent right, will consider only the right in *matter of substance*, and not in respect of mere *form*, such as should have been the subject of special demurrer. Thus, where the declaration was open to an objection of form, such as should have been brought forward by special demurrer—the plea bad in substance—and the defendant

(*p.*) *Vide supra*, p. 143.

(*q.*) *Belasyee v. Hester*, Lutw., 1592; *Routh v. Weddell*, 1667; *Hastrup v. Hastings*, 1 Salk., 212; *Rich v. Pilkington*, Carth., 172.

(*r.*) *Marsh v. Bulteel*, 5 Barn. & Ald., 507.

demurred to the replication, the court gave judgment for the plaintiff, in respect of the insufficiency of the plea, without regard to the formal defect in the declaration. (s.)

2. Next is to be considered the effect of pleading over without demurrer.

It has been shown that it is the effect of a demurrer to admit the truth of all matters of fact sufficiently pleaded on the other side; but it cannot be said, *e converso*, that it is the effect of a pleading to admit the sufficiency in law of the facts adversely alleged. On the contrary, it has been seen (t) that, upon a demurrer arising at a subsequent stage of the pleading, the court will take into consideration, retrospectively, the sufficiency in law of matters to which an answer in fact had been given. And in the first chapter it was shown, (u,) that even after an issue in fact and verdict thereon, the court are bound to give judgment on the whole record, and therefore to examine the sufficiency in law of all allegations through the whole series of the pleadings; and, accordingly, that advantage may often be taken by either party of a legal insufficiency in the pleading on the other side, either by motion in arrest of judgment or motion for judgment *non obstante veredicto* or writ of error, according to the circumstances of the case.

It thus appears, then, that in many cases a party, though he has pleaded over without demurring, may nevertheless afterwards avail himself of an insufficiency in the pleading of his adversary. But this is not universally true. For, first, it is to be observed, *that faults in the pleading are, in some cases, aided by pleading over, (x.)* Thus, in an action of trespass, for taking a hook, where the plaintiff omitted to allege in the declaration that it was *his* hook, or even that it was in his possession, and the defendant pleaded a

(s.) *Humphreys v. Bethily*, 2 Vent., 222.

(t.) *Supra*, pp. 159, 160.

(u.) *Supra*, pp. 126, 127, 143.

(x.) Com. Dig., Pleader, C. 85, E. 37; Co. Litt., 303 b.; Pract. Reg., 351; Anon., 2 Salk., 519; *Fowle v. Welsh*, 1 Barn. & Cres., 29; *Fletcher v. Pcgson*, 3 Barn. & Cres., 192.

matter in confession and avoidance, justifying his taking the hook *out of the plaintiff's hand*, the court, on motion in arrest of judgment, held, that as the plea itself showed that the hook was in the possession of the plaintiff, the objection, which would otherwise have been fatal, was cured, (y.) And with respect to all *objections of form*, it is laid down as a general proposition, "that if a man pleads over he shall never take advantage of any slip committed in the pleading of the other side which he could not take advantage of upon a general demurrer," (z.) Again, it is to be observed, *that faults in the pleading are, in some cases, aided by a verdict*, (a.) Thus, if the grant of a reversion, a rent charge, an advowson, or any other hereditament which lies *in grant*, and can only be conveyed by deed, be pleaded, such grant ought to have been alleged to have been made *by deed*, and, if not so alleged, it will be ground of demurrer; but if the opposite party, instead of demurring, pleads over, and issue be taken upon the grant, and the jury find that the grant was made, the verdict aids or cures the imperfection in the pleading, and it cannot be objected in arrest of judgment or by writ of error, (b.) The extent and principle of this rule of *aider by verdict* is thus explained in a modern decision of the court of king's bench: "Where a matter is so essentially necessary to be proved that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms, in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and

(y.) *Glasscock v. Morgan*, Sid., 184, cited Bac. Ab., Trespass, p. 603.

(z.) Per Holt, C. J.; Anon., 2 Salk., 519; Bac. Ab., Pleas, &c., 322.

(a.) Com. Dig., Pleader, C. 87; 1 Saund., 228, n. 1; *Weston v. Mason*, 3 Burr., 1725; *Spieres v. Parker*, 1 T. R., 141; *Johnstone v. Sutton*, *ibid*, 545; *Nerot v. Wallace*, 3 T. R., 25; *Jackson v. Pesked*, 1 M. & S., 234; *Campbell v. Lewis*, 3 Barn. & Ald., 392; *Keyworth v. Hill*, *ibid*, 685; *Pigpit v. Hearn*, 5 Barn. & Ald., 634; *Lord Huntingtower v. Gardiner*, 1 Barn. & Cres., 297; *Price v. Seaman* 4 Barn. & Cres., 525.

(b.) 1 Saund., 228 a, n. 1; *Lightfoot v. Brightman*, Hutt., 54.

where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed, after verdict, that it was so restrained at the trial," (c.) In entire accordance with this are the observations of Mr. Sergeant Williams: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict," (d.) It is, however, only where such "fair and reasonable intendment" can be applied that a verdict will cure the objection; and, therefore, if a necessary allegation be altogether omitted in the pleading, or if the pleading contain matter adverse to the right of the party by whom it is alleged, and so clearly expressed that no reasonable construction can alter its meaning, a verdict will not aid, (e.) Therefore, where the plaintiff brought an action of trespass on the case, as being entitled to the reversion of a certain yard and wall, to which the declaration stated a certain injury to have been committed, but omitted to allege that the *reversion* was, in fact, prejudiced, or to show any grievance which, in its nature, would necessarily prejudice the reversion, the court arrested the judgment, after a verdict had been given in favor of plaintiff, and held the fault to be one which the verdict could not cure, (f.) Lastly, it is to be observed, that at certain stages of the cause all objections of form are cured by the different

(c.) Jackson v. Pesked, 1 M. & S., 234.

(d.) 1 Saund., 228, n. 1.

(e.) Jackson v. Pesked, 1 M. & S., 234; Nerot v. Wallace, 3 T. R., 25; Weston v. Mason, 3 Burr., 1725.

(f.) Jackson v. Pesked, 1 M. & S., 234.

statutes of jeofails and amendments, (g;) the cumulative effect of which is, to provide that neither after verdict nor judgment, by confession, *nil dicit*, or *non sum informatus*, can the judgment be arrested or reversed by any objection of that kind. Thus, in an action of trespass, where the plaintiff omits to allege in his declaration on what certain day the trespass was committed, (which is a ground of demurrer,) and the defendant, instead of demurring, pleads over to issue, and there is a verdict against him, the fault is cured by the statutes of jeofails, (*h,*) if not also by the mere effect of pleading over.

3. It will now be useful to examine the considerations by which, in a view to the state of the law, as above explained, the pleader ought to be governed, in making his election to *demur* or to *plead*.

He is first to consider whether the declaration or other pleading opposed to him is sufficient in substance and in form to put him to his answer. If sufficient in both, he has no course but to plead. On the other hand, if insufficient in either, he has ground for demurrer; but whether he should demur or not is a question of expediency, to be determined upon the following views: If the pleading be insufficient in *form*, he is to consider whether it is worth while to take the objection, recollecting the indulgence which the law allows in the way of *amendment, (i;)* but also bearing in mind that the objection, if not taken, will be aided by pleading over, or, after pleading over, by the verdict, or by the statutes of amendments and jeofails. And if he chooses to demur, he must take care to demur specially, lest, upon general demurrer, he should be held excluded from the objection. On the other hand, supposing an insufficiency in substance, he is to consider whether that insufficiency be in the case itself, or in the manner of state-

(g.) *Vide supra*, p. 126.

(h.) 3 Bl. Com., 394; 1 Saund., 223 c. n. 1, where Mr. Sergeant Williams corrects a mistake in the passage in Blackstone's Commentaries.

(i.) *Vide supra*, p. 109.

ment; for, on the latter supposition, it might be removed by an amendment, and it may, therefore, not be worth while to demur. And whether it be such as an amendment would remove or not, a further question will arise, whether it be not expedient to pass by the objection for the present, and plead over; for a party, by this means, often obtains the advantage of contesting with his adversary, in the first instance, by an issue in fact, and of afterwards urging the objection in law by motion in arrest of judgment or writ of error, (*k.*) This double aim, however, is not always advisable; for, though none but *formal* objections are cured by the statutes of jeofails and amendments, there are some defects, of *substance* as well as *form*, which are aided by pleading over or by a verdict, (*l.*) and therefore, unless the fault be clearly of a kind not to be so aided, a demurrer is the only mode of objection that can be relied upon. The additional delay and expense of a trial is also sometimes a material reason for proceeding in the regular way by demurrer, and not waiting to move in arrest of judgment or to bring a writ of error. And a concurrent motive for adopting that course is, that costs are not allowed when the judgment is arrested, (*m.*) nor where it is reversed upon writ of error, (*n.*) (each party in these cases paying his own;) but on demurrer the party succeeding obtains his costs.

Having now taken some view of the doctrine of *demurrers*, the next subject for consideration will be that

II. Of *pleadings*.

Under this head it is proposed to examine, 1, the na-

(*k.*) "When the matter in fact will clearly serve for your client, although your opinion is that the plaintiff hath no cause of action, yet take heed that you do not hazard the matter upon a demurrer, in which, upon the pleading and otherwise, more will perhaps arise than you thought of; but first take advantage of the matters of fact, and leave matters in law, which always arise upon the matters in fact, *ad ultimum*, and never at first demur in law when, after trial of the matters in fact, the matters in law will be saved to you." (Lord Cromwell's Case, 4 Rep., 14 a.)

(*l.*) As in the example, *supra*, p. 162.

(*m.*) 1 Sel. Pract., 497; Cameron v. Reynolds, Cowp., 407.

(*n.*) 2 Tidd, 1243, 8th edit.

ture and properties of *traverses*; 2, the nature and properties of pleadings in *confession and avoidance*; 3, the nature and properties of *pleadings in general*, without reference to their quality, as being by way of traverse or confession and avoidance.

1. Of the nature and properties of traverses.

Of *traverses*, there are various kinds. The most ordinary kind is that which may be called a *common* traverse. It consists of a *tender of issue*; that is, of a denial, accompanied by a formal offer of the point denied for decision, (*o*;) and the denial that it makes is by way of *express contradiction, in terms of the allegation traversed*. Of this kind examples have already been given in the first chapter, (*p*.)

Upon referring to these, it will be found that they are all expressed in the *negative*. That, however, is not invariably the case with a common traverse; for, if opposed to a precedent negative allegation, it will, of course, be in the *affirmative*, as in the following example:

PLEA OF THE STATUTE OF LIMITATIONS.

In assumpsit.

(*q*.) And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that the said *A. B.* ought not to have or maintain his aforesaid action against him, because, he says, that he, the said *C. D.*, did not, at any time within six years next before the commencement of this suit, undertake or promise, in manner and form as the said *A. B.* hath above complained; and this the said *C. D.* is ready to verify. Wherefore he prays judgment, if the said *A. B.* ought to have or maintain his aforesaid action against him, &c.

REPLICATION.

And the said *A. B.* says, that, by reason of anything in the said plea alleged, he ought not be barred from having and maintaining his aforesaid action against the said *C. D.*, because, he says, that the said *C. D.* did, within six years next before the commencement of this suit, undertake and promise,

(*o*.) See the definition of *tendering issue*, given in the first chapter, *supra* p. 91.

(*p*.) *Vide supra*, pp. 90, 94, 95.

(*q*.) Pleadings are always *entitled* at the commencement, *i. e.*, have a super-scription of the court and term, as in the examples in the first chapter; but in this, and all subsequent examples, the title is, for the sake of brevity, omitted.

in manner and form as he, the said *A. B.*, hath above complained; and this he prays, may be inquired of by the country.

Besides this, the common kind, there is a class of traverses which, from its great frequency and importance in practice, requires particular notice. It is that of the *general issues*. In most of the usual actions there is an appropriate plea, fixed by ancient usage, as the proper method of traversing the declaration, in cases where the defendant means to deny the whole or the principal part of its allegations, (*r.*) This form of plea or traverse is called the *general issue* in that action; and it appears to be so called, because the issue that it tenders, involving the whole declaration or the principal part of it, is of a more general and comprehensive kind than that usually tendered by a common traverse. From the examples of it that will be presently given, it will be found that, not only in extent or comprehensiveness, but in point of form also, it differs somewhat from a common traverse; for though, like that, it *tenders issue*, yet, in several instances, it does not contradict *in terms of the allegation traversed*, but in a more general form of expression, (*s.*)

In the *writ of right* and in *dower* there seems to be, properly speaking, *no general issue*, (*t.*)

In *formedon* the *general issue* is in the following formula, and is called the plea of *ne dona pas* or *non dedit*.

And the said *C. D.*, by ———, his attorney, comes and defends his right, when, &c., and says that the said *E. F.* did not give the said manor, with the appurtenances, or any part thereof, to the said *G. B.* and the heirs of his body issuing, in manner and form as the said *A. B.* hath in his said count above alleged; and of this the said *C. D.* puts himself upon the country, (*u.*)

In *quare impedit* the *general issue* is called *ne disturba pas*, (*x.*) and it is in the following form:

And the said bishop, *C. D.*, and *E. F.*, by ———, their attorney, come and defend the wrong and injury, when, &c., and say that they do not hinder the

(*r.*) Reg. Plac., 57; Doct. & Stud., 272.

(*s.*) See the general issues of *non est factum* and *not guilty*, *post.* 169.

(*t.*) See Appendix, note 46.

(*u.*) 10 Went., 182.

(*x.*) *Colt v. Bishop of Coventry*, Hob., 162; Bac Ab., Simony, I. But there

said *A. B.* to present a fit person to the said church, in manner and form as the said *A. B.* hath in his said declaration above alleged; and of this the said bishop, *C. D.*, and *E. F.* put themselves upon the country, (*y.*)

In *debt on bond or other specialty* the general issue is called the plea of *non est factum*; and is as follows:

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that the said supposed writing obligatory (or "indenture," or "articles of agreement," according to the subject of the action) is not his deed; and of this he puts himself upon the country.

In *debt on simple contract* the general issue is called the plea of *nil debet*; and is thus:

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said *A. B.* hath above complained; and of this the said *C. D.* puts himself upon the country, (*z.*)

In *covenant* the general issue is *non est factum*, and its form is similar to that in *debt on specialty*.

In *detinue* the general issue is called the plea of *non detinet*; and is as follows:

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that he does not detain the said goods and chattels (or "deeds and writings," according to the subject of the action) in the said declaration specified, or any part thereof, in manner and form as the said *A. B.* hath above complained; and of this the said *C. D.* puts himself upon the country.

In *trespass* the general issue is called the plea of *not guilty*; and is as follows:

And the said *C. D.*, by ———, his attorney, comes and defends the force and injury, when, &c., and says that he is not guilty of the said trespasses

is a dictum of Ashhurst, J., that there is no general issue in *quare impedit*. (Read v. Brookman, 3 T. R., 158.)

(*y.*) See Rast., 517; Winch. Ent., 703.

(*z.*) *Nil debet* is the proper form of the general issue, not only in *debt on simple contract*, but in all other actions of *debt* not founded on a deed or specialty. And an action is not considered as founded on a deed or specialty, so as to require a plea of *non est factum*, if the deed be mentioned in the declaration only as introductory to some other main cause of action. Therefore *nil debet* is a good plea in *debt* for rent upon an indenture, or in *debt* for an escape, or in *debt* upon a devastavit. (1 Tidd., 701, 8th edit.)

above laid to his charge, or any part thereof, in manner and form as the said *A. B.* hath above complained; and of this the said *C. D.* puts himself upon the country.

In *trespass on the case* (in the species of *assumpsit*) the general issue is called the plea of *non assumpsit*; and is as follows:

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake or promise, in manner or form as the said *A. B.* hath above complained; and of this the said *C. D.* puts himself upon the country.

In *trespass on the case, in general*, the general issue is *not guilty*; and is thus:

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that he is not guilty of the premises above laid to his charge, in manner and form as the said *A. B.* hath above complained; and of this the said *C. D.* puts himself upon the country.

In *replevin* the general issue is called the plea of *non cepit*; and is as follows:

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not take the said cattle (or "*goods and chattels*," according to the subject of the action) in the said declaration mentioned, or any of them, in manner and form as the said *A. B.* hath above complained; and of this the said *C. D.* puts himself upon the country.

A very important effect attends the adoption of the general issue, viz, that by tendering the issue on the declaration, and thus closing the process of the pleading at so early a stage, it throws out of use, wherever it occurs, a great many rules of pleading, applying exclusively to the remoter allegations. For it is evident that, when the issue is thus tendered in the plea, the whole doctrine relating to pleadings in confession and avoidance, replications, rejoinders, &c., is superseded. At the same time, the general issue is of very frequent occurrence in pleading; and it has, therefore, on the whole, the effect of narrowing, very considerably, the application of the greater and more subtle part of the science.

The important character of this plea makes it material to explain distinctly in what cases it may and ought to be used; and this is the more necessary, because an allowed

relaxation in the modern practice has, in some actions, given it an application more extensive than belongs to it in principle. To obtain a clear view of this subject, we must examine the language of the different general issues, in reference to the declarations which they respectively traverse.

First, with respect to the general issue in *formedon*, we find that this plea simply denies the gift in tail to have been in the manner and form as alleged. It will therefore be the proper plea if the tenant means to dispute the fact of the gift, but will apply to no other case, (a.)

In *quare impedit*, the general issue simply denies that the defendant obstructed the presentation, and is adapted to no other ground of defense, (b.)

In *debt on specialty* and in *covenant*, the general issue, *non est factum*, denies that the deed mentioned in the declaration is the deed of the defendant. Under this, the defendant at the trial may contend, either that he never executed such deed as alleged, or that it is absolutely void in law: for example, on the ground that the alleged obligor or covenantor was, at the time of execution, a married woman or a lunatic, (c;) or that since its execution, and before the commencement of the suit, it has been erased or altered by the obligee or covenantee himself, or (if in a material point) by a stranger, (d.) But if the defendant's case consist of anything but a denial of the execution of such deed as alleged, or some fact showing its absolute invalidity, the plea of *non est factum* will be

(a.) See *Dowland v. Slade*, 5 East., 289.

(b.) It is consequently never pleaded, unless in cases where there has been actually no refusal to institute and induct the plaintiff's clerk. It amounts to a confession of the right of patronage; and, therefore, upon such plea, the plaintiff may immediately pray judgment and a writ to the ordinary; or, if he please, he may proceed in the action, to maintain the disturbance, and recover damages. (1 Arch., 441; *Colt. v. Bishop of Coventry*, Hob., 162; Bac. Ab., Simony, I.

(c.) Com. Dig., Pleader, 2 W., 18; *Yates v. Boen*, 2 Str., 1164; *Collins v. Blantern*, 2 Wils., 347.

(d.) *Pigot's Case*, 11 Rep., 26 b.

improper, (c.) And it is to be observed that, in point of pleading, a deed is on some grounds absolutely *void* in law, on others *voidable* only. Thus, though it is void for the lunacy of the party who executes, his infancy makes it only voidable, (f.) And its execution under duress is also an objection of the latter kind, (g.) Now the rule is, that while matters which make a deed absolutely void may be given in evidence under *non est factum*, those which make it voidable only must be specially pleaded, (h.) And it seems that, in general, objections to the legality of the consideration on which a deed was founded are referable to the latter class; for it has been decided, that where the condition of a bond is in restraint of matrimony, that ground of defense is not evidence under *non est factum*, (i;) and that where a bond is given to compound a felony, that is matter which must be specially pleaded, (k.) And it is a general rule that any illegality arising from the prohibition of *an act of parliament*, as in the case of usury, or gaming, is matter for special plea, and is not evidence under *non est factum*, (l;) a rule apparently founded on the same principle; for its reason seems to be, that the statute

(c.) If the statement of the deed in the declaration materially varies from the tenor of the deed itself, the plea of *non est factum* will of course be as applicable as where no deed has been executed by the defendant; for in either case the deed, as *alleged*, is not his. So, if the instrument was delivered as an *escrow*, this is evidence under *non est factum*, (1 Tidd, 701, 8th edit.,) because it shows the invalidity of the instrument as a *deed*. But it seems that its delivery as an *escrow* may be also specially pleaded. (Murray v. Earl of Stair, 2 Barn. & Cres., 82; 2 Chitty, 462, n. t, 1st edit.)

(f.) Whelpdale's Case, 5 Rep., 119 a; 2 Inst., 483; Darby v. Boucher, 1 Salk., 279; Zouch v. Parsons, 3 Burr., 1805; Gibbs v. Merrell, 3 Taunt., 307; Baylis v. Dinely, 3 M. & S., 477; Keane v. Boycott, 2 H. Bl., 515.

(g.) 2 Inst., 482, Com. Dig., Pleader, 2 W., 19.

(h.) Com. Dig., Pleader, 2 W., 18.

(i.) Colton v. Goodridge, 2 Black., 1108.

(k.) Harmer v. Rowe, 2 Chit. Lep., 334; 2 Stark., 36, S. C.; and see Collina v. Blantern, 2 Wils., 347.

(l.) Whelpdale's Case, 5 Rep., 119 a. With respect to *usury*, it is said that, even if the condition of a bond, as set forth in the pleadings, appears on the face of it to be usurious, yet the defendant cannot *demur*, but must plead the *usury*. (1 Saund., 295 a., n. 1.)

is always so construed as to make the instrument not absolutely void, but voidable by special plea, (*m.*)

If the general issue in *debt on simple contract* be now examined, its effect and application will be found to be much more extensive. The declaration alleges that the defendant was indebted to the plaintiff on some consideration, *e. g.*, for goods sold and delivered, (*n.*) The general issue alleges "that he does not owe the sum of money," &c. Were the allegation merely that "the goods were not sold and delivered," it would of course be applicable to no case but that where the defendant means to deny the sale and delivery; but as the allegation is that he *does not owe*, it is evident that the plea is adapted to any kind of defense that tends to deny *an existing debt*; and, therefore, not only to a defense consisting in a denial of the sale and delivery, but to those of *release, satisfaction, arbitrament*, (*o.*) and a multitude of others, to which a general issue of a narrower kind (for example, that of *non est factum*) would, in its appropriate actions, be inapplicable. In short, there is hardly any matter of defense to an action of debt to which the plea of *nil debet* may not be applied, because almost all defenses resolve themselves into a denial of *the debt*, (*p.*)

In *detinue*, the declaration states that the defendant detains certain goods of the plaintiff, (*q.*) the general issue alleges that he "does not detain the said goods in the said declaration specified," &c. This will apply either to a case

(*m.*) See *Whelpdale's Case*, 5 Rep., 119 a.

(*n.*) *Vide supra*, p. 67.

(*o.*) *Anon*, 5 Mod., 18; *Paramore v. Johnson*, 1 Ld. Ray., 566; 12 Mod., 376, S. C.

(*p.*) It was even holden, per Holt., C. J., that as the plea is in the present tense, the defendant may give in evidence the *statute of limitations*. (*Draper v. Glassop*, 1 Ld. Ray., 153; *Lee v. Clarke*, 2 East., 336. Per Lawrence, J. Qu. tamen., see 1 Saund., 283, n. 2, 2 Saund., 62 c., n. 6.) But under this plea, defendant cannot give in evidence a *tender*, nor (without notice) a *set-off*; nor (in an action for rent on indenture,) that the plaintiff *had nothing in the tenements*; nor (in debt, *qui tam*) a *former recovery* against him for the same cause by another person. (1 Tidd, 700, 8th edit.)

(*q.*) *Vide supra*, p. 69.

where the defendant means to deny that he detains the goods mentioned, or to a case where he means to deny that the goods so detained are the *property of the plaintiff*; for, if they are not the plaintiff's property, then it is true that the defendant does not detain the goods specified in the declaration; the only goods there specified being described as the goods of *the plaintiff*, (r.)

In *trespass*, the general issue, *not guilty*, evidently amounts to a denial of the trespasses alleged, and no more. Therefore, if in trespass for assault and battery the case be, that the defendant has *not* assaulted or beat the plaintiff, it will be proper that he should plead the general issue; but if his case be of any other description, the plea will be inapplicable. So, in trespass *quare clausum fregit*, or for taking the plaintiff's goods, if the defendant did not, in fact, break and enter the close in question or take the goods, the general issue, "not guilty," will be proper. It will also be applicable if he *did* break and enter the close, but it was not *in the possession of the plaintiff*, or not *lawfully in his possession, as against the better title of the defendant*, (s.) So it will be applicable if he did take the goods, but they did not *belong to the plaintiff*; for, as the declaration alleges the trespass to have been committed on the close or goods of *the plaintiff*, the plea of *not guilty* involves a denial that the defendant broke and entered the close or took the goods of *the plaintiff*; and is, therefore, a fit plea, if the defendant means to contend that the plaintiff had no possession of the close, or property in the goods, sufficient to entitle him to call them his own. But if the defense be of any other kind, the general issue will not apply.

So far, all is consistent with the form and principle of these several pleas; but, with respect to the two general issues that next follow, the case is somewhat different.

First, with respect to that in *assumpsit*. The declara-

(r.) Therefore he may give in evidence, under *non detinet*, a gift from the plaintiff; for that proves that he does not detain the plaintiff's goods; but he cannot give in evidence that they were *pawned* to him. (Co. Litt., 283.)

(s.) *Dodd v. Kyffn*, 7 T. R., 254.

tion in this action, (t.) states that the defendant, upon a certain consideration therein set forth, made a certain promise to the plaintiff. The general issue, in this action, states that the defendant "did not promise and undertake in manner and form," &c. This, at first sight, would appear to put in issue merely the fact of his having made a promise such as alleged. A much wider effect, however, belongs in practice to this plea, and was originally allowed, (as it would appear,) in reference to the following distinction. It has been already stated, in a former part of the work, (u,) that the law will always *imply* a promise, in consideration of an existing debt or liability; and that the action of assumpsit may be consequently founded on a promise either *express* or *implied*. When the promise relied upon was of the *latter kind*, and the defendant pleaded the general issue, the plaintiff's mode of maintaining the affirmative of this issue, on the trial, was, of course, by proving that debt or liability on which the implied promise would arise; and in such case it was evidently reasonable that the defendant also should, under his plea denying the promise, be at liberty to show any circumstance by which the debt or liability was disproved; such, for example, as performance or a release. Accordingly, in actions on *implied* assumpsits, this effect was, on the principle here mentioned, allowed to the general issue. But it was at first allowed in the case of implied assumpsits *only*; and, where an *express* promise was proved, the defendant, in conformity with the language and strict principle of his plea, was permitted, under the general issue, only to contest the fact of the promise, or at most to show that, on the ground of some illegality, it was a promise void in law, (x.) This practice, however, was by relaxation gradually applied to those on *express* promises also; and at length, in *all* actions

(t.) *Vide supra*, p. 72.

(u.) *Vide supra*, p. 49.

(x.) *Fits v. Freestone*, 1 Mod., 310; *Abbot v. Chapman*, 2 Lev., 81; *Vin. Ab., Evidence*, Z a; 1 Chitty, 471, 1st edit.

of *assumpsit*, without distinction, the defendant was, under the general issue, permitted not only to contend that no promise was made, or to show facts impeaching the validity of the promise, but (with some few exceptions,) (*y*), to prove any matter of defense whatever which tends to deny his debt or liability; for example, a release or performance. And such is the present state of the practice.

This is a great deviation from principle; for it is to be observed that many of these matters of defense are such (in the case of express promise) as ought regularly to be pleaded in *confession and avoidance*. Thus, if the defendant be charged with an express promise, and his case be, that, after making such promise, it was *released* or *performed*, this plainly *confesses and avoids* the declaration. To allow the defendant, therefore, to give this in evidence under the general issue, which is a plea by way of *traverse*, is to lose sight of the distinction between the two kinds of pleading. And even where the matters of defense thus admitted in evidence are *not* such as would have been pleadable by way of confession and avoidance, but are in the nature of a traverse of the declaration, yet they are almost always inconsistent with the form and language of the general issue in this action; which (as has been seen) consists of a denial of the *promise* only, and purports to traverse no other part of the declaration. Thus, in an action which has become, of all others, the most frequent and general in its application, the science of pleading has been, in a great measure, superseded by an innovation of practice, which enables the parties to come to issue upon the plea (the second step in the series of allegations) in a great variety of cases, which would formerly have led to much remoter or more specific issues. This important inroad on the ancient dominion of pleading has been effected for

(*y*) He cannot give in evidence a *tender*, *bankruptcy of defendant*, the *statute of limitations*, a *discharge under the insolvent act*, nor (in some cases) a defense under the *court of conscience acts*. Nor is a *set-off* evidence under non *assumpsit*, unless notice of set-off be given with the plea. (1 Chitty, 473, 1st edit.; 1 Tidd, 700, 8th ed.)

more than a century past, (z,) and was probably first encouraged by the judges in consequence of a prevalent opinion that the rules of this science were somewhat more strict and subtle than is consistent with the objects of justice; and that, as the general issue tended to abbreviate its process, and proportionably to emancipate the suitors from its restrictions, it was desirable to extend, as much as possible, the use and application of that plea.

Next in order is the general issue, which belongs to the action of *trespass on the case in general*. The declaration in this action sets forth specifically the circumstances which form the subject of complaint, (a.) The general issue, *not guilty*, is a mere traverse or denial of the facts so alleged; and, therefore, on principle, should be applied only to cases in which the defense rests on such denial. But here a relaxation has taken place similar to that which prevails in *assumpsit*; for, under the plea now in question, a defendant is permitted not only to contest the truth of the declaration, but, with certain exceptions, (b,) to prove any matter of defense that tends to show that the plaintiff has no right of action, though such matters be in confession and avoidance of the declaration; as, for example, a release given or satisfaction made. This latitude was, no doubt, originally allowed in the same view that prompted the encouragement of the general issue in *assumpsit*. It is not, however, easy to conceive by what artifice of reasoning the relaxation was, in this case, held to be reconcilable with the principles of pleading, to which it stands in apparent variance; and perhaps the truth is, that the practice in question was first applied to the general issue in *trespass on the*

(z.) See *Paramour v. Johnson*, 12 Mod., 377, where Holt, C. J., says: "It is indulgence to give *accord with satisfaction* in evidence upon non *assumpsit* pleaded, but that has crept in, and now is settled."

(a.) *Supra*, p. 73.

(b.) In an action of libel or words of slander he cannot give in evidence the truth of the charges, but must plead it specially; nor *retaking on fresh pursuit*, in an action for escape; nor in any action on the case, the *statute of limitations*. (1 Tidd, 702, 8th edit.; 1 Chitty, 487, 1st edit.)

case *in general*, without regard to any principle beyond that of a forced analogy to the similar practice in trespass on the case in *assumpsit*, (*c.*)

Thus, in *assumpsit* and trespass on the case in general, the defendant is allowed, under the general issue, to give in evidence matters which do not fall within the strict principles of that plea; and, among these, matters in confession and avoidance. It is to be observed, however, with respect to matters of this latter description, that, though allowed, he is in no case obliged to take that course, but may still bring forward, by way of special plea in confession and avoidance, all such allegations as properly fall within the principle of such pleadings; that is, all which confess what is adversely alleged, but repel or obviate its legal effect. Thus the defendant may, in *assumpsit* and other actions of trespass on the case, plead a release, though it is also competent to him to rely upon it in evidence under the general issue, (*d.*) As this course is allowable, so there are reasons of convenience which sometimes dictate its adoption, (*e.*) but the general issue, where capable of being applied, is much the more usual form of plea, and that which, from its generality, is commonly the most advantageous to the defendant.

Lastly, the general issue, *non cepit*, in *replevin*, applies to the case where the defendant has not in fact taken the cattle or goods, or where he did not take them, or have them, in

(*c.*) See, however, Lord Mansfield's explanation of the reason for allowing this practice in trespass on the case. (*Bird v. Randall*, 3 Burr, 1353; 1 Chitty, 486, 1st edit.

(*d.*) Upon this principle the defendant may plead specially, not only a *release, performance, payment, accord and satisfaction*, or other matter in *discharge*, but any matter also which tends to show the contract *void* or *voidable in point of law*, while it admits it to have been made in fact, such as *infancy, lunacy, coverture, duress, usury, gaming*, or the *statute of frauds*. All these, however, are evidence under the general issue.

(*e.*) The chief advantage of pleading specially is, that it obliges the plaintiff to *reply*; in doing which, he is confined (as will be shown hereafter) to a single answer. This often puts him to great disadvantage, for he may have several answers to the defendant's case; and, if the general issue be pleaded, may avail himself of all.

the *place* mentioned in the declaration, (*f.*) For it will be observed, that the declaration alleges that the defendant "took certain cattle or goods of the plaintiff, in a certain place called," &c., (*g.*) and the general issue states that he did not take the said cattle or goods "in manner and form as alleged;" which involves a denial both of the taking and of the place in which the taking was alleged to have been; the *place* being a material point in this action, (*h.*)

On the subject of general issues, it remains only to remark, that other pleas are ordinarily distinguished from them by the appellation of *special pleas*; and, when resort is had to the latter kind, the party is said to plead *specially*, in opposition to pleading the *general issue*, (*i.*) So the *issues* produced upon special pleas, as being usually more specific and particular than those of *not guilty, nil debet, &c.*, are sometimes described in the books as *special issues*, by way of distinction from the others, which were called *general issues*, (*k.*) the latter term having been afterwards applied not only to the issues themselves, but to the pleas which tendered and produced them.

There is another species of traverse, which varies from the common form, and which, though confined to particular actions, and to a particular stage of the pleading, is of frequent occurrence. It is the traverse *de injuria sua propria, absque tali causa*, or (as it is more compendiously called) the traverse *de injuria*. It always *tenders issue*; but, on the other hand, differs, like many of the general issues, from

(*f.*) 1 Chitty, 490; 2 Chitty, 508, 1st edit.

(*g.*) *Supra*, p. 74.

(*h.*) It may occur that this plea ought, upon the principle already explained with respect to *detinue* and *trespass*, (*supra*, pp. 173, 174.) to be also applicable to the case where the defendant denies the *plaintiff's property* in the goods; but the law is not so. (1 Chitty, 159, 1st edit.; *Wildman v. Norton*, 1 Vent., 249.)

(*i.*) These terms, it may be remarked, have given rise to the popular denomination of the whole science to which this work relates, *namely*, though properly described as that of *pleading*, is generally known by the name of *special pleading*.

(*k.*) Co. Litt., 126 a; Heath's *Maxims*, 53; Com. Dig., *Pleader*, R. 2.

the common form of a traverse, by denying in general and summary terms, and *not in the words of the allegation traversed*. The following is an example:

PLEA OF SON ASSAULT DEMESNE.

In trespass, for assault and battery.

And for a further plea (*l*) in this behalf, as to the said assaulting, beating, wounding, and ill-treating, in the said declaration mentioned, the said *C. D.*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *A. B.* ought not to have or maintain his aforesaid action thereof against him, because, he says, that the said *A. B.*, just before the said time, when, &c., to wit, on the day and year aforesaid, at ——— aforesaid, in the county aforesaid, with force and arms, made an assault upon him, the said *C. D.*, and would then and there have beaten and ill-treated him, the said *C. D.*, if he had not immediately defended himself against the said *A. B.*; wherefore the said *C. D.* did then and there defend himself against the said *A. B.*, as he lawfully might, for the cause aforesaid, and in so doing did necessarily and unavoidably a little beat, wound, and ill-treat the said *A. B.*, doing no unnecessary damage to the said *A. B.* on the occasion aforesaid; and so the said *C. D.* saith, that if any hurt or damage then and there happened to the said *A. B.*, the same was occasioned by the said assault so made by the said *A. B.* on him, the said *C. D.*, and in the necessary defense of himself, the said *C. D.*, against the said *A. B.*, which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A. B.* hath above complained; and this the said *C. D.* is ready to verify. Wherefore he prays judgment if the said *A. B.* ought to have or maintain his aforesaid action thereof against him.

REPLICATION.

And as to the said plea by the said defendant last above pleaded, in bar to the said several trespasses in the introductory part of that plea mentioned, the said *A. B.* says that, by reason of anything therein alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against the said *C. D.*, because, he says, that the said *C. D.*, at the said time when &c., *of his own wrong, and without the cause in his said last-mentioned plea alleged*, committed the said several trespasses in the introductory part of that plea mentioned, in manner and form as the said *A. B.* hath above complained; and this he prays may be inquired of by the country, (*m.*)

This species of traverse occurs in the *replication* in action

(*l.*) In this case the defendant is supposed to plead more pleas than one. The doctrine of pleading *several pleas* will be explained in a subsequent section.

(*m.*) 2 Chitty, 523, 642, 1st edit.

of *trespass* and *trespass on the case*, (*n.*) but is not used in any other stage of the pleading. In these actions it is the *proper* form, when the plea consists merely of matter of *excuse*. But when it consists of or comprises matter of *title* or *interest* in the land, &c., or the *commandment* of another, or *authority of law*, or *authority in fact*, derived from the opposite party, or matter of *record*,—in any of these cases, the replication *de injuria* is generally improper, (*o.*) and the traverse of any of these matters should be in the common form; that is, in the words of the allegation traversed, (*p.*)

There is still another species of traverse, which differs from the common form, and which will require distinct notice. It is known by the denomination of a *special traverse*, (*q.*) Though formerly in very frequent occurrence, this species has now fallen, in great measure, into disuse; but the subtlety of its texture, its tendency to illustrate the general spirit and character of pleading, and the total dearth of explanation in all the reports and treatises with respect to its principle, seem to justify the consideration of it at greater length and in a more elaborate manner than its actual importance in practice demands. Of the special traverse the following is an example:

Example 1.

DECLARATION IN COVENANT.

For non-payment of rent, by the heir of a lessor against a lessee.

——, to wit, *C. D.*, was summoned to answer *A. B.*, son and heir of *E. B.*, his late father, deceased, of a plea, that he keep with the said *A. B.* the covenant made by the said *C. D.* with the said *E. B.*, according to the force, form, and effect of a certain indenture in that behalf made between them. And thereupon the said *A. B.*, by ——, his attorney, complains: For that

(*n.*) It is not applicable in *replevin*. (Finch Law, 396; *Jones v. Kitchen*, 1 Bos. & Pul., 76.)

(*o.*) *Crogate's Case*, 8 Rep., 67 a; Doct. Pl., 113, 115. See the law on this subject more fully explained, and the exceptions noticed, 1 Chitty, 578, 1st edit.; 1 Arch., 238; 2 Saund., 295, n. 1; 1 Saund., 244 c, n. 7.

(*p.*) As to the traverse *de injuria absque residuo cause*, *vide post*, Sec. III, Rule I, 5.

(*q.*) It is also called a *formal traverse*; or, a *traverse with an absque hoc*.

whereas the said *E. B.* at the time of making the indenture hereinafter mentioned, was seized in his demesne as of fee of and in the premises hereinafter mentioned to be demised to the said *C. D.*; and, being so seized, he, the said *E. B.*, in his lifetime, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, by a certain indenture then and there made between the said *E. B.* of the one part and the said *C. D.* of the other part, (one part of which said indenture, sealed with the seal of the said *C. D.*, the said *A. B.* now brings here into court, the date whereof is the day and year aforesaid,) for the considerations therein mentioned, did demise, lease, set, and to farm let, unto the said *C. D.*, his executors, administrators, and assigns, a certain messuage, or dwelling-house, with the appurtenances, situate at —, to have and to hold the same unto the said *C. D.*, his executors, administrators, and assigns, from the — day of — then last past to the full end and term of — years thence next ensuing and fully to be complete and ended, yielding and paying therefor yearly, and every year, to the said *E. B.*, his heirs or assigns, the clear yearly rent or sum of — pounds, payable quarterly, at the four most usual feasts or days of payment of rent in the year, that is to say, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in each and every year, in equal portions. And the said *C. D.* did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree, to and with the said *E. B.*, his heirs and assigns, that he, the said *C. D.*, his executors, administrators, or assigns, should and would well and truly pay, or cause to be paid, to the said *E. B.*, his heirs or assigns, the said yearly rent or sum of — pounds, at the several day and times aforesaid, as by the said indenture, reference being thereunto had, will more fully appear. By virtue of which said demise, the said *C. D.* afterwards, to wit, on the — day of —, in the year —, entered into the said premises, and was thereof possessed for the said term, the reversion thereof belonging to the said *E. B.* and his heirs. And he, the said *C. D.*, being so possessed, and the said *E. B.* being so seized of the said reversion in his demesne as of fee, he, the said *E. B.*, afterwards, to wit, on the — day of —, in the year aforesaid, at — aforesaid, in the county aforesaid, died so seized of the said reversion. After whose decease the said reversion descended to the said *A. B.*, as son and heir of the said *E. B.*; whereby the said *A. B.* was seized of the reversion of the said demised premises in his demesne as of fee. And the said *A. B.* in fact says that he, the said *A. B.*, being so seized, and the said *C. D.* being so possessed as aforesaid, afterwards, and during the said term, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, a large sum of money, to wit, the sum of — pounds, of the rent aforesaid, for divers, to wit, — years of the said term then elapsed, became and was due and owing, and still is in arrear and unpaid to the said *A. B.*, contrary to the form and effect of the said covenant in that behalf. And so the said *A. B.* in fact saith, that the said *C. D.* (although often requested) hath not kept his said covenant in that behalf, but hath broken the same, and to keep the same hath hitherto wholly refused, and still refuses, to the damage of the said *A. B.* of — pounds; and therefore he brings his suit, &c.

PLEA.

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that the said *A. B.* ought not to have or maintain his aforesaid action against him, because, he says, that the said *E. B.*, deceased, at the time of the making of the said indenture, was seized in his demesne as of freehold, for the term of his natural life, of and in the said demised premises, with the appurtenances, and continued so seized thereof until and at the time of his death; and that, after the making of the said indenture and before the expiration of the said term, to wit, on the — day of ———, in the year of our Lord —, at ———, aforesaid, the said *E. B.* died; whereupon the term created by the said indenture wholly ceased and determined: *(Without this, that after the making of the said indenture, the reversion of the said demised premises belonged to the said E. B. and his heirs, in manner and form as the said A. B. hath in his said declaration alleged; and this the said C. D. is ready to verify.)* Wherefore he prays judgment if the said *A. B.* ought to have or maintain his aforesaid action against him, (*r.*)

The substance of this plea is, that the father was seized for life only, and therefore that the term determined at his death; which involves a denial of the allegation in the declaration, that the reversion belonged to the father in fee. The defendant's course was, therefore, to traverse the declaration, (*s.*) But it will be observed that he does not traverse it in the common form. If the *common* traverse were adopted in this case, the plea would be: "And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that the said *A. B.* ought not to have or maintain his aforesaid action against him, because, he says, that after the making of the said indenture, the said reversion of the said demised premises did not belong to the said *E. B.* and his heirs, in manner and form as the said *A. B.* hath in his said declaration alleged; and of this the said *C. D.* puts himself upon the country." But, instead of this simple denial and tender of issue, the defendant adopts a *special* traverse. This first sets forth the new affirmative matter, that *E. B.* was seized for life, &c., and then annexes to this the denial

(*r.*) 2 Chitty, 500, 1st edit.; and see *Brudnell v. Roberts*, 2 Wills., 143; *Palmer v. Ekins*, Lord Ray., 1550.

(*s.*) See Appendix, note 47.

that the reversion belonged to him and his heirs by that peculiar and barbarous formula, "*Without this, that,*" &c.; and, lastly, does not (like a common traverse) *tender issue*, but concludes with the words, "and this the said *C. D.* is ready to verify. Wherefore he prays judgment," &c.; which is called a *verification* and *prayer of judgment*, and is the constant conclusion of all pleadings in which issue is not tendered. The affirmative part of the special traverse is called its *inducement*, (*t.*) the negative part is called the *absque hoc*, those being the Latin words formerly used, and from which the modern expression, *without this*, is translated. The different parts and properties here noticed are all essential to a special traverse, which must always thus consist of an inducement, a denial, and a verification, (*u.*)

By way of further illustration, and as the foundation for some subsequent remarks on the nature and meaning of a special traverse, it will be necessary here to add some other examples of this form of pleading

Example 2.

PLEA.

In trespass, quare clausum fregit.

And for a further plea, as to the breaking and entering the said close, in which, &c., and the treading down, trampling upon, consuming, and spoiling the said grass and herbage, as above supposed to have been done, the said *C. D.*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *A. B.* ought not to have or maintain his aforesaid action thereof against him, because, he says, that before the said time, when, &c., to wit, on the — day of —, in the year —, one *I. N.*, clerk, prebendary of the prebend of *N.*, in the cathedral church of *H.*, was seized in his demesne, as of fee, in right of the said prebend, of and in certain tenements, whereof the said close, in which, &c., then and from thenceforth hitherto hath been parcel; and being so seized, before the said time, when, &c., to wit, on the day and year last aforesaid, at —, aforesaid, in the county aforesaid, by a certain indenture, sealed with the seal of the said *I. N.*, (and now shown to the court here, the date whereof is the day and year last aforesaid,) the said *I. N.* demised the

(*t.*) Bac. Ab., Pleas, &c., H. 1.

(*u.*) The denial, however, may be introduced by other forms of expression besides *absque hoc*. *Et non* will suffice. (*Bennet v. Filkins*, 1 Saund., 21 *Walters v. Hodges*, Lut., 1625.)

said tenements, with the appurtenances, (among other things,) to the said *C. D.*, by the name of all his prebend of *N.* aforesaid, &c., to have and to hold to the said *C. D.* and his assigns, from the — day of — then next, to the end and term of fifty years thence next following, yielding and paying therefor, yearly, during the said term, to the said prebendary and his successors, the sum of — pounds, at the feasts of — and —, by equal portions. By virtue of which demise the said *C. D.* was possessed (among other things) of the said tenements, with the appurtenances; and, being so possessed, one *I. H.*, bishop of —, then being true and undoubted patron and ordinary of the said prebend of *N.*, afterwards, to wit, on the — day of —, in the year —, at —, by his writing, sealed with his common seal, (and now shown to the court here, the date whereof is the day and year last aforesaid,) ratified, approved, and confirmed the said estate and interest of the said *C. D.* in the premises. And afterwards one *I. E.*, master of arts, dean of the said cathedral church and the chapter of the said church for the time being, (x.) to wit, on the — day of —, in the year —, at —, by their writing, sealed with their common seal, (and now shown to the court here, the date whereof is the day and year last aforesaid,) ratified, approved, and confirmed the said estate and interest of the said *C. D.* in the premises. And the said *A. B.*, claiming the said tenements, with the appurtenances, by color of a certain charter of demise to him thereof made for the term of his life by the said *I. N.*, long before the said demise to the said *C. D.*, in form aforesaid made, (whereas nothing of the said tenements, with the appurtenances, ever passed into the possession of the said *A. B.* by that charter;) before the said time, when, &c., entered into the said tenements, with the appurtenances; upon whose possession whereof the said *C. D.*, at the said time, when, &c., entered into the said tenement, with the appurtenances, and broke and entered the said close, in which, &c., and trod down, trampled upon, consumed, and spoiled the grass and herbage there growing and being, as it was lawful for him to do, for the cause aforesaid; which are the same trespasses in the introductory part of this plea mentioned, and whereof the said *A. B.* hath above complained; and this the said *C. D.* is ready to verify. Wherefore he prays judgment if the said *A. B.* ought to have or maintain his aforesaid action against him, &c.

REPLICATION.

And as to the said plea by the said *C. D.* last above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, the said *A. B.* says that, by reason of anything therein alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against him, because, protesting that the said *I. N.* did not demise the said tenements, with the appurtenances, to the said *C. D.*, as the said *C. D.* hath above alleged, for replication, nevertheless, in this behalf, the said *A. B.* says that the said *C.*

(x.) If the bishop happen to be patron as well as the ordinary, the confirmation of the dean and chapter, as well as the bishop, is necessary. (Co. Litt., 300 b.)

D., on the said — day of —, in the year —, at —, aforesaid, in the county aforesaid, brought to the said bishop a certain writing of demise of the said tenements by the said *I. N.* to the said *C. D.*, and then and there desired the said bishop to confirm the said writing, sealed with the seal of the said *I. N.*, in which writing no number of years was then written which the said *C. D.* was to have in the said tenements; which said writing of demise the said bishop then and there confirmed, and sealed the said writing with his seal. And before the said time, when, &c., to wit, on the — day of —, in the year —, at —, aforesaid, in the county aforesaid, the said *I. N.* died. After whose death, and before the said time, when, &c., the said bishop, as the true and undoubted patron and ordinary of the said prebend so being vacant by the death of the said *I. N.*, collated the same on his clerk, the said *A. B.*, and caused him to be justly instituted and inducted and put in corporeal possession of the said prebend. Whereby the said *A. B.* was seized of the said tenements, with the appurtenances, in his demesne, as of fee, in right of his said prebend, until the said *C. D.*, on the — day of —, in the year —, with force and arms, broke and entered the close of the said *A. B.*, at — aforesaid, and trod down, trampled upon, consumed, and spoiled the grass and herbage therein to value of — pounds, as he hath above complained. *Without this, that* the said bishop, by his said writing, ratified, approved, and confirmed the estate and interest of the said *C. D.* in the premises, in manner and form as the said *C. D.* hath in his said last-mentioned plea alleged; and this the said *A. B.* is ready to verify. Wherefore he prays judgment, and his damages by him sustained by reason of the said trespasses in the introductory part of that plea mentioned, to be adjudged to him, &c., (*y.*)

In both the preceding examples, it will be observed that the *inducement* contains *new* affirmative matter. But a special traverse may also occur in cases where the denial is, in its nature, unconnected with any new affirmative matter that can be stated by way of inducement. Of this the following is an example:

Example 3.

PLEA.

In trespass, quare clausum fregit.

And for a further plea in this behalf, as to the breaking and entering the said close, in which, &c., and with feet in walking, treading down, trampling upon, consuming, and spoiling the said grass, as above supposed to have been done, the said *C. D.*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *A. B.* ought not to have or maintain his aforesaid action thereof against him, because he says, that one *W. F.*, before and at the same time, when, &c., was and yet is seized in his demesne, as of fee, of and in a

(*y.*) See the precedent, Pl. Gen., 609.

certain messuage, or tenement and lands, with the appurtenances, situate and being at ——, in the county aforesaid. And that the said *W. F.*, and all those whose estate he hath, and at the same time when, &c., had of and in the said messuage, or tenement and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used; and been accustomed to have and use, and of right ought to have and use, for himself and themselves, and his and their farmers, and tenants, occupiers of the said messuage, or tenement and lands, with the appurtenances, for the time being, a certain way from the said messuage, or tenement and lands, with the appurtenances, into, through, and over the said close, in which, &c., unto a certain place called ——, and so from thence back again into, through, and over the said close, in which, &c., unto the said messuage, or tenement and lands, with the appurtenances, to go, return, pass and repass, on foot, at all times of the year, at his and their free will and pleasure, as to the said messuage, or tenement and lands, with the appurtenances belonging and appertaining. Wherefore the said *C. D.*, as the servant of the said *W. F.*, and by his command, at the said several times when, &c., having occasion to use that way, broke and entered the said close, in which, &c., and passed and repassed on foot through and over the said way there, using the said way for the purpose and on the occasion aforesaid, as it was lawful for him to do for the cause aforesaid; and in so doing the said *C. D.* necessarily and unavoidably, at the said time when, &c., with his feet in walking, trod down, trampled upon, consumed, and spoiled a little of the grass then growing and being in the said way there; doing as little damage as he possibly could to the said *A. B.* on that occasion. Which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A. B.* hath above complained; and this the said *C. D.* is ready to verify. Wherefore he prays judgment if the said *A. B.* ought to have or maintain his aforesaid action thereof against him, &c.

REPLICATION.

And as to the said plea by the said *C. D.* last above pleaded, as to the several trespasses in the introductory part of that plea mentioned, the said *A. B.* says that, by reason of anything therein alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against him; because the said *A. B.* says that he, the said *C. D.*, of his own wrong, broke and entered the said close, in which, &c., and with feet in walking, trod down, trampled upon, consumed, and spoiled the grass there then growing and being, as the said *A. B.* hath above complained. *Without this, that the said W. F.*, and all those whose estate he hath, and at the said several times when, &c., had of and in the said messuage, or tenement and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of right ought to have and use, for himself and themselves, and his and their farmers and tenants, occupiers of the said messuage, or tenement and lands, with the appurtenances, for the time being, a certain way from the said messuage, or tenement and lands, with the appurtenances, into, through, and over the said close, in which, &c., unto a certain place called ——, and so from thence back again

into, through, and over the said close, in which, &c., unto the said messuage, or tenement and lands, with the appurtenances, to go, return, pass and repass, on foot, at all times of the year, at his and their free will and pleasure, as to the said messuage, or tenement and lands, with the appurtenances belonging and appertaining, in manner and form as the said *C. D.* hath in his said last-mentioned plea alleged; and this the said *A. B.* is ready to verify. Wherefore he prays judgment, and his damages by him sustained by reason of the said trespasses in the introductory part of that plea mentioned, to be adjudged to him, &c., (z.)

In this last example it will be observed that there is *no* new affirmative matter contained in the inducement. For it consists of a mere repetition of the trespasses that had been antecedently alleged in the declaration, and an allegation that they were committed *de injuria sua propria*, or of the defendant's own wrong. In this respect, therefore, viz, in the want of new affirmative matter in the inducement, this last example differs from the two first given.

The regular method of pleading in *answer* to a special traverse, is to tender issue upon it, with a repetition of the allegation traversed. Accordingly, in the first example, issue would be tendered in the replication thus: .

REPLICATION.

To the plea, (p. 183.)

And as to the said plea by the said *C. D.* above pleaded, the said *A. B.* says that, by reason of anything therein alleged, he ought not to be barred from having and maintaining his aforesaid action against the said *C. D.*, because the said *A. B.* says, that after the making of the said indenture the reversion of the said demised premises belonged to the said *E. B.* and his heirs, in manner and form as the said *A. B.* hath in his said declaration above alleged; and this he prays may be inquired of by the country.

And so, in the remaining examples, issue would be tendered in the rejoinder by a similar repetition of the matter which the traverse denies.

It will be perceived, therefore, that the *effect* of a special traverse is to postpone the issue to one stage of the pleading later than it would be attained by a traverse in the common form. For if the defendant had, in the first example, traversed without an inducement, and concluded to

(z.) See the precedents, 9 Went., 233, 233.

the country, it would only have remained for the plaintiff to add the similiter, so that the issue would have been joined in the replication. On the other hand, upon the plan of special traverse, the issue is not tendered till the replication; and, consequently, the similiter still remains to be added in a rejoinder by the defendant.

The *use and object* of a special traverse is the next subject for consideration. Though this relic of the subtle genius of the ancient pleaders has now fallen, as above stated, into comparative disuse, it is still of occasional occurrence; and it is remarkable, therefore, that no author should have hitherto offered any explanation of the objects for which it was originally devised, and in a view to which it continues to be, in some cases, adopted, (*a.*) The following remarks are submitted, as those which have occurred to the writer of this work, on a subject thus barren of better authority. The general design of a special traverse, as distinguished from a common one, is to *explain or qualify the denial*, instead of putting it in the direct and absolute form; and there were several different views, in reference to one or other of which the ancient pleaders seem to have been induced to adopt this course.

First. A simple or positive denial may, in some cases, be rendered improper, by its opposition to some general rule of law. Thus, in the example of special traverse first above given, it would be improper to traverse in the common form, viz, "that after the making of the said indenture the reversion of the said demised premises did not belong to the said *E. B.* and his heirs," &c., because, by a rule of law, a tenant is precluded (or, in the language of pleading, *estopped*) from alleging that his lessor had no title in the premises demised, (*b.*) and a general assertion that the reversion did not belong to him and his heirs would seem to fall within the prohibition of that rule. But a tenant is not by law estopped to say that his lessor

(*a.*) See Appendix, note 48.

(*b.*) *Blake v. Foster*, 8 T. R., 487

had only a *particular estate*, which has since expired, (c.) In a case, therefore, in which the declaration alleged a seizin in fee in the lessor, and the nature of the defense was, that he had a particular estate only, (e. g., an estate for life,) since expired, the pleader would resort, as in the first example, to a special traverse, setting forth the lessor's limited title, by way of inducement, and traversing his seizin of the reversion in fee under the *absque hoc*. He thus would avoid the objection that might otherwise arise on the ground of estoppel.

Secondly. A common traverse may sometimes be inexpedient, as involving, in the issue in *fact*, some question which it would be desirable rather to develop and submit to the judgment of the court as an issue in *law*. This may be illustrated by the second example of special traverse, above given. In that case it would seem that a lease, not expressing any certain term of demise, had been brought to the ordinary for his confirmation; that he had accordingly confirmed it in that shape under his seal; and that the instrument was afterwards filled up as a lease for fifty years. The party relying upon this lease states that the demise was to the defendant for the term of fifty years, and that the ordinary "ratified, approved, and confirmed his estate and interest in the premises," (d.) If the opposite party were to traverse in the common form, "that the ordinary did not ratify, approve, and confirm his estate and interest in the premises," &c., and so tender issue in fact on that point, it is plain that there would be involved in such issue the following question of *law*, viz: whether the confirmation by the ordinary of a lease, in which the length of the term is not at the time expressed, be valid? This question would, therefore, fall under the decision of the jury to whom the issue in fact is referred, subject to the direction of the judge presiding at *nisi prius*, and the

(c.) *Blake v. Foster*, 8 T. R., 487.

(d.) This case would seem to have arisen before the restraining statutes; since which a lease by ecclesiastical persons, even with confirmation, is good for no longer period than twenty-one years, or three lives. (2 Bl. Com., 320.)

ultimate revision of the court in banc. Now, it may, for many reasons, be desirable that, without going to a trial, this question should rather be brought before the court in the first instance, and that, for that purpose, an issue in *law* should be taken. The pleader, therefore, in such a case, would state the circumstances of the transaction in an inducement, substituting a special for a common traverse. As the whole facts thus appear on the face of the pleading, if his adversary means to contend that the confirmation was, under the circumstances, valid in point of law, he is enabled by this plan of special traverse to raise the point by demurring to the replication; on which demurrer an issue in law arises for the adjudication of the court.

By these reasons, and sometimes by others also, which the reader, upon examination of different examples, may, after these suggestions, readily discover for himself, the ancient pleader appears to have been actuated in his frequent adoption of an inducement of new affirmative matter, tending to explain or qualify the denial, (*e.*) But though these reasons seem to show the purpose of the *inducement*, they do not account for the two other distinctive features of the special traverse, viz, the *absque hoc* and the *conclusion with a verification*. For it will naturally suggest itself, that the affirmative matter might, in each of the above cases, have been pleaded *per se*, without the addition of the *absque hoc*. So, whether the *absque hoc* were added or not, the pleading might, consistently with any of the above reasons, have *tendered issue*, like a common traverse, instead of concluding with a verification. These latter forms were dictated by *other* principles. The direct denial under the *absque hoc* was rendered necessary by this consideration: that the affirmative matter, taken *alone*, would be only an *indirect* (or, as it is called in pleading, *argumentative*) denial of the precedent statement; and, by a rule which will be considered in its proper place hereafter, all *argumentative*

(c.) See Appendix, note 49.

pleading is prohibited. In order, therefore, to avoid this fault of *argumentativeness*, the course adopted was, to follow up the explanatory matter of the inducement with a *direct denial*, (*f.*) Thus, to allege, as in the first example, that *E. B.* was seized for life, would be to deny by implication, but by implication *only*, that the reversion belonged to him in fee; and therefore, to avoid argumentativeness, a direct denial that the reversion belonged to him in fee is added, under the formula of *absque hoc*, (*g.*) With respect to the *verification*, this conclusion was adopted in a special traverse, in a view to another rule, of which there will also be occasion to speak hereafter, viz: that *wherever new matter is introduced in a pleading it is improper to tender issue, and the conclusion must consequently be with a verification.* The inducement setting forth new matter makes a verification necessary, in conformity with that rule.

The special traverse having, with these views and in this manner, been introduced into the system of pleading, grew so much into fashion as to be frequently adopted even in cases to which the original reasons of the form were inapplicable, that is, to cases where the intended denial was in its nature simple and absolute, and connected with no new matter. This will be illustrated by the last of the preceding examples. In this, the defendant having pleaded a right of way, the object of the replication is merely to deny that the right of way existed. And there is no reason why this should not be done in the simple form of a common traverse, viz: "that the said *W. F.*, and all those whose estate, &c., have not had and used, &c., a certain way, &c., in manner and form as alleged;" concluding to the country. But the fashion of traversing specially led the ancient pleaders, in such a case as this also, to use the inducement, the *absque hoc*, and the *verification*. And because the nature of the case afforded no allegation of

(*f.*) 3 Reeves' Hist., 432; Bac. Ab., Pleas, &c., H.; Courtney v. Phelps, 1 Sid., 301; Herring v. Blacklow, Cro. Eliz., 30; 10 Hen. VI, 7 pl., 21.

(*g.*) See Appendix, note 50.

new matter, as introductory to the denial, in lieu of this a kind of inducement was adopted containing, in fact, no new matter, but a mere repetition of the original complaint, viz, "that the defendant, *of his own wrong, broke and entered the close, &c.* Without this, that," &c., (*h.*)

Having now explained the form, the effect, and the use and object of a special traverse, it remains to show in what cases this method of pleading is or ought to be applied at the present day. First, it is to be observed that this form was at *no* period applicable to *every case* of denial, at the pleasure of the pleader. There are many cases of denial to which the plan of special traverse has never been applied, and which have always been and still are the subjects of traverse in the common form exclusively, (*i.*) These it is not easy to enumerate or define; they are determined by the course of precedent, and in that way become known to the practitioner. On the other hand, in many cases where the special traverse used anciently to occur, it is now no longer practiced. This relates principally to that species of it which is illustrated by the last example. Even when the formula was most in repute, the use of *this* species does not appear to have been regarded as matter of *necessity*; and, in cases which admit or require no allegation of new matter, we find the special and the common traverse to have been indifferently used by the pleaders of those days, (*k.*) But in modern times the special traverse, without an inducement of new matter, has been considered, not only as *unnecessary*, but as frequently *improper*. As the taste in pleading gradually simplified and improved, the prolix and dilatory effect of a special traverse brought it into disfavor with the courts; and they began, not only to enforce the doctrine that the common form might allow-

(*h.*) Upon the same principle, where the traverse was taken in the rejoinder, it had often an inducement, simply maintaining the matter of the plea. as in *Stennell v. Hogg*, 1 Saund., 223; *Mayor of Oxford v. Richardson*, 4 T. R., 437; 9 Went., 211, 308.

(*i.*) *Horne v. Lewin*, 1 Ld. Ray., 641.

(*k.*) *Rast. Ent.*, 622; and see *Horne v. Lewin*, 1 Ld. Ray., 641.

ably be substituted in cases where there was no inducement of new matter, but often intimated their preference of that form to the other, (l.) Afterwards they appear to have gone further, and to have established in favor of the common plan of traverse, in cases where there is no allegation of new matter, the following rule of distinction: *That where the whole substance of the last pleading is denied, the conclusion must be to the country, or, in other words, the traverse must be in the common form; but where one of several facts only is the subject of denial, the conclusion may be either to the country or with a verification; that is, the traverse may be either common or special, at the option of the pleader, (m.)* Thus, in the last example, the special traverse would apparently now be no longer allowable; because the replication, denying the right of way, denies the whole substance of the plea. It is not easy to trace either the original authority, or even a very satisfactory reason, for this distinction. It does not appear to coincide with the practice at a former period, which certainly allowed special traverses, though without an inducement of new matter, in many cases where the whole substance of the pleading was denied; and its true origin is perhaps to be referred very much to the inclination of the courts to discourage this formula. From the time that the special traverse thus fell into disrepute it has been much neglected, even in cases where legally allowable; and it now rarely occurs in any instance where there is no inducement of new matter, although the denial relate to one out of several facts only. This change of practice, however, is very recent, having been effected within the memory of many living practitioners, (n.) With respect to the *other* kind of special traverse, viz, that which is attended with an inducement of new matter, as illustrated in the first two examples, the case is very different. This

(l.) *Robinson v. Rayley*, 1 Burr., 320.

(m.) See 1 Saund., 103 a, b, n. 3; Bac. Ab., Pleas, &c., p. 381, in notis; *Smith v. Dovers*, 2 Doug., 420.

(n.) See 1 Chitty, 593, 1st edit.; and 1 Saund., 103 a, n. 3.

was originally devised, as has been shown, for certain reasons of convenience or necessity; and those reasons still occasionally operate the same way. However, in the general decline of the method of special traverse there is felt in practice a great disinclination to adopt in any case whatever, without a clear reason for doing so, this discredited form; and this more particularly in a view to the disadvantages with which it is attended. These disadvantages consist not only in prolixity and delay, but in the additional inconvenience that the inducement tends to open the real nature of the party's case, by giving notice to his adversary of the precise grounds on which the denial proceeds, and thus facilitates to the latter the preparation of his proofs, or otherwise guides him in his further proceedings. For these reasons the special traverse is perhaps daily becoming more rare. And even though the case be such as would admit of an inducement of new matter explanatory of the denial, the usual course is to omit any such inducement, and to make the denial in an absolute form, with a tender of issue; thus substituting the common for the special formula. The latter, however, appears to be still always allowable when the case is such as admits of an inducement of new matter, except in certain instances before noticed, to which, by the course of precedent, the common form of traverse has always been exclusively applied, (o.) And, where allowable, it should still be occasionally adopted, in a view to the various grounds of necessity or convenience by which it was originally suggested. Accordingly, it is apprehended that in the two first examples a special traverse would be as proper at the present day as it was at the period when the precedents first occurred.

To complete our view of the nature of a special traverse, it will be necessary now to advert to certain principles laid down in the books relative to this form.

First, it is a rule *that the inducement should be such as in*

(o.) *Supra*, p. 193.

itself amounts to a sufficient answer in substance to the last pleading, (p.) For, as has been shown, it is the use and object of the inducement to give an explained or qualified denial; that is, to state such circumstances as tend to show that the last pleading is not true; the *absque hoc* being added merely to put that denial in a positive form, which had previously been made in an indirect one. Now, an indirect denial amounts, in substance, to an answer; and it follows, therefore, that an inducement, if properly framed, must always in itself contain, without the aid of the *absque hoc*, an answer in substance to the last pleading. Thus, in the first example, the allegation that *E. B.* was seized for life, and that that estate is since determined, is in itself, in substance, a sufficient answer, as denying, by implication, that the fee descended from *E. B.* on the plaintiff. That sort of special traverse containing no new matter in the inducement, as in the last example, is no exception to this rule. Thus, to say, as in that example, that the defendant, *of his own wrong*, broke the close, &c., is of itself an answer, for it indirectly denies the right of way.

It follows, from the same consideration as to the object and use of a special traverse, that the answer given by the inducement can properly be of *no other* nature than that of an indirect denial. Accordingly, we find it decided, in the first place, *that it must not consist of a direct denial.* Thus, the plaintiff, being bound by recognizance to pay J. Bush 300*l.* in six years, by 50*l.* per annum, at a certain place, alleged that he was ready every day, at that place, to have paid to Bush the said 50*l.*, but that Bush was not there to receive it. To this the defendant pleaded, that J. Bush was ready at the place to receive the 50*l.*, *absque hoc*, that the plaintiff was there ready to have paid it. The plaintiff demurred, on the ground that the inducement alleging Bush to have been at the place ready to receive contained a direct denial of the plaintiff's precedent allegation that

(p.) *Rac. Ab.*, H. 1; *Com. Dig. Pleader*, G. 20; *Anon.*, 3 *Salk.* 333; *Dike v. Ricks*, *Cro. Car.*, 336.

Bush was *not* there, and should therefore have concluded to the country, without the *absque hoc*, and judgment was given accordingly for the plaintiff, (*q.*) Again, as the answer given by the inducement must not be a *direct denial*, so it must not be *in the nature of a confession and avoidance*, (*r.*) Thus, if the defendant makes title as assignee of a term of years of *A.*, and the plaintiff, in answer to this, claims under a prior assignment to himself from *A.* of the same term, this is a confession and avoidance; for it admits the assignment to the defendant, but avoids its effect, by showing the prior assignment. Therefore, if the plaintiff pleads such assignment to himself by way of inducement, adding, under an *absque hoc*, a denial that *A.* assigned to the defendant, this special traverse is bad, (*s.*) The plaintiff should have pleaded the assignment to himself as in confession and avoidance, without the traverse.

Again, it is a rule with respect to special traverses, that the opposite party has no right to traverse the inducement, (*t.*) or (as the rule is more commonly expressed) *that there must be no traverse upon a traverse*, (*u.*) Thus, in the first example, if the replication, instead of taking issue on the traverse, (as in page 188,) had traversed the inducement, either in the common or the special form, denying that *E. B.*, at the time of making the indenture, was seized in his demesne as of freehold for the term of his natural life, &c., such replication would have been bad, as containing a traverse upon a traverse. The reason of this rule is clear and satisfactory. By the first traverse a matter is denied by one of the parties which had been alleged by the other, and which, having once alleged it, the latter is bound to maintain, instead of prolonging the series of the pleading and

(*q.*) *Hughes v. Phillips*, Yelv., 38; and see 36 Hen. VI, 15.

(*r.*) Com. Dig., Pleader, G. 3; *Lambert v. Cook*, Ld. Ray., 238; *Helier v. Whytier*, Cro. Eliz., 650.

(*s.*) Com. Dig., Pleader, G. 3; *Helier v. Whytier*, Cro. Eliz., 650.

(*t.*) Anon., 3 Salk., 353.

(*u.*) Com. Dig., Pleader, G. 17; Bac. Ab., Pleas, &c., H. 4; *The King v. Bishop of Worcester*, Vaughan, 62; *Digby v. Fitzharbert*, Hob., 104.

retarding the issue by resorting to a new traverse. However, this rule is open to an important exception, viz, *that there may be a traverse upon a traverse when the first is a bad one, (x;)* or, in other words, if the denial under the *absque hoc* of the first traverse be insufficient in law, it may be passed by, and a new traverse taken on the inducement. Thus, in an action of prohibition, the plaintiff declared that he was elected and admitted one of the common council of the city of London, but that the defendants delivered a petition to the court of common council, complaining of an undue election, and suggesting that they themselves were chosen; whereas (the plaintiff alleged) the common council had no jurisdiction to examine the validity of such an election, but the same belonged to the court of the mayor and aldermen. The defendants pleaded that the common council, *time out of mind*, had authority to determine the election of common councilmen; and that the defendants, being duly elected, the plaintiff intruded himself into the office; whereupon the defendants delivered their petition to the common council, complaining of an undue election; *without this, that* the jurisdiction to examine the validity of such election belonged to the court of the mayor and aldermen. The plaintiff replied by traversing the inducement; that is, he pleaded that the common council had not authority to determine the election of common councilmen, concluding to the country.

To this the defendant demurred, and the court adjudged that the first traverse was bad, because the question in this prohibition was not whether the court of aldermen had jurisdiction, but whether the common council had; and that, the first traverse being immaterial, the second was well taken, (*y.*)

As the inducement cannot, when the denial, under the

(x.) Com. Dig., Pleader, G. 18, 19; *Thrale v. Bishop of London*, 1 H. Bl., 376; *Richardson v. Mayor of Oxford*, 2 H. Bl., 186; *King qui tam v. Bolton, Str.*, 117; *Crosse v. Hunt, Carth.*, 99.

(y) *King qui tam v. Bolton, Str.*, 117.

absque hoc, is sufficient in law, be traversed, so, for the same reasons, it cannot be answered by a *pleading in confession and avoidance*. But, on the other hand, if the denial be insufficient in law, the opposite party has then a right to plead in confession and avoidance of the inducement, or (according to the nature of the case) to traverse it; or he may demur to the whole traverse for the insufficiency of the denial.

As the inducement of a special traverse, when the denial under the absque hoc is sufficient, can neither be traversed nor confessed and avoided, it follows that there is, in that case, no manner of *pleading* to the inducement. The only way, therefore, of answering a good special traverse is to plead to the absque hoc, which is done by tendering issue on such denial, in the form already explained at p. 188. But, though there can be no *pleading* to an inducement, when the denial under the absque hoc is sufficient, yet the inducement may be open, in that case, to exception in point of *law*. If it be faulty in any respect, as, for example, in not containing a sufficient answer in substance, or in giving an answer by way of direct denial, or by way of confession and avoidance, the opposite party may demur to the whole traverse, though the absque hoc be good, for this insufficiency in the inducement, (z.)

The *different kinds, or forms of traverse*, having been now explained, it will be proper next to advert to certain principles which belong to *traverses in general*.

The first of these that may be mentioned is, that it is the nature of a traverse to deny the allegation in the *manner and form* in which it is made, and therefore to put the opposite party to prove it to be true in manner and form, as well as in general effect. Accordingly, it has been shown in the first chapter (a) that he is often exposed at the trial to the danger of a *variance*, for a slight deviation in his evidence from his allegation. This doctrine of *variance*

(z.) Com. Dig., Pleader, G. 22; Foden v. Haines, Comb., 245.

(a.) *Supra*, p. 118. And see Hoar v. Mill, 4 M. & S., 47.

we now perceive to be founded on the strict quality of the traverse here stated. It has been explained, however, in the same place, that this strictness is so far modified that it is, in general, sufficient to prove *accurately* the *substance* of the allegation; and that a deviation in point of *mere form*, or *in matter quite immaterial*, will be disregarded. On this subject of variance, or the degree of strictness with which, in different instances, the traverse puts the fact in issue, there are a great number of adjudged cases, involving much nicety of distinction; but it does not belong to this work to enter into it more fully, (b.) The general principle is that which is here stated, that the traverse brings the fact into question, according to the *manner and form in which it is alleged*; and that the opposite party must consequently prove that, in substance, at least, the allegation is *accurately true*. The existence of this principle is indicated by the *wording* of a traverse, which, when in the negative, generally denies the last pleading *modo et forma*, "in manner and form as alleged," (c.) This will be found to be the case in all the preceding examples, except in the general issue *non est factum* and the replication *de injuria*, which are almost the only negative traverses that are not pleaded *modo et forma*. These words, however, though usual, are said to be in no case strictly essential, so as to render their omission cause of demurrer, (d.)

It is naturally a consequence of the principle here mentioned, that great accuracy and precision, in adapting the allegation to the true state of the fact, are observed in all well-drawn pleadings; the vigilance of the pleader being always directed to these qualities, in order to prevent any

(b.) Several of these cases are collected, *supra*, p. 119, note (y.)

(c.) But, notwithstanding the words *modo et forma*, it is enough to prove the substance of the allegation. (See Litt., sect. 483; Doct. Pl., 344; Harris v. Ferrand, Hardr., 39; Pope v. Skinner, Hob., 72; Carrick v. Blagrave, 1 Brod. & Bing., 536.) As to the effect of these words, as covering the whole matter of the allegation traversed, see Weathrell v. Howard, 3 Bing., 135.

(d.) Com. Dig., Pleader, G. 1; Nevil and Cook's Case, 2 Leo., 5.

risk of variance or failure of proof at the trial, in the event of a traverse by the opposite party.

Again, with respect to all traverses, it is laid down as a rule, that a *traverse must not be taken upon matter of law*, (e.) For a denial of the law involved in the precedent pleading is, in other words, an exception to the sufficiency of that pleading in point of law, and is therefore within the scope and proper province of a *demurrer*, and not of a *traverse*. Thus where, to an action of trespass for fishing in the plaintiff's fishery, the defendant pleaded that the *locus in quo* was an arm of the sea, in which every subject of the realm had the liberty and privilege of free fishing, and the plaintiff, in his replication, traversed that in the said arm of the sea every subject of the realm had the liberty and privilege of free fishing, this was held to be a traverse of a mere inference of law, and therefore bad, (f.) Upon the same principle, if a matter be alleged in pleading, "by reason whereof" (*virtute cujus*) a certain legal inference is drawn, as that the plaintiff "became seized," &c., or the defendant "became liable," &c., this *virtute cujus* is not traversable, (g;) because, if it be intended to question the facts from which the seizin or liability is deduced, the traverse should be applied to the facts, and to those only; and, if the legal inference be doubted, the course is to demur. But, on the other hand, where an allegation is *mixed of law and fact*, it may be traversed, (h.) For example, in answer to an allegation that a man was "taken out of prison by virtue of a certain writ of habeas corpus," it may be traversed that he was "taken out of prison by virtue of that writ," (i.) So, where it was alleged in a plea that,

(e.) 1 Saund., 23, n. 5; Doct. Pl., 351; Kenicot v. Bogan, Yelv., 200; Priddle and Napper's Case, 11 Rep., 10 b; Richardson v. Mayor of Oxford, 2 H. Bl., 182.

(f.) Richardson v. Mayor of Oxford, 2 H. Bl., 182.

(g.) Doct. Pl., 351; Priddle and Napper's Case, 11 Rep., 10 b.

(h.) 1 Saund., 23, n. 5, and see the instances cited; Bac. Ab., Pleas, &c., p. 380, note b, 5th edit.; Beal v. Simpson, 1 Lord Ray., 412; Grocers' Company v. Archbishop of Canterbury, 3 Wils., 234.

(i.) Beal v. Simpson, 1 Lord Ray., 412; Treby, Ch. J., cont.

in consequence of certain circumstances therein set forth, it belonged to the wardens and commonalty of a certain body corporate to present to a certain church, being vacant, in their turn, being the second turn, and this was answered by a special traverse, *without this*, that it belonged to the said wardens and commonalty to present to the said church, at the second turn, when the same became vacant, &c., in manner and form as alleged, the court held the traverse good, as not applying to a mere matter of law, "but to a matter of law, or rather of right resulting from facts," (k.) So it is held, upon the same principle, that traverse may be taken upon an allegation that a certain person obtained a church by simony, (l.)

It is also a rule, *that a traverse must not be taken upon matter not alleged*, (m.) The meaning of this rule will be sufficiently explained by the following cases: A woman brought an action of debt on a deed, by which the defendant obliged himself to pay her 200*l.* on demand, if he did not take her to wife, and alleged in her declaration that, though she had tendered herself to marry the defendant, he refused, and married another woman. The defendant pleaded that, after making the deed, he offered himself to marry the plaintiff, and she refused; *absque hoc*, "that he refused to take her for his wife before she had refused to take him for her husband." The court was of opinion that this traverse was bad; because there had been no allegation in the declaration "that the defendant had refused before the plaintiff had refused;" and therefore the traverse went to deny what the plaintiff had not affirmed, (n.) The plea in this case ought to have been in *confession and avoidance*; stating merely the affirmative matter, that before the plaintiff offered the defendant offered, and that the plaintiff had refused him; and omitting the *absque hoc*.

(k.) *Grocers' Company v. Archbishop of Canterbury*, 3 Wils., 234.

(l.) *Ibid*; Rast. Ent., 532 a.

(m.) 1 Saund., 312 d, n. 4; Doct. Pl., 358; *Crosse v. Hunt*, Carth., 99; *Powers v. Cook*, 1 Lord Ray., 63; 1 Salk., 298, S. C.

(n.) *Crosse v. Hunt*, Carth., 99.

Again, in an action of debt on bond against the defendant, as *executrix* of *J. S.*, she pleaded in abatement that *J. S.* died *intestate*, and that *administration* was granted to her. On demurrer, it was objected, that she should have gone on to traverse "that she meddled as executrix before the administration granted;" because, if she so meddled, she was properly charged as executrix, notwithstanding the subsequent grant of letters of administration. But the court held the plea good in that respect; and Holt, C. J., said, "that, if the defendant had taken such traverse, it had made her plea vicious; for it is enough for her to show that the plaintiff's writ ought to abate, which she has done, in showing that she is chargeable only by another name. Then, as to the traverse, that she did not administer as executrix before the letters of administration were granted, it would be to traverse what is not alleged in the plaintiff's declaration; which would be against a rule of law, that a man shall never traverse that which the plaintiff has not alleged in his declaration," (o.) There is, however, the following exception to this rule, viz, *that a traverse may be taken upon matter which, though not expressly alleged, is necessarily implied*, (p.) Thus, in replevin for taking cattle, the defendant made cognizance (q) that *A.* was seized of the close in question, and, by his command, the defendant took the cattle damage feasant. The plaintiff pleaded in bar, that he himself was seized of one-third part, and put in

(o.) *Powers v. Cook*, 1 Lord Ray., 63; 1 Salk., 298, S. C.

(p.) 1 Saund., 312 d., n. 4; *Gilbert v. Parker*, 2 Salk., 629; 6 Mod., 158, S. C; *Meriton v. Briggs*, 1 Lord Ray., 39.

(q.) The action of *replevin* differs from other actions in the names of the pleadings. If the defendant pleads some matter confessing the taking, but showing lawful title or excuse, such pleading is not (as it would be in other actions) called a *plea in bar*, but an *avowry* or a *cognizance*; the former term applying to the case where the defendant sets up right or title in himself; the latter being used when he alleges the right or title to be in another person, by whose command he acted. (Com. Dig. Pleader, 3 K., 13, 14.) The answer to the avowry or cognizance is called *plea in bar*; and then follow *replication*, *rejoinder*, &c.; the ordinary name of each pleading being thus postponed by one step.

his cattle, *absque hoc*, "that the said *A.* was *sole seized.*" On demurrer, it was objected that this traverse was taken in matter not alleged, the allegation being that *A.* was *seized*, not that *A.* was *sole seized*. But the court held, that in the allegation of *seizin* that of *sole seizin* was necessarily implied, and that whatever is necessarily implied is traversable, as much as if it were expressed. Judgment for plaintiff, (*r.*) The court, however, observed that, in this case, the plaintiff was not *obliged* to traverse the *sole seizin*; and that the effect of merely traversing the *seizin modo et formâ*, as alleged, would have been the same on the trial as that of traversing the *sole seizin*.

Another rule that may be referred to this head, though of a more special and limited application than the former, is the following: *that a party to a deed, who traverses it, must plead non est factum, and should not plead that he did not grant, did not demise, &c., (s.)* This rule seems to depend on the doctrine of *estoppel*.

A man is sometimes precluded, in law, from alleging or denying a fact in consequence of his own previous act, allegation, or denial to the contrary, and this preclusion is called an *estoppel*, (*t.*) It may arise either from matter of record, from the *deed* of the party, or from matter in *pais*, that is, matter of *fact*, (*u.*) Thus, any confession or admission made in pleading in a court of record, whether it be express or implied, from pleading over without a traverse, will forever preclude the party from afterwards contesting the same fact, in any subsequent suit, with the same adversary, (*x.*) This is an *estoppel* by matter of record. As an instance of an *estoppel* by *deed*, may be mentioned the

(*r.*) *Gilbert v. Parker*, 2 Salk., 629; 6 Mod., 158, S. C.

(*s.*) Doct. Pl., 261; *Robinson v. Corbett*, Lutw., 662; *Taylor v. Needham*, 2 Taunt., 278.

(*t.*) An *estoppel* is, "when a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." (Co. Litt., 352 a.)

(*u.*) Co. Litt., 352 a.

(*x.*) Bract., 421 a.; Com. Dig., *Estoppel*, A. 1; and see *Outram v. Morewood*, 3 East., 346; *Vooght v. Winch*, 2 Barn. & Ald., 662.

case of a bond reciting a certain fact. The party executing that bond will be precluded from afterwards denying, in an action brought upon that instrument, the fact so recited, (y.) An example of an estoppel by matter in *pais* occurs when one man has accepted rent of another. He will be estopped from afterwards denying, in any action with that person, that he was, at the time of such acceptance, his tenant, (z.)

Now, it is from this doctrine of estoppel, apparently, that the rule now under consideration as to the mode of traversing deeds has resulted, (a.) For though a party against whom a deed is alleged may be allowed, consistently with the doctrine of estoppel, to say *non est factum*, viz, that the deed is not his, he is, on the other hand, precluded by that doctrine from denying its effect or operation; because, if allowed to say *non concessit* or *non demisit*, when the instrument purports to grant or to demise, he would be permitted to contradict his own deed. Accordingly, it will be found that in the case of a person not a party, but a *stranger* to the deed, the rule is reversed, and the form of traverse in that case is *non concessit*, &c., (b;) the reason of which seems to be, that estoppels do not hold with respect to strangers, (c.)

The doctrine of traverse being now discussed, the next subject for consideration is,

2. The nature and properties of pleadings in *confession and avoidance*.

First, with respect to their *division*. Of *pleas* in confes-

(y.) *Bonner v. Wilkinson*, 5 Barn. & Ald., 682; and see *Baker v. Dewey*, 1 Barn. & Cres., 704.

(z.) Com. Dig., Estoppel, A. 3; Co. Litt., 352 a.

(a.) See 39 Ed. III, 3; *Taylor v. Needham*, 2 Taunt., 278.

(b.) *Taylor v. Needham*, 2 Taunt., 278. N. B. The court there lay it down that the plea of *non concessit*, &c., brings into issue the title of the grantor, as well as the operation of the deed.

(c.) In accordance with the same doctrine of estoppel, it is held, with respect to *real or personal representatives*, that they are in the same situation with *parties*, and must plead *non est factum*. (*Robinson v. Corbett*, Lutw., 662. As to *privies in estate*, see 2 Hen. IV, 20; *Taylor v. Needham*, 2 Taunt., 281.)

sion and avoidance, some are distinguished (in reference to their subject-matter) as pleas in *justification or excuse*, others as pleas in *discharge*, (*d.*) The pleas of the former class show some justification or excuse of the matter charged in the declaration; those of the latter, some discharge or release of that matter. The effect of the former, therefore, is to show that the plaintiff never had any right of action, because the act charged was lawful; the effect of the latter, to show that though he had once a right of action, it is discharged or released by some matter subsequent. Of those in justification or excuse, the plea of *son assault demesne* (*e.*) is an example; of those in discharge, a release, (*f.*) This division applies to *pleas* only; for *replikations and other subsequent pleadings* in confession and avoidance are not subject to any such classification.

As to the *form* of pleadings in confession and avoidance, it will be sufficient to refer the reader to the examples in the first chapter, (*g.*) and to observe that, in common with all pleadings whatever which do not tender issue, they always conclude *with a verification and prayer of judgment*, (*h.*)

With respect to the *quality* of these pleadings, it is a rule, *that every pleading by way of confession and avoidance must give color*, (*i.*) This is a rule which it is very essential to understand, in a view to a correct apprehension of the nature of these pleadings; yet it appears to have been not hitherto adequately explained or developed in the books of the science. *Color* is a term of the ancient rhetoricians, (*k.*) and was adopted at an early period into the language of pleading, (*l.*) As a term of pleading, it signifies an ap-

(*d.*) Com. Dig., Pleader, 3 M., 12.

(*e.*) See this plea, *supra*, p. 180.

(*f.*) See this plea, *supra*, p. 90.

(*g.*) *Supra*, pp. 90, 95.

(*h.*) *Vide supra*, p. 186.

(*i.*) See Reg. Plac., 304; *Hatton v. Morse*, 3 Salk., 273; *Hallet v. Byrt*, 5 Mod., 252; *Holler v. Bush*, 1 Salk., 394; 1 Chitty, 498, 1st edit.

(*k.*) See Appendix, note 51.

(*l.*) It occurs at least as early as the reign of Ed. III. (See Year-Books, 48 Ed. III, 28; 40 Ed. III, 23.)

parent or *prima facie* right; and the meaning of the rule, that every pleading in confession and avoidance must give color, is, that it must admit an apparent right in the opposite party, and rely, therefore, on some new matter by which that apparent right is defeated, (*m.*) Thus, in the example formerly given of a plea of release to an action for breach of covenant, (*n.*) the tendency of the plea is to admit an apparent right in the plaintiff, viz, that the defendant did, as alleged in the declaration, execute the deed and break the covenant therein contained, and would, therefore, *prima facie*, be chargeable with damages on that ground; but shows new matter, not before disclosed, by which that apparent right is done away, viz, that the plaintiff executed to him a release, (*o.*) Again, the plaintiff, in his replication, impliedly admits that the defendant has, *prima facie*, a good defense, viz, that such release was executed as alleged in the plea, and that the defendant, therefore, would be apparently discharged; but relies on new matter, by which the effect of the plea is avoided, viz, that the release was obtained by duress. The plea in this case, therefore, *gives color* to the declaration, and the replication to the plea. But let it be supposed that the plaintiff had replied that the release was executed by him, but to another person, and not to the defendant; this would be an informal replication, as *wanting color*, because, if the release were not to the defendant, there would not exist even an apparent defense, requiring the allegation of new matter to avoid it, and the plea might be sufficiently answered by a *traverse*, denying that the deed stated in the plea is the deed of the plaintiff, (*p.*) So, in the following example, the pleading is bad for *want of color*.

(*m.*) See Appendix, note 52.

(*n.*) *Supra*, p. 90.

(*o.*) See another illustration, Reg. Plac., 304.

(*p.*) See *Gifford v. Perkins*, 1 Sid., 450, where a *plea* of this kind was held to be bad. The objection, indeed, in that case, took a somewhat different shape, viz, that the plea amounted to the *general issue*. But this objection, as will be explained in a subsequent part of the work, is in substance the same with the *want of color*.

PLEA.

In trespass, quare clausum fregit.

And for a further plea in this behalf, as to the breaking the said close, in which, &c., and the treading down, trampling upon, and consuming and spoiling the grass and herbage, as above supposed to have been done, the said *C. D.* and *E. F.*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said *A. B.* ought not to have or maintain his aforesaid action thereof against them, because, they say, that before the said time, when, &c., one *C. D.*, the father of the said *C. D.*, the now defendant, was seized in his demesne, as of fee, of and in the said close, in which, &c.; and, being so seized, the said *C. D.*, the father, before the said time, when, &c., to wit, on the — day of —, in the year of our Lord —, gave the said close, &c., to one *G. D.*, son and heir-apparent to the said *C. D.*, the father, to have and to hold the same to himself, the said *G. D.*, and the heirs of his body lawfully begotten, and for default of such issue the remainder thereof to the said *C. D.*, the now defendant, younger son of the said *C. D.*, the father, and the heirs of the body of him, the said *C. D.*, the now defendant, lawfully begotten, and for the default of such issue the remainder thereof to the right heirs of the said *C. D.*, the father, for ever. By virtue of which gift the said *G. D.* was seized of and in the said close, in which, &c., in his demesne, as of fee tail, that is to say, to him and the heirs of his body lawfully begotten, the remainder thereof, for default of such issue, to the said *C. D.*, the now defendant, and the heirs of his body lawfully begotten, the remainder thereof over, for default of such issue, to the right heirs of the said *C. D.*, the father, for ever; until one *J. S.*, before the said time, when, &c., entered into and upon the said close, in which, &c., upon the possession of the said *G. D.* thereof, and him the said *G. D.* unjustly and without judgment disseized, whereby the said *J. S.* was seized of and in the said close, in which, &c., in his demesne, as of fee, by disseizin, &c.; and he, being so seized thereof by disseizin, the said *G. D.* made his continual claim to the said close, in which, &c., upon the possession of the said *J. S.* thereof, sometimes by entering thereon, and sometimes by approaching thereto as near as he, the said *G. D.*, dared, so as to avoid bodily hurt, during the whole life of the said *J. S.*, and within a day and year of the death of the said *J. S.*; which said *J. S.*, being seized in form aforesaid of the said close, in which, &c., before the said time, when, &c., to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, died so seized of his said estate therein. After whose death the said close, in which, &c., descended to one *T. S.*, as son and heir of the said *J. S.* Wherefore the said *T. S.*, before the said time, when, &c., entered into the said close, in which, &c., and was seized thereof in his demesne as of fee; upon whose possession whereof the said *G. D.* re-entered in and upon the said close, in which, &c., and was seized thereof in his demesne as of fee tail, by form of the gift aforesaid, as in his former estate. And being so seized thereof, the said *G. D.* afterwards, and before the said time, when, &c., to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, died so seized of his said estate thereof, without heir of his body lawfully

begotten. After whose death, and before the said time, when, &c., the said *C. D.*, the now defendant, entered into and upon the said close, in which, &c., as into his said remainder, and was thereof seized in his demesne as of fee tail, according to the term of the gift aforesaid. And being so seized thereof, the said *C. D.*, the now defendant, before the said time, when, &c., to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, demised the said close, in which, &c., to *E. F.*, the other of the said defendants, to have and to hold the same to him and his assigns, from the feast of the annunciation of the Blessed Virgin Mary then last past until the end and term of twenty-one years thence next following and fully to be complete and ended. By virtue of which demise the said *E. F.*, before the said time, when, &c., entered into the said close, in which, &c., and was thereof possessed*. Wherefore, the said *E. F.*, in his own right, and the said *C. D.*, the now defendant, as the servant of the said *E. F.*, and by his command, afterwards, to wit, at the said time, when, &c., broke and entered the said close, in which, &c., and trod down, trampled upon, consumed, and spoiled the grass and herbage there growing and being, as it was lawful for them to do for the cause aforesaid; which are the same trespasses in the introductory part of this plea mentioned, and whereof the said *A. B.* hath above complained; and this the said defendants are ready to verify. Wherefore they pray judgment if the said *A. B.* ought to have or maintain his aforesaid action thereof against them, &c.

This plea, as already observed, is informal, as *wanting color*, (*q.*) The declaration charges the defendants with breaking and entering the *plaintiff's close*; to which the answer (in substance) is, that at the time of the alleged trespass, one of the defendants was seized in tail of the said close, and the other defendant in possession of it, as his lessee for years. But, if this be so, it follows that the plaintiff has not even a colorable right to maintain the action as for trespass *to his close*; for he had not even the possession, and, if he had, a mere possession, without some show of title, is insufficient in law to give such colorable right against the true owner. In such case, the usual and regular course would be, not to plead in confession and avoidance, but to adopt the general issue, *not guilty*, which, (as we have seen,) (*r.*) puts the plaintiff's lawful possession of the close in issue, as well as the mere fact of the trespass.

(*q.*) See *Patrickson v. Barton*, Cro. Jac., 229.

(*r.*) *Vide supra*, p. 174.

The kind of color to which these observations relate, being a latent quality naturally inherent in the structure of all regular pleadings in confession and avoidance, has been called implied color, to distinguish it from another kind, which is, in some instances, formally inserted in the pleading, and is therefore known by the name of *express* color, (s.) It is the latter kind to which the technical term most usually applies; and to this the books refer when color is mentioned *per se*, without the distinction between *express* and *implied*. Color, in this sense, is defined to be "a feigned matter, pleaded by the defendant in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has, in truth, only an appearance or color of cause," (t.) This is one of the most curious subtleties that belong to the science of pleading; and though now rather of rare occurrence, yet, as it is still sometimes practiced, and is, besides, illustrative of the important doctrine of *implied* color, deserves attention. Its nature and use may be thus explained. The necessity of an implied color has evidently the effect of obliging the pleader to traverse in many instances in which his case, when fully stated, does not turn on a mere denial of fact, but involves some considerations of law. In the example first above given, of want of color, (u.) this would not be so; for, if the deed of release were executed not to the defendant, but to a different person, this, of course, amounts to no more than a mere denial that the deed, as alleged in the plea, is the deed of the plaintiff; and no question of *law* can be said to arise under this traverse. But, in the second example, (x.) let it be supposed that the plaintiff was in wrongful possession of the close, without any further appearance of title than the possession itself, at the time of the trespass alleged, and that the defend-

(s.) *Hallett v. Burch*, 3 Salk., 272; *Hatton v. Morse*, 3 Salk., 273; *Holt's Inst.*, 561, S. C.; *Reg. Plac.*, 304.

(t.) *Bac. Ab.*, *Trespass*, I. 4.

(u.) *Supra*, p. 207.

(x.) *Supra* p. 207.

ants entered upon him in assertion of their title, but being unable to set forth this title in the pleading, in consequence of the objection that would arise from want of color, (the plaintiff's mere wrongful possession being insufficient to prevent that objection,) are driven to plead the general issue, not guilty. By this plea an issue is produced, whether the defendants are guilty or not of the trespasses; but upon the trial of the issue it will be found that the question turns entirely upon construction of law. The defendants say they are not guilty of the trespasses, because they are not guilty of breaking the *close of the plaintiff*, as alleged in the declaration; and that they are not guilty of breaking the close of the plaintiff, because they had themselves the property in that close; and their title is this: That the father of one of the defendants, being seized of the close in fee, gave it in tail to his eldest son, remainder in tail to one of the defendants; that the eldest son was disseized, but made continual claim until the death of the disseizor; after whose death, the descent being cast upon his heir, the disseizee entered upon the heir, and afterwards died; when the remainder took effect in the said defendant, who demised to the other defendant. Now, this title involves a legal question, viz, whether continual claim will not preserve the right of entry in the disseizee, notwithstanding a descent cast on the heir of a disseizor, (*y.*) The issue, however, is merely *not guilty*, and this is triable by jury; and the effect, therefore, would be that a jury would have to decide this question of law, subject to the direction upon it which they would receive from the judge at nisi prius. But let it be supposed that the defendants, in a view to the more satisfactory decision of this question, wish to bring it under the consideration of the court in banc, rather than have it referred to a jury. If they have any means of setting forth their title specially in their plea, the object will be attained; for then the plaintiff, if disposed to question the sufficiency

(*y.*) As to the law on this point, see Co. Litt. 250, 251; 2 Bl. Com., 316; *Ibid*, 175

of the title, may demur to the plea, and thus refer the legal question to the decision of the judges. But such plea, (as we have seen,) if pleaded simply according to the state of fact, would be informal for want of color; and hence arises a difficulty. The pleaders of former days contrived to overcome this difficulty in the following singular manner. In such a case as that supposed, the plea wanting *implied* color, they gave in lieu of it an *express* one, by inserting a fictitious allegation of some colorable, but insufficient, title in the plaintiff; which they at the same time avoided by the preferable title of the defendants. Thus they would set forth the title as in the example, p. 209, down to the mark *, and would then proceed to insert the following fictitious averment: "And the said *A. B.*, claiming the said close, &c., by color of a certain charter of demise to him thereof made for the term of his life by the said *C. D.*, the father, long before the said gift by the said *C. D.*, the father, to the said *G. D.*, in form afore-said, made (whereas nothing of or in the said close, in which, &c., ever passed into the possession of the said *A. B.* by virtue of that charter) before the said time, when, &c., entered into and upon the said close, in which, &c., And thereupon the said *E. F.*, in his own right, and the said *C. D.*, the now defendant, as the servant of the said *E. F.*, and by his command, afterwards, to wit, at the said time, when, &c., entered into and upon the said close, in which, &c., in and upon the said *A. B.*'s possession thereof, and trod down, trampled upon, consumed, and spoiled," &c., to the end of the plea, (z.) This was called *giving color*; and it was held to cure, or prevent, the objection which would otherwise arise from the want of implied color; and the plea with this insertion was considered as sufficiently formal. For, when pleaded in that form, it confesses some apparent title in the plaintiff, viz, a charter of demise for the term of his

(z.) This plea, with the color here given, is copied from Brown's Entries, p. 343. Another example will be found, *supra*, p. 185. See also 2 Edw. IV, 8 for an example of color, and an illustrative case upon the subject.

life, by virtue of which he entered and was possessed. The plea admits, therefore, that the close was, in some sense, the *close of the plaintiff*, but at the same time it *avoids* this colorable title, by showing that of the defendants, and alleging that the plaintiff's title under the charter of demise was defective in point of law, and that nothing passed under that charter, (a.)

It is to be understood, that when color was thus given, the plaintiff was not allowed, in his replication, to traverse the fictitious matter suggested by way of color, (b;) for, its only object being to prevent a difficulty of *form*, such traverse would be wholly foreign to the merits of the cause, and would only serve to frustrate the fiction which the law in such case allows. The plaintiff would, therefore, pass over the color without notice, and would either traverse the title of the defendants, if he meant to contest its truth in point of fact, or demur to it, if he meant to except to its sufficiency in point of law; and thus the defendants would obtain their object, of bringing any legal question raised upon their title under consideration of the court, and withdrawing it from the jury.

Such is still the course of proceeding and the state of the law on this subject, in the few cases in which express color is now given; and the particular example above adduced is one that might occur in the practice of the present day, (c.)

The practice of giving express color obtained in the mixed actions called an *assize*, and the *writ of entry, in nature of an assize*, and the personal action of *trespass*, (d.) The two former kinds of proceeding being now out of use, it occurs at present in the action of trespass only, nor is it,

(a) The defect in the title, given by this color, is, that the charter, though a charter of demise for life, is not pleaded as a *feoffment*, and does not appear to have been accompanied by *livery of seizin*. (See Doct. Pl., 73; *Leyfield's Case*, 10 Rep., 89 b.)

(b.) 1 Chitty, 501, 1st edit.

(c.) See Appendix, note 53.

(d.) 3 Reeves, 438; Doct. & Stud., p. 271.

even in trespass, often found to be expedient. As to these actions, so the practice of giving express color seems to be confined to *pleas*, and not to extend to replications or other subsequent pleadings, (*e.*) It is also to be understood, with respect to giving express color, that though, originally, various suggestions of apparent right might be adopted, according to the fancy of the pleader, (*f.*) and though the same latitude is, perhaps, still allowable, yet, in practice, it is unusual to resort to any except certain known fictions, which long usage has applied to the particular case. Thus, in trespass to land, the color universally given is that of a defective *charter of demise*, as in the above example.

There are some rules, with respect to express color, immediately resulting from the nature of the fiction and the object for which it is adopted. Thus, it is laid down, *that it must consist of such matter as, if it were effectual, would maintain the nature of the action*, (*g.*) For example: In an action of assize, where the demandant complains of a disseizin of his *freehold*, the tenant should not, by way of giving color, suggest a demise to the demandant for *years*, because this would not give him even a colorable ground to maintain an assize, (*h.*) On the other hand, it is to be observed that the right suggested must be *colorable* only, and that it must not amount to a *real* or *actual* right. For, if it does, then the plaintiff would, of course, upon the defendant's own showing, be entitled to recover, and the plea would be an insufficient answer. For example: In trespass for taking away one hundred loads of wood, if the defendant pleads that *I. S.* was possessed of them *ut de bonis propriis*, and the plaintiff, claiming them *by color of a deed of gift by the said I. S. afterwards made*, took them, and then the defendant retook them, the plea is bad; for if the plaintiff took possession of the goods under a deed of gift

(*e.*) 1 Chitty, 601, 1st edit. And see *Taylor v. Eastwood*, 1 East., 212; 3 Reeves, 441.

(*f.*) 3 Reeves, 441.

(*g.*) Bac. Ab., Pleas, &c., I. 8; Com. Dig., Pleader, 3 M., 41.

(*h.*) Anon., Keilw., 103 b.

from the lawful owner, he has a good title to them, and ought to recover, (i.) So, in the example of color before given, it would be bad pleading, if, instead of alleging that the plaintiff claimed by color of a certain *charter of demise* for the term of his life, &c., it were alleged that he claimed by color of a certain *feoffment* for the term of his life; for in the word *feoffment* the law intends not only the charter of demise, but the delivery of seizin also; and the title allowed to the plaintiff would, therefore, not be defective or colorable, but valid, (k.) There are other rules relative to express color, (l.) but as they seem, on examination, to be either resolvable into the same principles that have been already considered, or, where this is not the case, to be obscure and unimportant, they need not be here discussed.

The pleadings by way of *traverse*, and those by way of *confession and avoidance*, having been now separately considered, there are yet to be noticed,

3. The nature and properties of *pleadings in general*, without reference to their quality, as being by way of *traverse* or *confession and avoidance*.

First, it is a rule *that every pleading must be an answer to the whole of what is adversely alleged*, (m.)

Therefore, in an action of trespass for breaking a close and cutting down three hundred trees, if the defendant pleads, as to cutting down all but two hundred trees, some matter of justification or title, and as to the two hundred trees says nothing, the plaintiff is entitled to sign judgment, as by *nil dicit*, against him in respect of the two hundred trees, and to demur or reply to the plea as to the remainder of the trespasses. In such cases the plaintiff should take care to avail himself of his advantage in this (which is the only proper) course; for if he demurs or replies to the plea, without signing judgment for the part

(i.) *Radford v. Harbyn*, Cro. Jac., 122.

(k.) Doct. Pl., 73.

(l.) See Com. Dig., Pleader, 3 M, 40, 3 M, 41.

(m.) Com. Dig., Pleader, E. 1, F. 4; 1 Saund., 28, n. 3, *Herlakenden's Case*, 4 Rep., 62 a.

not answered, the whole action is said to be *discontinued*, (n.) The principle of this is, that the plaintiff, by not taking judgment, as he was entitled to do for the part unanswered, does not follow up his entire demand, and there is consequently that sort of chasm or interruption in the proceedings which is called in the technical phrase a *discontinuance*, (o;) and such discontinuance will amount to error on the record, (p.) It is to be observed, however, that as to the plaintiff's course of proceeding, there is a distinction between a case like this, where the defendant does not profess to answer the whole, and a case where, by the commencement of his plea, he professes to do so, but in fact gives a defective and partial answer, applying to part only. The latter case amounts merely to insufficient pleading; and the plaintiff's course therefore is not to sign judgment for the part defectively answered, but to *demur* to the whole plea, (q.) It is also to be observed, that where the part of pleading to which no answer is given is immaterial, or such as requires no separate or specific answer—for example, if it be mere matter of *aggravation*—the rule does not in that case apply, (r.)

Again, it is a rule that *every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse*, (s.) Thus, in the example given in the first chap

(n.) Com. Dig., Pleader, E. 1, F. 4; 1 Saund., 28, n. 3; Herlakenden's Case, 4 Rep., 62 a; Morley v. ———, 12 Mod., 421; Vincent v. Beston, 1 Ld. Ray., 716; Market v. Johnson, 1 Salk., 180.

(o.) The proper and original meaning of a *discontinuance* is explained *supra*, p. 60. By analogy to this, whenever a suit is not regularly carried on from its commencement to its conclusion, but a chasm of any kind, either in the process or pleading, occurs, there is also a discontinuance. Besides the example in the text, see another in Tippet v. May, 1 Bos. & Pul., 411.

(p.) Wats v. King, Cro. Jac., 353. A discontinuance is cured, however, after verdict, by the statute of jeofails, 32 H. VIII, c. 3; and after judgment by nil dicit, confessor, or non sum informatus, by 4 Ann., c. 16.

(q.) 1 Saund., 28, n. 3; Thomas v. Heathorn, 2 Barn. & Cres., 477; Earl of St. Germain's v. Willan, 216.

(r.) 1 Saund., 28, n. 3.

(s.) Com. Dig., Pleader, G. 2; Bac. Ab., Pleas, &c., pp. 322, 386, 5th edit.; Hudson v. Jones, 1 Salk., 91; Nicholson v. Simpson, Fort., 356.

ter, (*t*), of an action on an indenture of covenant, the plea of release, as it does not traverse the indenture, is taken to admit its execution; and the replication of duress, on the same principle, is an admission of the execution of the release. So the plea traversing the want of repair (*u*) is an admission of the indenture of demise. The effect of such admission is extremely strong, for, first, it concludes the party, even though the jury should improperly go out of the issue and find the contrary of what is thus confessed on the record, (*x*;) and, in the next place, it is to be remarked, that the confession operates not only to prevent the fact from being afterwards brought into question in the same suit, but is equally conclusive as to the truth of that fact in any *subsequent action* between the same parties. The rule, however, (it will be observed,) extends only to such matters as are *traversable*; for matters of *law* (*y*) or any other matters which are not fit subjects of traverse, are not taken to be admitted by pleading over, (*z*.)

It is this rule which has given rise to the practice of *protestation* in pleading, (*a*.) When the pleader passes over, without traverse, any traversable fact alleged, and, at the same time, wishes to preserve the power of denying it *in another action*, he makes, collaterally or incidentally to his main pleading, a declaration, importing that this fact is untrue; and this is called a *protestation*, and it has the effect of enabling the party to dispute, in another action, the fact so passed over, (*b*.) Its form is as follows:

(*t*.) *Supra*, pp. 90, 95.

(*u*.) *Supra*, p. 90.

(*x*.) Bac. Ab., Pleas, &c., p. 322, 5th edit.; *Wilcox v. Servant of Skipwith*, 2 Mod., 4.

(*y*.) *Vide supra*, p. 201.

(*z*.) 10 Ed., IV, 12; *The King v. The Bishop of Chester*, 2 Salk., 561. See Appendix, note 54.

(*a*.) Bac. Ab., Pleas, &c., p. 386, note a, 5th edit.

(*b*.) Com. Dig., Pleader, N; Co. Litt., 124 b; 2 Saund., 103 a, n. 1; 17 Ed. II, 534; 43 Ed. III, 17; 40 Ed. III, 46; 48 Ed. III, 11.

PLEA IN ASSUMPSIT.

For goods sold and delivered.

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that the said *A. B.* ought not to have or maintain his aforesaid action against him, the said *C. D.*, because, he says, that after the making of the said promises and undertakings, and before the commencement of this suit, to wit, on the ——— day of ———, in the year ———, at ——— aforesaid, in the county aforesaid, he, the said *C. D.*, gave and delivered to the said *A. B.* a certain pipe of wine, in full satisfaction and discharge of the said promises and undertakings and of all damages accrued to the said *A. B.* by reason of the non-performance thereof, which said pipe of wine, so given in full satisfaction and discharge as aforesaid, the said *A. B.* then and there accepted in full satisfaction and discharge of the said promises and undertakings and of all damages accrued to the said *A. B.* by reason of the non-performance thereof; and this the said *C. D.* is ready to verify. Wherefore he prays judgment if the said *A. B.* ought to have or maintain his aforesaid action against him.

REPLICATION.

And the said *A. B.* says, that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against the said *C. D.*, because, *protesting that the said C. D. did not give or deliver to him, the said A. B., the said pipe of wine, as the said C. D. hath above in pleading alleged*, for replication, nevertheless, in this behalf, the said *A. B.* says that he, the said *A. B.*, did not accept the said pipe of wine in full satisfaction and discharge of the said promises and undertakings, and of all damages accrued to the said *A. B.* by reason of the non-performance thereof, in manner and form as the said *C. D.* hath above alleged; and this the said *A. B.* prays may be inquired of by the country, (c.)

In the case supposed by the above example, the *delivery* of the pipe of wine and its *acceptance* are two different allegations, and in traversing the latter it may be thought advisable not to admit the former, because the delivery, if it were not accepted in satisfaction, might possibly become the subject of dispute in some other action between the same parties. In order, therefore, not to be concluded by the implied admission of its delivery, which would otherwise arise by passing it over without traverse, the pleader takes the *delivery* by protestation, while he traverses the *acceptance*.

Such being the only object and effect of the protestation,

(c.) 3 Went., 135; 2 Chitty, 602, 1st edit.; Young v. Rudd, Carth., 347.

it will be understood that it is wholly without avail *in the action in which it occurs*; and that, under the rule already laid down, every traversable fact not traversed is, notwithstanding the protestation, to be taken as admitted *in the existing suit*.

It is also given as a rule, that if upon the traverse the issue is found *against* the party protesting, the protestation does not avail; and that it is of no use except in the event of the issue being determined *in his favor*; with this exception, however, that if the matter taken by protestation be such as the pleader could not have taken issue upon, the protestation in that case shall avail, even though the issue taken were decided against him, (*d.*)

A protestation ought not to be *repugnant to the pleading which it accompanies*, (*e.*) nor ought it to be *taken on such matter as the pleading itself traverses*, (*f.*) The rules, however, with respect to the *form* of a protestation, becomes the less material, because it has been decided that neither a superfluous nor repugnant protestation is sufficient ground for *demurrer*, (*g.*) the protestation itself having in view *another suit* only, and its faults of form being, therefore, immaterial in the present action.

It has been already observed, that the necessity of the protestation arises from the rule, "that every traversable fact not traversed is confessed." But it has been seen, that an answer in fact is no admission of the sufficiency in point of *law* of the matter answered, (*h.*) It follows, therefore, that it is not necessary, in passing over an insufficient pleading without demurrer, and answering in point of fact, to make any protestation of the insufficiency in law of such pleading; for, even without the protestation, no implied admission of its sufficiency arises. In practice, however, it is not unusual, in such case, to make a

(*d.*) 2 Saund., 103 a., n. I; p. v., for further explanation on this subject.

(*e.*) Com Dig., Pleader, N; 2 Saund., *ubi supra*.

(*f.*) Com. Dig., Pleader, N.

(*g.*) Com. Dig. and Saund., *ubi sup* a.

(*h.*) *Vide supra*, p. 162.

protestation of *insufficiency in law*, the form having apparently been adopted by analogy to the proper kind of protestation, viz, that against the truth of a *fact*.

Such are the doctrines involved in the general rule, that the party must either demur, or plead by way of traverse or by way of confession and avoidance. It remains, however, to notice

Certain *exceptions* to which that branch of the rule is subject which relates to *pleading*, and which requires a party to plead either by way of *traverse* or by way of *confession and avoidance*.

First, there is an exception in the case of *dilatory pleas*, for a plea of this kind merely opposes a matter of form to the declaration, and (as will appear on examination of the examples in the first chapter) does not tend either to deny or to confess its allegations. But *replications* and *subsequent pleadings*, following on dilatory pleas, are not within this exception.

Again, the rule is not applicable to the case of *pleadings in estoppel*.

These are pleadings which, without confessing or denying the matter of fact adversely alleged, rely merely on some matter of estoppel (*i*) as a ground for excluding the opposite party from the allegation of the fact, and after stating the previous act, allegation, or denial on which the estoppel is supposed to arise, pray judgment if he *shall be received or admitted to aver* contrary to what he before did or said. The form is as follows:

PLEA OF MISNOMER.

In abatement of the bill.

And *C. D.*, against whom the said *A. B.* hath exhibited his bill, by the name of *E. D.*, in his own person comes and says, that he was baptized by the name of *C.*, to wit, at ——— aforesaid, and by the christian name of *C.* hath always, since his baptism, hitherto been called and known, (*k*.) Without

(*i*.) As to the doctrine of *estoppel*, *vide supra*, p. 204.

(*k*.) It is a rule, with respect to pleas in abatement, (to be hereafter explained in its proper place,) that they must give the plaintiff a better writ or bill, that is, afford him the means of correcting the mistake of form to which the plea

this, that the said *C. D.* now is, or at the time of exhibiting the said bill was, or ever before had been, called or known by the christian name of *E.*, as by the said bill is supposed; and this the said *C. D.* is ready to verify. Wherefore he prays judgment of the said bill and that the same may be quashed.

REPLICATION.

And the said *A. B.* saith, that the said person against whom he hath exhibited his said bill, by the name of *E. D.*, ought not to be admitted or received to plead the plea by him above pleaded for quashing the bill of him the said *A. B.*, because, he saith, that the said person against whom he, the said *A. B.*, hath exhibited his said bill, by the name of *E. D.*, heretofore, to wit, in the term of ———, last past, came into this court here and put in bail, at the suit of the said *A. B.*, in the plea aforesaid, by the name of *E. D.*, as by the record thereof remaining in the said court of our said lord the king, before the king himself, at Westminster, aforesaid, more fully appears; and this he, the said *A. B.*, is ready to verify by that record. Wherefore he prays judgment if the said person against whom he hath exhibited his said bill, by the name of *E. D.*, ought to be admitted or received to his said plea for quashing the said bill, contrary to his own acknowledgment and the said record, and that he may answer over to the said bill, (*l.*)

Another exception to that branch of the general rule, which requires the pleader either to traverse, or confess and avoid, arises in the case of what is called a *new assignment*.

It has been seen that the declarations are conceived in very general terms; a quality which they derive from their adherence to the tenor of those simple and abstract formulæ, the original writs. The effect of this is, that in some cases, the defendant is not sufficiently guided by the declaration to the real cause of complaint, and is, therefore, led to apply his plea to a different matter from that which the plaintiff has in view. A new assignment is a method of pleading to which the plaintiff in such cases is obliged to resort in his replication, for the purpose of setting the de-

fers. Accordingly, this plea of misnomer, in denying that the defendant is called by the name of *E.*, states his true name, *C.*, and the insertion of this matter, by way of introduction to the denial, occasions the necessity of using a *special* traverse. Here, therefore, is another case, in addition to those formerly noticed, in which it becomes proper to resort to that formula. *Vide supra*, pp. 181, 186.

(*l.*) 2 Chitty, 416, 590, 1st edit. See another example of pleading in *estoppel* in *Took v. Glascock*, 1 Saund., 257.

fendant right. An example shall be given in an action for assault and battery. A case may occur in which the plaintiff has been *twice assaulted* by the defendant; and one of these assaults may have been justifiable, being committed in self-defense, while the other may have been committed without legal excuse. Supposing the plaintiff to bring his action for the *latter*, it will be found, by referring to the example formerly given, (*m.*) of declaration for assault and battery, that the statement is so general as not to indicate to which of the two assaults the plaintiff means to refer, (*n.*) The defendant may, therefore, suppose, or affect to suppose, that the *first* is the assault intended, and will plead *son assault demesne*, as in the example, (*supra*, p. 180.) This plea the plaintiff cannot safely *traverse*; because, as an assault was in fact committed by the defendant, under the circumstances of excuse here alleged, the defendant would have a right, under the issue joined upon such traverse, to prove those circumstances, and to presume that such assault, and no other, is the cause of action. And it is evidently *reasonable* that he should have this right; for if the plaintiff were, at the trial of the issue, to be allowed to set up a different assault, the defendant might suffer, by a mistake into which he had been led by the generality of the plaintiff's declaration. The plaintiff, therefore, in the case supposed, not being able safely to traverse, and having no ground either for demurrer or for pleading in confession and avoidance, has no course, but by a new pleading, to correct the mistake occasioned by the generality of the declaration, and to declare that he brought his action, not for the *first*, but for the *second* assault; and this is called a *new assignment*, (*o.*) Its form, in the example here chosen, would be as follows :

(*m.*) *Supra*, p. 70.

(*n.*) As for the *day* and *place* alleged in the declaration, (which may be supposed sufficient in general to identify the assault referred to,) it will be shown hereafter that they are not considered as material to be proved in such a case, and are consequently alleged without much regard to the true state of fact.

(*o.*) He may guard himself, by anticipation, against this necessity, in the

REPLICATION.

To the plea of son assaill demesne, (in p. 180,) by way of new assignment.

And as to the said plea of the said *C. D.* by him secondly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned and therein attempted to be justified, the said *A. B.* says that, by reason of anything in that plea alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against the said *C. D.*, because, he says, that he brought his said action, not for the trespasses in the said second plea acknowledged to have been done, but for that the said *C. D.* heretofore, to wit, on the — day of —, in the year of our Lord —, with force and arms, at — aforesaid, in the county aforesaid, upon another and different occasion, and for another and different purpose than in the said second plea mentioned, made another and different assault upon the said *A. B.* than the assault in the said second plea mentioned, and then and there beat, wounded, and ill-treated him, in manner and form as the said *A. B.* hath above thereof complained; which said trespasses, above newly assigned, are other and different trespasses than the said trespasses in the said second plea acknowledged to have been done; and this the said *A. B.* is ready to verify. Wherefore, inasmuch as the said *C. D.* hath not answered the said trespasses above newly assigned, he, the said *A. B.*, prays judgment and his damages by him sustained by reason of the committing thereof to be adjudged to him, &c., (p.)

The mistake being thus set right by the new assignment, it remains for the defendant to plead such matter as he may have in answer to the assault last mentioned, the first being now out of the question.

By way of further example, may be mentioned a case that arises in trespass *quare clausum fregit*, and was formerly of very frequent and ordinary occurrence. In this action, if the plaintiff declares for breaking his close in a certain parish, without naming or otherwise describing the close, (a course which in point of pleading is allowable,) (q.) if the defendant happen to have any freehold land in the same parish, he may be supposed to mistake the close in question for his own, and may therefore plead

particular case supposed, by charging the defendant in the declaration with *both* the assaults, which (in the form of different counts) is allowable. (As to the use of several counts, *vide post*, Sec. III.) If both assaults are thus charged, the defendant of course must answer both in his plea, and the reason for the new assignment fails.

(p.) 9 *Went.* 10; 2 *Chitty*, 553, 1st edit.

(q.) *Martin v. Kesterton*, 2 *Black.*, 1089.

what is called *the common bar*, viz, that the close in which the trespass was committed is his own freehold, (*r.*) And then, upon the principle already explained, it will be necessary for the plaintiff to new-assign, alleging that he brought his action in respect of a different close from that claimed by the defendant as his freehold, (*s.*)

The examples that have been given consist of cases where the defendant in his plea *wholly* mistakes the subject of complaint. But it may also happen that the plea correctly applies to *part* of the injuries, while, owing to a misapprehension occasioned by the generality of the statement in the declaration, it fails to cover the whole. Thus, in trespass *quare clausum fregit*, for repeated trespasses, the declaration usually states, that the defendant, on divers days and times before the commencement of the suit, broke and entered the plaintiff's close, and trod down the soil, &c., without setting forth, more specifically, in what parts of the close or on what occasions the defendant trespassed, (*t.*) Now, the case may be, that the defendant claims a right of way over a certain part of the close, and, in exercise of that right, has repeatedly entered and walked over it; but has also entered and trod down the soil, &c., on other occasions, and in parts out of the supposed line of way; and the plaintiff, not admitting the right claimed, may have intended to point his action both to the one set

(*r.*) In the common bar, it seems that the defendant is not bound to name his close. (1 Saund., 299 b., n. 5; *Elwis v. Lombe*, 6 Mod., 117; Salk., 453, S. C., *sed qu.*? See *Cocker v. Crompton*, 1 Barn. & Cres., 489.)

(*s.*) See examples, *Baldwin's Case*, 2 Rep., 18; 2 Chitty, 656, 1st edit. But if the plaintiff has named his close in the declaration, the plea of freehold does not drive him to new-assign, though the defendant may have another close of the same name in the same parish; unless, at least, the defendant, in his plea, describes his close by its abutments. (*Cocker v. Crompton*, 1 Barn. & Cres., 489; and see *Lethbridge v. Winter*, 2 Bing., 49.) And on the subject of the common bar generally, see 1 Saund., 299 b., n. 5; *Martin v. Kesterton*, *supra*; *Hawke v. Bacon*, 2 Taunt., 156.

N. B.—In order to avoid the prolixity of the common bar and new assignment, it is now usual to name the close in the declaration, as in the example, *supra*, p. 48.

(*t.*) See an example, 9 Went., 97.

of trespasses and to the other. But from the generality of the declaration the defendant is entitled to suppose that it refers only to his entering and walking in the line of way. He may, therefore, in his plea allege, as a complete answer to the whole complaint, that he has a right of way by grant, &c., over the said close; and if he does this, and the plaintiff confines himself in his replication to a traverse of that plea, and the defendant at the trial proves a right of way as alleged, the plaintiff would be precluded (upon the principle already explained) from giving evidence of any trespasses committed out of the line or track in which the defendant should thus appear entitled to pass. His course of pleading in such a case, therefore, is, both to traverse the plea and also to new-assign, by alleging that he brought his action not only for those trespasses supposed by the defendant, but for others, committed on other occasions and in other parts of the close, out of the supposed way, which is usually called a new assignment *extra viam*; or, if he means to admit the right of way, he may new-assign simply, without the traverse, (*u.*)

As the object of a new assignment is to correct a mistake occasioned by the generality of the *declaration*, it always occurs in answer to a *plea*, and is therefore in the nature of a *replication*. It is not used in any other part of the pleading because the statements subsequent to the declaration are not, in their nature, such, when properly framed, as to give rise to the kind of mistake which requires to be corrected by a new assignment.

A new assignment chiefly occurs in an action of *trespass*, but it seems to be generally allowed in all actions in which the form of declaration makes the reason of the practice equally applicable, (*x.*)

Several new assignments may occur in the course of the

(*u.*) See examples of a new assignment *extra viam*, 9 Went., 323, 396.

(*x.*) 1 Chitty, 602, 1st edit.; Vin. Ab., Novel Assignment 4, 5; 3 Went., 151; Batt v. Bradley, Cro Jac., 141.

same series of pleading. Thus, in the first of the above examples, if it be supposed that *three* different assaults had been committed, two of which were justifiable, the defendant might plead, as above, to the declaration, and then, by way of plea to the new assignment, he might again justify, in the same manner, another assault; upon which it would become necessary for the plaintiff to new-assign a third, and this upon the same principle by which the first new assignment was required, (*y.*)

A new assignment is said to be *in the nature of a new declaration*, (*z.*) It seems, however, to be more properly considered as a repetition of the declaration, (*a.*) differing only in this, that it distinguishes the true ground of complaint as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is consequently to be framed with as much *certainty* or specification of circumstances as the declaration itself, (*b.*) In some cases, indeed, it should be even *more* particular, so as to avoid the necessity of *another* new assignment. Thus, if the plaintiff declares in trespass *quare clausum fregit* without naming the close, and the defendant pleads the common bar, which, as we have seen, obliges the plaintiff to new-assign, he must, in his new assignment, either give his close its name or otherwise sufficiently describe it, (*c.*) though such name or description was not required in the declaration, (*d.*)

The rule under consideration and its exceptions being

(*y.*) 1 Chitty, 614; 1 Saund., 299 c.

(*z.*) Bac. Ab., Trespass, 1, 4, 2; 1 Saund., 299 c.

(*a.*) See 1 Chitty, 602.

(*b.*) Bac. Ab., *ubi supra*; 1 Chitty, 610.

(*c.*) Semb. Dy., 264 a; Com. Dig., Pleader, 3 M., 34. (See an example, 9 Went., 187.)

(*d.*) On the subject of new assignment, see 1 Saund., 299 a., n. 6; Barnes v Hunt., 11 East., 451; Cheasley v. Barnes, 10 East., 73; Taylor v. Smith, 7 Taunt., 156; Taylor v. Cole, 3 T. R., 292; Lambert v. Prince, 1 Bing., 317; Phillips v. Howgate, 5 Barn. & Ald., 220. Some of these cases will be found to involve nice distinctions as to the necessity, in particular instances, of a new assignment.

now discussed, the last point of remark relates to an inference or deduction to which it gives rise.

It is implied in this rule, that as the proceeding must either be by demurrer, traverse, or confession and avoidance, so *any* of these forms of opposition to the last pleading is in itself *sufficient*.

There is, however, an exception to this in a case which the books consider as anomalous and solitary. It is as follows: If in debt on a bond, conditioned for the performance of an award, the defendant pleads that no award was made, and the plaintiff, in reply, alleges that an award was made, setting it forth, it is held that he must also proceed to state a *breach* of the award, and that without stating such breach the replication is insufficient, (*e.*) This, as has been observed, is an anomaly; for, as by alleging and setting forth the award he fully *traverses* the plea which denied the existence of an award, the replication would seem, according to the general rule under consideration, to be sufficient without the specification of any breach. And in accordance with that rule it is expressly laid down, that in all other cases, "if the defendant pleads a special matter that admits and excuses a non-performance, the plaintiff need only answer and falsify the special matter alleged; for he that excuses a non-performance supposes it, and the plaintiff need not show that which the defendant hath supposed and admitted," (*f.*)

RULE II.

UPON A TRAVERSE, ISSUE MUST BE TENDERED.

In the account given in another place (*g.*) of traverses, it was shown that, with the exception of a *special* traverse,

(*e.*) 1 Saund., 103, n. 1; Meredith v. Alleyn, 1 Salk., 133; Carth., 116, S. C.; Nicholson v. Simpson, Str., 299. In Meredith v. Alleyn a reason is assigned for the exception, but not (as the author conceives) a satisfactory reason. Though this is considered as a solitary case, it may be observed that another analogous one is to be found, (Gayle v. Betts, 1 Mod., 227.)

(*f.*) Per Holt, C. J., Meredith v. Alleyn Salk., 133.

(*g.*) *Supra*, pp 167, 168, 180, 184.

the different forms all involve a *tender of issue*. The rule under consideration prescribes this as a necessary incident to them; and establishes it as a general principle, that wherever a traverse takes place, or, in other words, wherever a denial or contradiction of fact occurs in pleading, issue ought, at the same time, to be tendered on the fact denied. The reason is, that as by the contradiction it sufficiently appears what is the issue or matter in dispute between the parties, it is time that the pleading should now close, and that the method of deciding this issue should be adjusted.

The formulæ of tendering the issue in fact vary, of course, according to the mode of trial proposed.

The tender of an issue to be tried by *jury* is by a formula called the *conclusion to the country*. This conclusion is in the following words, when the issue is tendered by the *defendant*: "And of this the said *C. D.* puts himself upon the country." When it is tendered by the *plaintiff*, the formula is as follows: "And this the said *A. B.* prays may be inquired of by the country," (*h.*) It is held, however, that there is no material difference between these two modes of expression, and that if *ponit se* be substituted for *petit quod inquiratur*, or vice versa, the mistake is unimportant, (*i.*) Of the tender of issue thus concluding to the country several examples have already been given in this work, (*k.*) and to these it will now be sufficient to refer.

The form of the issue, or *mise*, when in a writ of right the tenant puts himself upon the *grand assize*, is as follows:

PLEA.

In a writ of right, (l.)

And the said *C. D.*, by ———, his attorney, comes and defends (*m*) the right of the said *A. B.* and the seizin of the said *G. B.*, when, &c., and the

(*h.*) Heath's Maxims, 68; *Weltale v. Glover*, 10 Mod.; 166, Bract., 57; Ry Plac. Parl., 146.

(*i.*) *Weltale v. Glover*, 10 Mod., 166.

(*k.*) *Supra*, pp. 90, 94, 95.

(*l.*) See the count, p. 65.

(*m.*) "Defends" here means "denies." (3 Bl. Com., 297.)

whole, &c., and whatsoever, &c., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and of right, &c., and puts himself upon the grand assize of our lord the king, and prays recognition to be made whether he himself has greater right to hold the tenements aforesaid, with the appurtenances, to him and his heirs, as tenants thereof, as he now holds them, or the said *A. B.* to have the said tenements, with the appurtenances, as he above demands them, (n.)

The form of tendering an issue to be tried *by record* is this:

PLEA.

Of judgment recovered, in assumpsit.

And the said *C. D.*, by ———, his attorney, comes and defends the wrong and injury, when, &c., and says that the said *A. B.* ought not to have or maintain his aforesaid action against him, because, he says, that the said *A. B.* heretofore, to wit, in ——— term, in the ——— year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, the same court then and still being holden at Westminster, in the county of Middlesex, impleaded the said *C. D.*, in a certain plea of trespass on the case on promises, to the damage of the said *A. B.* of ——— pounds, for the not performing the same identical promises and undertakings in the said declaration mentioned. And such proceedings were thereupon had in the same court in that plea, that afterwards, to wit, in that same term, the said *A. B.*, by the consideration and judgment of the said court, recovered in the said plea against the said *C. D.* ——— pounds, for the damages which he had sustained, as well by reason of the not performing of the said promises and undertakings in the said declaration mentioned, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* was convicted, as by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, at Westminster, aforesaid, more fully appears; which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void; and this the said *C. D.* is ready to verify by the said record. Wherefore he prays judgment if the said *A. B.* ought to have or maintain his aforesaid action against him.

REPLICATION.

And the said *A. B.* says, that by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said *C. D.*, because, he says, that there is not any record of the said supposed recovery remaining in the said court of our said lord the king, before the king himself, in manner and form as the said *C. D.* hath above in his said plea alleged; and this he, the said *A. B.*, is ready to verify when, where, and in such manner as the court here shall order, direct, or appoint, (o.)

(n.) Co. Ent., 181 b.; 3 Bl. Com., Appendix No. I, sec. 6; 3 Chitty, 652, 1st edit.; see Appendix, note 55.

(o.) 2 Chitty, 438, 602, 1st edit.; Tidd, 800, 801, 8th edit., where see the further entry with which the replication in such cases concludes, giving a day to produce the record.

The tender of an issue to be decided by *certificate, witnesses, or inspection* is by the following formula: "And this, the said *A. B.* (or *C. D.*) is ready to verify, when, where, and in such manner as the court here shall order, direct, or appoint," (*p.*)

The form of tendering an issue to be tried by *wager of law* is as follows:

PLEA.

Of nil debet, in debt on simple contract.

And the said *C. D.*, in his own proper person, comes and defends the wrong and injury, when, &c., and says that he does not owe to the said *A. B.* the said sum of — pounds, above demanded, or any part thereof, in manner and form as the said *A. B.* hath above complained against him; and this he is ready to defend against him, the said *A. B.*, and his suit, as the court of our lord the king here shall consider, &c., (*q.*)

With respect to the *extraordinary* methods of trial, their occurrence is too rare to have given rise to any illustration of the rule in question. It refers chiefly to traverses of such matters of fact as are triable by the *country*; and, therefore, we find it propounded in the books most frequently in the following form: *That upon a negative and affirmative the pleading shall conclude to the country, but otherwise with a verification, (r.)*

To the rule, in whatever form expressed, there is the following exception: *That when new matter is introduced, the pleading should always conclude with a verification, (s.)*

To this exception belongs the case formerly noticed, of *special traverses*. These, as already explained, never tender issue, but always conclude with a verification, (*t.*) and the

(*p.*) See Co. Ent., 180 b.; Rast., 228; Thorn v. Rolfe, Moore, 14; Benl., 86 S. C.; 3 Chitty, 599, 1st edit.; Qu., however, as to trial by inspection? See Booth, 147; 17 Ed. III, pl., 116; 24 Ed. III, pl., 10.

(*q.*) Co. Ent., 119 a.; Mod. Ent., 179; Lil. Ent., 467; 3 Chitty, 497, 1st edit.

(*r.*) Com. Dig., Pleader, E., 32; 1 Saund., 103, n. 1.

(*s.*) 1 Saund., 103, n. 1, and the authorities there cited; Whitehead v. Buckland, Stile, 401; Cornwallis v. Savery, 2 Burr., 772; Vere v. Smith, 2 Lev., 5; Vent., 121 S. C.; Sayre v. Minns, Cowp., 575; Henderson v. Withy, 2 T. R., 576.

(*t.*) *Vide supra*, p. 192.

reason seems to be, that in such of them as contain new matter in the inducement, the introduction of that new matter will give the opposite party a right to be heard in answer to it if the *absque hoc* be immaterial, and consequently makes a tender of issue premature. And, on the other hand, with respect to such special traverses as contain no new matter in the inducement, they seem in this respect to follow the analogy of those first mentioned, though they are not within the same reason.

Not only in the case of special traverses, but in other instances also, to which that form does not apply, a traverse may sometimes involve the allegation of new matter; and in all such instances, as well as upon a special traverse, and for a similar reason, the conclusion must be with a verification, and not to the country. An illustration of this is afforded by a case of very ordinary occurrence, viz, where the action is in debt on a bond conditioned for performance of covenants. If the defendant pleads generally performance of the covenants, and the plaintiff, in his replication, relies on a breach of them, he must show specially in what that breach consists; for to reply generally that the defendant did not perform them would be too vague and uncertain, (*u.*) His replication, therefore, setting forth, as it necessarily does, the circumstances of the breach, discloses new matter; and consequently, though it is a direct denial or traverse of the plea, it must not tender issue, but must conclude with a verification, (*x.*) So, in another common case, in an action of debt on bond conditioned to indemnify the plaintiff against the consequences of a certain act, if the defendant pleads non damnificatus, and the plaintiff replies, alleging a damnification, he must, on the principle just explained, set forth the circumstances, and the new matter thus introduced will make a verification necessary, (*y.*) To these it may be useful to add another example.

(*u.*) This results from a rule which will be discussed hereafter. (See Sec. IV.)

(*x.*) See an example in *Gainsford v. Griffith*, 1 Saund., 54.

(*y.*) See an example in *Richards v. Hodges*, 2 Saund., 82.

The plaintiff declared in debt, on a bond conditioned for the performance of certain covenants by the defendant, in his capacity of clerk to the plaintiff; one of which covenants was to account for all the money that he should receive. The defendant pleaded performance. The plaintiff replied, that on such a day such a sum came to his hands, which he had not accounted for. The defendant rejoined, that he *did* account, and in the following manner: that thieves broke into the counting-house and stole the money, and that he acquainted the plaintiff of the fact; and he concluded with a verification. The court held, that though there was an express affirmative that he did account, in contradiction to the statement in the replication that he did not account, yet that the conclusion with a verification was right; for that, *new matter* being alleged in the rejoinder, the plaintiff ought to have liberty to come in with a surrejoinder, and answer it by traversing the robbery, (z.)

The application, however, to particular cases, of this exception, as to the introduction of *new matter*, is occasionally nice and doubtful; and it becomes difficult sometimes to say whether there is any such introduction of new matter as to make the tender of issue improper. Thus, in debt on a bond conditioned to render a full account to the plaintiff of all such sums of money and goods as were belonging to *W. N.* at the time of his death, the defendant pleaded that no goods or sums of money came to his hands. The plaintiff replied, that a silver bowl, which belonged to the said *W. N.* at the time of his death, came to the hands of the defendant, viz, on such a day and year; "and this he is ready to verify," &c. On demurrer, it was contended that the replication ought to have concluded to the country, there being a complete negative and affirmative; but the court thought it well concluded, as new matter was introduced. However, the learned judge who reports the case thinks it clear that the replication was *bad*; and Mr. Ser-

(z) *Vere v. Smith*, 2 Lev., 5; Vent., 121, S. C.

jeant Williams expresses the same opinion, holding that there was *no* introduction of new matter, such as to render a verification proper, (a.)

RULE III.

ISSUE, WHEN WELL TENDERED, MUST BE ACCEPTED, (b.)

If issue be well tendered, both in point of substance and in point of form, nothing remains for the opposite party but to accept or join in it, and he can neither demur, traverse, nor plead in confession and avoidance, (c.)

The acceptance of the issue, in case of a conclusion to the *country*, *i. e.*, of trial by *jury*, may, as explained in the first chapter, (d.) either be added in making up the issue or paper-book, or may be filed or delivered before that transcript is made up. It is in both cases called the *similiter*, and in the latter case a *special similiter*. The form of a special similiter is thus: "And the said *A. B.*," (or "*C. D.*,") "as to the plea" (or "replication," &c.) "of the said *C. D.*," (or "*A. B.*") "whereof he hath put himself upon the country," (or whereof he hath prayed it may be "inquired by the country,") "doth the like." The similiter, when added in making up the issue or paper-book, is simply this: "And the said *A. B.*" (or "*C. D.*") "doth the like."

As the party has no option in accepting the issue, when well tendered, and as the similiter may in that case be added for him, the acceptance of the issue, when well tendered, may be considered as a mere matter of *form*. It is a form, however, which should be invariably observed;

(a.) *Hayman v. Gerrard*, 1 Saund., 101. But see *Cornwallis v. Savery Burr.*, 772; *Sayre v. Minns*, Cowp., 575.

(b.) *Bac. Ab.*, Pleas, &c., p. 353, 5th edit.; *Digby v. Fitzharbert*, Hob., 104; *Wilson v. Kemp*, 2 M. & S., 549. "In all pleadings, wherever a traverse was first properly taken, the issue closed." (*Gilb.*, C. P., 66.)

(c.) But he may plead in *estoppel*.

(d.) *Supra*, p. 108.

and its omission has sometimes formed a ground of successful objection, even after verdict, (*e.*)

The rule expresses that the issue must be accepted only when it is *well* tendered. For if the opposite party thinks the *traverse* bad, in substance or in form, or objects to the *mode of trial* proposed, in either case he is not obliged to add the similiter, but may *demur*, (*f.*) and, if it has been added for him, may strike it out and demur, (*g.*)

The similiter, therefore, serves to mark the acceptance both of the question itself and the mode of trial proposed. It seems originally, however, to have been introduced in a view to the *latter* point only. The resort to a jury, in ancient times, could in general be had only by the mutual *consent* of each party, (*h.*) It appears to have been with the object of expressing such consent that the similiter was in those times added in drawing up the record; and from the record it afterwards found its way into the written pleadings. Accordingly, no similiter or other acceptance of issue is necessary when recourse is had to any of the *other modes* of trial; and the rule in question does not extend to these. Thus, when issue is tendered to be tried by the *record*, as in the above example, (p. 229,) the plaintiff is entitled to consider the issue as complete upon such tender, (*i.*) and no acceptance of it, on the other side, is essential.

(*e.*) Griffith *v.* Crockford, 3 Brod. & Bing., 1. But see Saund., 319, n. 6; and Tidd, 956, 8th edit.

(*f.*) But he cannot *plead over*, as we have seen he may do in case of an immaterial traverse with an *absque hoc*. Whitehead *v.* Buckland, Stile, 402; where Roll, C. J., says the plaintiff "must either demur or join issue with you; and I have not heard of *passing over* in this case, as may be done in the case of a traverse," (meaning a traverse with an *absque hoc*.) So it is said, per Holt, C. J., that pleading over, when issue is offered, is a *discontinuance*. (Campbell *v.* St. John, 1 Salk, 219.)

(*g.*) *Vide supra*, p. 109.

(*h.*) See Appendix, note 34. It may be observed that this is still indicated by the form of the *venire facias*, which contains the formal clause, "because as well the said *C. D.* as the said *A. B.*," &c., "have put themselves upon that jury." *Vide supra*, p. 115.

(*i.*) And the replication may, therefore, conclude with an entry that a day

The rule in question extends to an issue in *law*, as well as an issue in *fact*; for, by analogy (as it would seem) to the similitur, the party whose pleading is opposed by a demurrer is required formally to accept the issue in law which it tenders by the formula called a *joinder in demurrer*; of which an example was given in the first chapter, (*k.*) However, it differs in this respect from the similitur, that whether the issue in law be well or ill tendered—that is, whether the demurrer be in proper form or not—the opposite party is equally bound to join in demurrer. For it is a rule, *that there can be no demurrer upon a demurrer*, (*l.*) because the first is sufficient, notwithstanding any inaccuracy in its form, to bring the record before the court for their adjudication; and as for *traverse* or *pleading in confession and avoidance*, there is of course no ground for them while the last pleading still remains unanswered, and there is nothing to oppose but an exception in point of law.

SECTION II.

OF RULES WHICH TEND TO SECURE THE MATERIALITY OF THE ISSUE.

In a view to the materiality of the issue, it is of course necessary that at each step of the series of pleadings, by which it is to be produced, there should be some pertinent and material allegation or denial of fact. On this subject, therefore, a general rule may be propounded in the following form:

RULE.

ALL PLEADINGS MUST CONTAIN MATTER PERTINENT AND MATERIAL.

Thus, if to an action of *assumpsit* against an administratrix, laying promises by the intestate, she pleads that

is given to inspect the record. (*Tipping v. Johnson*, 2 Bos. & Pul., 302; *Jackson v. Wickes*, 2 Marsh, 354; 7 Taunt., 30, S. C.; *Pitt v. Knight*, 1 Saund., 96 a, Tidd, 300, 801, 8th edit.) And see Booth, 96, as to the mise on a writ of right.

(*k.*) *Supra*, p. 92.

(*l.*) Bac. Ab., Pleas, &c., N. 2. And demurrer upon demurrer is a *discontinuance*. (*Campbell v. St. John*, 1 Salk., 219.)

she, the *defendant*, (instead of the intestate,) did not promise, the plea is obviously immaterial and bad, (*m.*) So where, in replevin for taking cattle, the defendant avowed taking them in the close in which, &c., for rent in arrear, and the plaintiff pleaded in bar to the avowry that the cattle were not levant and couchant on the close in which, &c., the plea was holden bad on demurrer; for it is a general rule, that all things upon the premises are distrainable for rent in arrear, and the levancy and couchancy of the cattle is immaterial, unless under special circumstances, such as did not appear by the plea in bar to have existed in this case, (*n.*)

With respect to *traverses* in particular, this general doctrine is illustrated in the books by subordinate rules of a more special kind. Thus it is laid down:

1. *That traverse must not be taken on an immaterial point, (o.)*

This rule prohibits, first, the taking of a traverse on a point wholly immaterial. Thus where, to an action of trespass for assault and battery, the defendant pleaded that a judgment was recovered, and execution issued thereupon against a third person, and that the plaintiff, to rescue that person's goods from the execution, assaulted the bailiffs, and that in aid of the bailiffs, *and by their command*, the defendant *molliter manus imposuit* upon the plaintiff, to prevent his rescue of the goods, it was holden that a traverse of the *command of the bailiffs* was bad; for even without their command the defendant might lawfully interfere to prevent a rescue, which is a breach of the peace, (*p.*)

So, by this rule, a traverse is not good when taken on matter the allegation of which was premature, though in

(*m.*) Anon., 2 Vent., 196.

(*n.*) Jones v. Powell, 5 Barn. & Cres., 647.

(*o.*) Com. Dig., Pleader, R. 8, G. 10; Bac. Ab., Pleas, &c., H. 5.

(*p.*) Bridgwater v. Bythway, 3 Lev., 113. Aliter, if not done to prevent a rescue; for in a case where defendant justifies merely as assistant to, and by command of, a person executing legal process, the command is traversable. (Britton v. Cole, 3 Salk., 409.)

itself not immaterial to the case. Thus, if in debt on bond the plaintiff should declare that, at the time of sealing and delivery, the defendant was of full age, the defendant should not traverse this, because it was not necessary to allege it in the declaration; though if in fact he was a minor, this would be a good subject for a plea of infancy, to which the plaintiff might then well reply the same matter, viz, that he was of age, (q.)

Again, this rule prohibits the taking of a traverse on matter of *aggravation*; that is, matter which only tends to increase the amount of damages, and does not concern the right of action itself. Thus, in trespass for chasing sheep, per quod the sheep died, the dying of the sheep, being *aggravation* only, is not traversable, (r.) So it is laid down that, in general, traverse is not to be taken on matter of *inducement*; that is, matter brought forward only by way of explanatory introduction to the main allegations; but this is open to many exceptions, for it often happens that introductory matter is in itself essential, and of the substance of the case, and in such instances, though in the nature of inducement, it may nevertheless be traversed, (s.)

While it is thus the rule, that traverse must not be taken on an immaterial point, it is, on the other hand, to be observed that, where there are several material allegations, it is in the option of the pleader to traverse which he pleases, (t.) Thus, in trespass, if the defendant pleads that *A.* was seized and demised to him, the plaintiff may traverse either the seizure or the demise, (u.) Again, in trespass, the defendant pleads that *A.* was seized, and enfeoffed *B.*, who enfeoffed *C.*, who enfeoffed *D.*, whose estate the defendant hath: in this case

(q.) Sir Ralph Bovy's Case, 1 Vent., 217, where see another example.

(r.) Leech v. Widsley, 1 Vent., 54; 1 Lev., 283 S. C.

(s.) Com. Dig., Pleader, G. 14; Kinnersley v. Cooper, Cro. Eliz., 168; Carvick v. Blagrave, 1 Brod. & Bing., 531.

(t.) Com. Dig., Pleader, G. 10; Read's Case, 6 Rep., 24; Doct. Pl., 354, 365; Baker v. Blackman, Cro. Jac., 682; Young v. Rudd, Carth., 347; Young v. Ruddle, Salk., 627; Bac. Ab., Pleas, &c., H. 5, p. 392, 5th edit.

(u.) Com. Dig., Pleader, G. 10; Moor v. Pudsey, Hardr., 317.

the plaintiff may traverse which of the feoffments he pleases, (x.)

The principle of this rule is sufficiently clear; for it is evident that where the case of any party is built upon several allegations, each of which is essential to its support, it is as effectually destroyed by the demolition of any one of these parts as of another.

It is also laid down—

2. *That a traverse must not be too large, nor, on the other hand, too narrow, (y.)*

As a traverse must not be taken on an immaterial allegation, so, when applied to an allegation that is material, it ought, in general, to take in no more and no less of that allegation than is material. If it involves *more*, the traverse is said to be *too large*; if less, *too narrow*.

A traverse may be too large, by involving in the issue quantity, time, place, or other circumstances, which, though forming part of the allegation traversed, are immaterial to the merits of the cause. Thus, in an action of debt on bond conditioned for the payment of 1,550*l.*, the defendant pleaded that part of the sum mentioned in the condition, to wit, 1,500*l.*, was won by gaming, contrary to the statute in such case made and provided, and that the bond was consequently void. The plaintiff replied that the bond was given for a just debt, and traversed that the 1,500*l.* was won by gaming, in manner and form as alleged. On demurrer, it was objected that the replication was ill, because it made the precise sum parcel of the issue, and tended to oblige the defendant to prove that the whole sum of 1,500*l.* was won by gaming; whereas the statute avoids the bond if *any part* of the consideration be on that account. The court was of opinion that there was no color to maintain the replication, for that the material part of the plea was that *part* of the money for which the bond was given was won by gaming; and that the words “to

(x.) Doct. Pl., 365.

(y.) 1 Saund., 268, n. 1, 269, n. 2; Com. Dig., Pleader, G. 15, G. 16.

wit, 1,500*l.*," were only form, of which the replication ought not to have taken any notice, (z.) So, where the condition of a bond was that the obligor should serve the obligee half a year, and, in an action of debt on the bond, the defendant pleaded that he had served him half a year at *D.*, in the county of *K.*, and the plaintiff replied that he had not served him half a year at *D.*, in the county of *K.*, this was adjudged to be a bad traverse, as involving the *place*, which was immaterial, (a.) So, where the plaintiff pleaded that the queen, at a manor court, held on such a day, by *I. S.*, her steward, and by copy of court-roll, &c., granted certain land to the plaintiff's lessor, and the defendant rejoined, traversing that the queen, at a manor court, held such a day, by *I. S.*, her steward, granted the land to the lessor, the court held that the traverse was ill, "for the jury are thereby bound to find a copy on such a day, and by such a steward, which ought not to be." The traverse, it seems, ought to have been, that the queen did not grant, *in manner and form as alleged*, (b,) words which, as already observed, (c,) bring into issue only the *substance* of the allegation.

Again, a traverse may be too large, by being taken in the *conjunctive*, instead of the *disjunctive*, where it is not material that the allegation traversed should be proved conjunctively. Thus, in an action of assumpsit, the plaintiff declared on a policy of insurance, and averred "that the ship insured did not arrive in safety; but that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, were sunk and destroyed in the said voyage." The defendant pleaded with a traverse, "Without this, that the said ship, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, were sunk and destroyed in the voyage, in manner and form as alleged."

(z.) *Colborne v. Stockdale*, Str., 493; 8 Mod., 53 S. C.

(a.) Doct. Pl., 360.

(b.) *Lane v. Alexander*, Yelv., 122.

(c.) *Supra*, p. 200, note c.

Upon demurrer, this traverse was adjudged to be bad; and it was held that the defendant ought to have denied, disjunctively, that the ship *or* tackle, &c., was sunk or destroyed, because, in this action for damages, the plaintiff would be entitled to recover compensation for any part of that which was the subject of insurance, and had been lost; whereas, (it was said,) if issue had been taken in the conjunctive form, in which the plea was pleaded, "and the defendant should prove that only a cable or anchor arrived in safety, he would be acquitted of the whole, (*d.*)

On the other hand, however, *a party may, in general, traverse a material allegation of title or estate, to the extent to which it is alleged, though it need not have been alleged to that extent; and such traverse will not be considered as too large, (e.)* For example, in an action of replevin, the defendant avowed the taking of the cattle, as damage feasant, in the place in which, &c.; the same being the freehold of Sir *F. L.* To this the plaintiff pleaded that he was seized in his demesne as of fee of *B.* close, adjoining to the place in which, &c.; that Sir *F. L.* was bound to repair the fence between *B.* close and the place in which, &c.; and that the cattle escaped through a defect of that fence. The defendant traversed, that the plaintiff *was seized in his demesne as of fee of B. close*; and on demurrer the court was of opinion that it was a good traverse, for though a less estate than a seizin in fee would have been sufficient to sustain the plaintiff's case, yet, as the plaintiff, who should best know what estate he had, had pleaded a seizin in fee, his adversary was entitled to traverse the title so laid, (*f.*) Again, in an action of trespass, for trespasses committed in a close of pasture, containing eight acres, in

(*d.*) *Goram v. Sweeting*, 2 Saund., 205.

(*e.*) Com. Dig., Pleader, G. 16; *Sir Francis Leke's Case*, Dy., 365; 2 Saund., 207, n. 24; *Wood v. Budden*, Hob., 119; *Tatem v. Perient*, Yelv., 195; *Carvick v. Blagrave*, 1 Brod. & Bing., 531. *Palmer v. Ekins*, 2 Str., 818, is apparently *contra*, but, from the report of the same case, (Ld. Ray., 1550,) it may be reconciled with the other authorities.

(*f.*) *Sir Francis Leke's Case*, Dyer, 365; 2 Saund., 206 a, n. 22.

the town of Tollard Royal, the defendant pleaded that *W.*, Earl of Salisbury, was seized in fee and of right of an ancient chase of deer, called Cranborn, and that the said chase did extend itself, as well in and through the said eight acres of pasture as in and through the said town of Tollard Royal; and justified the trespasses as committed in using the said chase. The plaintiff traversed, *that the said chase extended itself as well to the eight acres as to the whole town;* and, issue being taken thereon, it was tried and found for the plaintiff. It was then moved, in arrest of judgment, "that this issue and verdict were faulty, because, if the chase did extend to the eight acres only, it was enough for the defendant; and therefore the finding of the jury, that it did not extend as well to the whole town as to the eight acres, did not conclude against the defendant's right in the eight acres, which was only in question. But it was answered by the court, that there was no fault in the issue, much less in the verdict, (which was according to the issue,) but the fault was in the defendant's plea; for he puts in his plea more than he needed, viz, the whole town, which, being to his own disadvantage and to the advantage of the plaintiff, there was no reason for him to demur upon it, but rather to admit it, as he did, and so to put it in issue. And so judgment was given for the plaintiff," (g.)

Of a traverse too *narrow*, the following is an example: In an action of assumpsit, brought for a compensation for the plaintiff's service as a hired servant, the plaintiff alleged that he served from the 21st of March, 1647, to 1st November, 1664; the defendant pleaded that the plaintiff continued in the service till December, 1658, and then voluntarily quitted the service; *without this, that he served until the 1st of November, 1664.* This was a bad traverse, for, as the plaintiff, in this action for damages, is entitled to compensation, pro tanto, for any period of service, it is obviously no answer to say that he did not serve the whole

(g) Wood v. Budden, Hob., 119.

time alleged, (*h.*) So a traverse may be too narrow, by being applied to part only of an allegation, which the law considers as in its nature indivisible and entire, such as that of a prescription or grant. Thus, in an action of trespass for breaking and entering the plaintiff's close, called *S. C.*, and digging stones therein, the defendant pleaded that there are certain wastes lying open to one another, one, the close called *S. C.*, and the other called *S. G.*, and so proceeded to prescribe for the liberty of digging stones in both closes, and justified the trespasses under that prescription. The replication traversed the prescriptive right in *S. C. only*, dropping *S. G.*; but the court held that the traverse could not be so confined, and must be taken on the whole prescription as laid, (*i.*)

SECTION III.

OF RULES WHICH TEND TO PRODUCE SINGLENES OR UNITY IN THE ISSUE.

The following rules enforce singleness in the method of pleading or allegation, and, by consequence, tend to produce a single issue.

RULE I.

PLEADINGS MUST NOT BE DOUBLE, (*k.*)

This rule applies both to the declaration and subsequent pleadings. Its meaning, with respect to the former, is, that the declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported. With respect to the subsequent pleadings, the meaning is, that none of

(*h.*) *Osborne v. Rogers*, 1 Saund., 267. This is a case which could not arise in assumpsit at the present day, because, by the modern practice, the plea would be only non-assumpsit.

(*i.*) *Morewood v. Wood*, 4 T. R., 157; and see Doct. Pl., 351, 352, 370; *Bridle and Napper's Case*, 11 Rep., 10 b; *Bradburn v. Kennerdale*, Carth., 164; 1 Saund., 268, n. 1.

(*k.*) Com. Dig., Pleader, C. 33, E. 2, F. 16; Bac. Ab., Pleas, &c., K.; *Humphreys v. Bethily*, 2 Vent., 198, 222; Doct. Pl., 135.

them is to contain several distinct answers to that which preceded it, and the reason of the rule in each case is, that such pleading tends to several issues in respect of a single claim, (*l.*)

The rule, it may be observed, in its terms, points to *doubleness* only, as if it prohibited only the use of *two* allegations or answers of this description; but its meaning, of course, equally extends to the case of more than two, the term *doubleness*, or *duplicity*, being applied, though with some inaccuracy, to either case.

Of this rule, as applied to the *declaration*, the following is an example: The plaintiff declared in debt on a penal bill, (*m.*) by which the defendant was to pay ten shillings on the 11th of June, and ten shillings upon the 10th of July next following, and ten shillings every three weeks after, till a certain total sum were satisfied by such several payments, and by the said bill the defendant bound himself for the true payment of the said several sums in the penal sum of seven pounds, and the plaintiff alleged that the defendant did not pay the said *total sum*, or *any part thereof*, upon the several days aforesaid; whereby an action had accrued to him to demand the said penalty of seven pounds. This was held bad for duplicity. For, if the defendant had failed in payment of *any one* of the sums, such failure would alone be a breach of the condition, and sufficient to entitle the plaintiff to the penalty he claimed; and the plaintiff ought, therefore, to have confined himself to the allegation of the non-payment of one of those sums only, (*n.*) So, where the plaintiff declared in assumpsit, that the defendant was indebted to him in such a sum, for nourishing one *E. L.*, at the request of the defendant, which the latter promised to pay, and also that the defend-

(*l.*) La cause est pur ceo, que deux issues purroient estre pris sur les plees. (Per Finchden, 49 Ed. III, 45;); see also 15 Ed. IV, 1.

(*m.*) *Bills penal* are instruments not now in use, having been superseded by *bonds with conditions*. The example in the text would, therefore, not occur in modern practice, but serves equally well the purpose of illustration.

(*n.*) *Humphreys v. Bethily*, 2 Vent., 198, 222.

ant promised to pay him so much as he reasonably deserved to have for nourishing the said *E. L.* during the same time; this was bad for duplicity, and, indeed, also for repugnancy, (another fault in pleading that will be hereafter considered,) as the two promises—to pay a sum certain, and to pay quantum meruit—were inconsistent, and could not stand together, (o.)

Of duplicity in *pleadings, subsequent to the declaration*, the following example occurs in a *plea in abatement*: The defendant pleaded, in disability of the person of the plaintiff, ten different outlawries adjudged against him, and it was held that the plea was ill for duplicity; because the plaintiff was disabled as well by one outlawry as by the whole ten, (p.) The following is an instance of duplicity in a *plea in bar*: In trespass for breaking a close and depasturing the herbage with cattle, if the defendant pleads that *A.* had a right of common, and *B.* also a right of common, in the close, and that the defendant, as their servant and by their command, entered and turned in the cattle, in exercise of their rights of common, the plea is bad for duplicity, (q.) because the title of either one or other of the commoners, and the authority derived as his servant, would have alone constituted a sufficient answer to the declaration. Duplicity in the *replication* may be thus exemplified: The plaintiff declared in trespass for breaking and entering his stable, cutting asunder a beam, and throwing down the tiles of the roof. The defendant justified, as servant to Sir *H. G.*, and pleaded that Sir *H. G.* was seized of a wall in his demesne as of fee, and because the beam was placed in the wall of the said Sir *H. G.* without his consent, the defendant, as his servant, in order to remove this nuisance, did enter the stable and cut the beam as near to the wall as he could, doing as little damage as possible, and thereby the tiles were thrown down. The plaintiff replied, trav-

(o.) *Hart v. Longfield*, 7 Mod., 148. As to the duplicity in the *declaration* see also *Cornwallis v. Savery*, 2 Burr., 773; *Manser's Case*, 2 Rep., 4.

(p.) *Trevelian v. Seccomb*, Carth., 8. See Appendix, note 56.

(q.) Vin. Ab., tit. Double Pleas, A, 114, cites 15 Henry VII, 10.

ersing that the wall was Sir *H. G.*'s; and then, with a protestation that the wall was not his, further pleaded that the defendant, of his own wrong, did throw down the tiles, for the cutting the beam as aforesaid. The court held that, the first traverse being a complete answer to the whole, the second made the replication double, (*r.*)

The object of this rule being to enforce a single issue, upon a *single subject of claim*, admitting of several issues, where the claims are *distinct*, (*s.*) the rule is, accordingly, carried no further than this in its application. The *declaration*, therefore, may, in support of *several demands*, allege as many distinct matters as are respectively applicable to each. Thus, let one of the examples above given, with respect to the declaration, be so far varied as to substitute, for the case of an action in debt on a penal bill for the penalty accrued in consequence of non-payment of a sum by several installments, the case of an action of covenant, on a covenant to pay that sum by similar installments. In this latter case the plaintiff might, without duplicity, declare that the defendant "did not pay the said total sum, or any part thereof, upon the several days aforesaid." For he does not, as in the action upon the penal bill, found upon such non-payments a single claim, viz, the claim to the penalty of seven pounds; there being no penalty in question, his claims are multiplied in proportion to the number of non-payments; that is, he is entitled to ten shillings in respect of the first default, and ten shillings more upon each of the rest; the allegation of several defaults is, therefore, in this case, the allegation of so many distinct demands, and consequently allowable, (*t.*) So the *plea*, though it must not contain several answers to the whole of the declaration, may nevertheless make distinct answers to such parts of it as relate to different matters of claim or complaint, (*u.*) Thus, in the preceding example of du-

(*r.*) *Humphreys v Churchman*, Rep., temp. Hard., 239.

(*s.*) *Supra*, p. 151.

(*t.*) See Bac. Ab., Pleas, &c., p. 446, 5th edit.

(*u.*) Com. Dig., Pleader, E. 2 Co. Litt., 304 a.

plicity in a plea in bar, if the case were a little varied, and the defendant, being charged with putting five beasts on the common, had pleaded that *A.* and *B.* had respectively rights of common there, and that he, as the servant of *A.*, put in two of the beasts in respect of *his* common right, and, as the servant of *B.*, put in three in respect of *his* common right, there would no longer be duplicity; for he pleads the several titles, not as several answers to the same subject of claim or complaint, but as distinct answers to different matters of complaint, arising in respect of different cattle, (*x.*) So, in the *replication* and other subsequent parts of the series, a severance of pleading may take place in respect of several subjects of claim or complaint. Thus, if an action be brought for trespasses in closes *A.* and *B.*, and the defendant pleads a single matter of defense applying to both closes, the plaintiff is still at liberty, in his replication, to give one answer as to so much of the plea as applies to close *A.*, and another answer as to so much of the plea as applies to close *B.*, (*y.*) The power, however, of alleging in a plea distinct matters, in answer to such parts of the declaration as relate to different claims, seems to be subject to this restriction: that neither of the matters so alleged be such as would alone be a sufficient answer to the whole. Thus, if an action be brought on two bonds, though the defendant may plead, as to one, payment, and as to the other, duress; yet if he pleads as to one a release *of all actions*, and as to the other duress, it will be double; for the release is alone a sufficient answer to both bonds, (*z.*)

Again, if there be *several defendants*, the rule against duplicity is not carried so far as to compel each of them to make the same answer to the declaration. Each defendant is at liberty to use such plea as he may think proper

(*x.*) Vin. Ab., tit. Double Pleas, A, 115.

(*y.*) See an example, in *Johns v. Whitley*, 3 Wils., 132.

(*z.*) Doct. Pl., p. 136; Vin. Ab., tit. Double Pleas, D. In *Viner*, however, some cases are cited which show that this restriction has not been uniformly observed, or is at least open to several exceptions.

for his own defense, and they may either join in the same plea or sever, at their discretion, (a.) But, if the defendants have once united in the plea, they cannot afterwards sever at the rejoinder or other later stage of the pleading, (b.)

Where, in respect of several subjects or several defendants, a severance has thus taken place in the pleading, this may, of course, lead to a corresponding severance in the whole subsequent series, and, as the ultimate effect, to the production of *several issues*. And where there are several issues, they may, respectively, be decided in favor of different parties, and the judgment will follow the same division.

Such being in general the nature of duplicity, the following rules or points of remark will tend to its further illustration:

1. *A pleading will be double that contains several answers, whatever be the class or quality of the answer.* Thus, it will be double by containing several matters in abatement or several matters in bar, (c,) or by containing one matter in abatement and another in bar, (d.) So a pleading will be double by containing several matters in confession and avoidance, or several answers by way of traverse, or by combining a traverse with a matter in confession and avoidance, (e.)

2. *Matter may suffice to make a pleading double, though it be ill pleaded.* Thus, in trespass for assault and battery, the defendant pleaded that he committed the trespasses in the

(a.) Co. Litt., 303 a.; *Essington v. Boucher*, Hob., 245. It is said, however, arguendo, in the case cited, that they cannot sever in *dilatory pleas*. *Sed qu.*? (See *Cuppledick v. Terwhit*, Hob., 350.)

(b.) And see a case where, upon a replication to a plea by one defendant, a rejoinder by all the defendants was adjudged to be bad. (*Morrow v. Belcher*, 4 Barn. & Cres., 704.)

(c.) Com. Dig., Pleader, E. 2; and see the cases already cited on the subject of duplicity.

(d.) Semb. Com. Dig., Pleader, E. 2; *Bleeke v. Grove*, 1 Sid., 176.

(e.) Com. Dig., Pleader, E. 2; Bac. Ab., Pleas, &c., K.; and see the cases already cited.

moderate correction of the plaintiff as his servant, and further pleaded, that since that time the plaintiff had discharged and released to him the said trespasses, without alleging, as he ought to have done, a release *under seal*. The court held that this plea was double, the moderate correction and the release being each a matter of defense; and, though the release was insufficiently pleaded, yet, as it was a matter that a material issue might have been taken upon, it sufficed to make the plea double, (*f.*)

On the other hand, it seems that

3. *Matter immaterial cannot operate to make a pleading double, (g.)* Thus, in an action by the executors of *J. G.* on a bond conditioned that the defendant should warrant to *J. G.* a certain meadow, the defendant pleaded that the said meadow was copyhold of a certain manor, and that there is a custom within the manor, that if the customary tenants fail in payment of their rents and services, or commit waste, then the lord for the time being may enter for forfeiture; and that the said *J. G.*, during his life, peaceably enjoyed the meadow; which descended after his death to one *B.*, his son and heir; who, of his own wrong, entered without the admission of the lord, against the custom of the manor; and because three shillings of rent were in arrear on such a day, the lord entered into the meadow, as into lands forfeited. On demurrer, it was objected (among other things) that the plea was double; because, in showing the forfeiture to have accrued by the heir's own wrongful act, two several matters are alleged: first, that he entered without admission, against the custom; secondly, that three shillings of rent were in arrear. But the judges held, that the only sufficient cause of for-

(*f.*) Bac. Ab., Pleas, &c., K. 2; *Bleeke v. Grove*, 1 Sid., 175.

(*g.*) Bac. Ab., Pleas, &c. K. 2; 1 Hen. VII., 16; *Countess of Northumberland's Case*, 5 Rep., 98 a.; *Case of the Executors of Grenolefe, Dyer*, 42 b.; Doct. Pl., 138. There is, however, a dictum of *Doddridge, J.*, that a plea may be double, though only one of the matters be material. (*Calfe v. Nevil*, Poph., 183.) But the weight of the authorities, and the reason of the thing, are opposed to this opinion.

feiture was the non-payment of rent; that, there being no custom alleged for forfeiture in respect of entry without admission, the averment of such entry was mere surplusage, and could not, therefore, avail to make the plea double, (*h.*) It is, however, to be observed, that the plea seems to *rely* on the non-payment of the rent as the only ground of forfeiture; for it alleges that, "because three shillings of the rent were in arrear, the lord entered;" and the court noticed this circumstance. The case, therefore, does not explicitly decide, that where two several matters are not only pleaded, but *relied upon*, the immateriality of one of them shall prevent duplicity; but the manner in which the judges express themselves seems to show that the doctrine goes to that extent; and there are other authorities the same way, (*i.*)

This doctrine, that a plea may be rendered double by matter *ill pleaded*, but not by *immaterial* matter, quite accords with the *object* of the rule against duplicity, as formerly explained, (*k.*) That object is the avoidance of several issues. Now, whether a matter be well or ill pleaded, yet if it be sufficient in substance, so that the opposite party may go to issue upon it, if he chooses to plead over, without taking the formal objection, such matter tends to the production of a separate issue, and is on that ground held to make the pleading double. On the other hand, if the matter be immaterial, no issue can properly be taken upon it; it does not tend, therefore, to a separate issue, nor, consequently, fall within the rule against duplicity.

4. *No matter will operate to make a pleading double that is pleaded only as necessary inducement to another allegation.* Thus, it may be pleaded without duplicity that, after the cause of action accrued, the plaintiff (a woman) took husband, and that the husband afterwards released the de-

(*h.*) Case of the Executors of Grenelafe, Dyer, 42 b.

(*i.*) Bac. Ab., Pleas, &c., K. 2.

(*k.*) *Supra*, p. 242; and see also p. 152.

fendant; for though the coverture is itself a defense, as well as the release, yet the averment of the coverture is a necessary introduction to that of the release, (*l.*) This exception to the general rule is prescribed by an evident principle of justice; for the party has a right to rely on any single matter that he pleases in preference to another; as in this instance, on the release, in preference to the coverture; but if a necessary inducement to the matter on which he relies, when itself amounting to a defense, were held to make his pleading double, the effect would be to exclude him from this right, and compel him to rely on the inducement only.

5. *No matters, however multifarious, will operate to make a pleading double that together constitute but one connected proposition or entire point.* Thus, to an action for assault and imprisonment, if the defendant plead that he arrested the plaintiff on suspicion of felony, he may set forth any number of circumstances of suspicion, though each circumstance may be alone sufficient to justify the arrest; for all of them taken together do but amount to one connected cause of suspicion, (*m.*) This qualification of the rule against duplicity applies not only to pleadings in confession and avoidance, but to traverses also; so that a man may deny as well as affirm, in pleading, any number of circumstances that together form but a single point or proposition. Thus, in an action of trespass for breaking the plaintiff's close and depasturing it with cattle, the defendant pleaded a right of common in the close for the said cattle, being his own commonable cattle, levant and couchant, upon the premises. The plaintiff, in the replication, traversed, "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle." On demurrer for duplicity, it was objected that there were three distinct facts put in issue by this replication, any one of which would be

(*l.*) Bac. Ab., Pleas, &c., K. 2; Com. Dig., Pleader, E. 2; 24 F. III, 75 b.

(*m.*) Vin. Af., Double Pleas, A. 7., cites 2 Ed. IV, 8.

sufficient by itself; but the court held that the point of the defense was, that the cattle in question were entitled to common; that this *point* was single, though it involved the *three several facts*, that the cattle were the defendant's own, that they were levant and couchant, and that they were commonable cattle; that the replication traversing these facts, in effect, therefore, only traversed the single point, whether the cattle were entitled to common; and was, consequently, not open to the objection of duplicity, (n.) The most frequent instance of this cumulative traverse, as it may be called, occurs in the case of the replication, *de injuria absque tali causa*. This replication, (it will be recollected,) alleges that the defendant did the act (the subject of complaint) of his own wrong, and "*without the cause alleged,*" and this *cause* frequently consists of several connected circumstances, of which the example formerly given (o) may serve as an illustration. Another example is afforded by the following recent case. In an action for maliciously suing out a commission of bankruptcy against the plaintiff, the defendant pleaded that the plaintiff, being a trader, and indebted to him in 100*l.*, became bankrupt; whereupon the defendant sued out the commission. The plaintiff replied *de injuria absque tali causa*. Upon demurrer, it was objected that by this form of replication it was attempted to put in issue three distinct facts: the trading, the petitioning creditor's debt, and the act of bankruptcy; but it was adjudged that these facts together constituted but one proposition, viz, that the plaintiff duly became bankrupt, and that the replication was therefore good, (p.) It is, however, (as was formerly stated,) (q.) a

(n.) *Robinson v. Rayley*, 1 Burr., 316.

(o.) *Supra*, p. 180.

(p.) *O'Brien v. Saxon*, 2 Barn. & Gres., 908; and see another example in *Phillips v. Howgate*, 5 Barn. & Ald., 220, a case which proves that upon this replication the defendant must prove the *whole* of the cause alleged in his plea, so far as material to the defense, but not such circumstances of it as are immaterial.

(q.) *Supra*, p. 180.

restriction in the use of this replication, that it cannot be applied so as to include in the traverse any matter alleged on the other side in the nature of *title, interest, commandment, authority, or matter of record*. If, therefore, any such matter be contained in the plea, and the plaintiff wishes to deny it, such matter must be traversed separately; or, if he chooses not to point the denial to this, but to other matters in the plea, these other matters must separately form the subject of traverse. In the former case, the denial is in the words of the allegation; in the latter, the usual form is to plead with a protestation, and a traverse *de injuria absque residuo causæ*, thus: "Protesting that the said *C. D.* is not seized, &c. For replication, nevertheless, in this behalf, the said *A. B.* says that the said *C. D.*, of his own wrong, and *without the residue of the cause* in his said plea alleged, broke and entered the said close, &c.," (*r.*) And it is to be observed that this restriction, by which matter of *title, interest, commandment, authority, or record* is required to be separately traversed, is not to be taken as applicable merely to the use of the replication *de injuria*, but extends (it is conceived) in its principle to *all* cases of cumulative traverse, so that it may be said to be generally true, that where any such matter is alleged in connection with other circumstances, it is not a case in which it is competent to the other party to traverse cumulatively, (*s.*) and that, if he include all these circumstances in the same traverse, his pleading will be double.

In some cases the *general issues* appear to partake of the nature of these cumulative traverses. For some of them are so framed as to convey a denial, not of any particular fact, but generally of the whole matter alleged, as *not guilty* in trespass or trespass on the case, and *nil debet* in debt. And in *assumpsit* the case is the same in effect, according to a relaxation of practice formerly explained, (*t.*)

(*r.*) See the precedents, 9 *Went.*, 327 2 *Chitty*, 644.

(*s.*) See *Bul. Ni. Pri.*, 93.

(*t.*) *Supra*, p. 175.

by which the defendant is permitted, under the general issue, in that action, to avail himself, with some few exceptions, of any matter tending to disprove his liability. The consequence is, that under these general issues the defendant has the advantage of disputing, and therefore of putting the plaintiff to the proof of every averment in the declaration. Thus, by pleading *not guilty*, in trespass *quare clausum fregit*, he is enabled to deny, at the trial, both that the land was the plaintiff's and that he committed upon it the trespasses in question, and the plaintiff must establish both these points in evidence. Indeed, besides this advantage of double *denial*, the defendant obtains, under the general issue, in *assumpsit* and other actions of trespass on the case, the advantage of double *pleading in confession and avoidance*. For, as upon the principles formerly explained, (u,) he is allowed, in these actions, to bring forward, upon the general issue, almost any matters, (though in the nature of confession and avoidance,) which tend to disprove his debt or liability; so he is not limited, (as he would be in special pleading,) to a reliance on any single matter of this description, but may set up any number of these defenses. While such is the effect of many of the general issues in mitigating or evading the rule against duplicity, the remark does not apply to all. Thus, the general issue of *non est factum* raises only a single question, namely, whether the defendant executed a valid and genuine deed, such as is alleged in the declaration. The defendant may, under this plea, insist that the deed was not executed by him, or that it was executed under circumstances which absolutely annul its effect as a deed, but can set up no other kind of defense.

6. *A protestation will not make the pleading double*, (x.) Thus, in the example formerly given, (y,) where the defendant pleads the delivery or acceptance of a pipe of wine

(u.) *Supra*, pp. 175, 177.

(x.) 3 Bl. Com., 311.

(y.) *Supra*, p. 218.

in satisfaction of the plaintiff's demand, though the plaintiff cannot reply that the wine was neither delivered nor accepted in satisfaction, for this would be double; yet he may *protest* that it was not delivered, and at the same time deny the acceptance, without incurring the objection. For a protestation (as already explained) does not tend to issue in the action, but is made merely to reserve to the party the right of denying or alleging the same matter in a future suit. It consequently cannot fall within the object of the rule against duplicity, which is, to avoid a plurality of issues.

The rule against duplicity in pleading being now explained, (z.) it is necessary, in the next place, to advert to certain *modes of practice* by which the effect of that rule is materially qualified and evaded. These are, the use of *several counts* and the allowance of *several pleas*, the former being grounded on ancient practice, the latter on the stat. 4 Ann., c. 16.

First shall be considered the subject of *several counts*.

Where a plaintiff has several distinct causes of action, he is allowed to pursue them cumulatively in the same original writ, subject to certain rules which the law prescribes, as to joining such demands only as are of similar quality or character, (a.) Thus, he may join a claim of debt on bond with a claim of debt on simple contract, and pursue his remedy for both by the same original writ in debt. So, if several distinct trespasses have been committed, these may all form the subject of one original writ in trespass; but, on the other hand, a plaintiff cannot join in the same suit a claim of debt on bond and a complaint of trespass, these being dissimilar in kind, (b.) Where a plaintiff thus makes several demands by the same writ, his course of proceeding in debt, covenant, and detinue, and the real and mixed actions, where the writs are in a simple and general

(z.) See Appendix, note 57.

(a.) Upon this subject, see Bac. Ab., Actions, C.

(b.) See Appendix, note 58.

form, (c,) is merely to enlarge his claim in point of sums and quantities; but in trespass, and trespass on the case, where the form is more special, (d,) the original writ separately specifies each subject of claim or complaint. For example, if the action be brought in trespass for two assaults and batteries, the original writ, after setting forth one, proceeds to detail the other. And, when the time for the *declaration* arrives, the plaintiff, in *all* forms of action, sets forth in the declaration, separately, each different subject of claim or complaint thus put together in the same writ. So, in the case of proceeding by *bill*, the different claims or complaints are separately brought forward in the bill or declaration, care, however, being taken to join only such as might have been jointly claimed by the same original. Such different claims or complaints constitute different parts or sections of the declaration, and are known in pleading by the description of *several counts*, (e.)

But in order to give the unlearned reader an exact idea of the nature of several counts, it will be necessary (though it lead to the insertion of some very common and well-known forms) to lay before him the following examples:

DECLARATION.

In trespass, for assault and battery.

(*By original.*)

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

—, to wit, *C. D.* was attached to answer *A. B.* of a plea, wherefore he, the said *C. D.*, with force and arms, at —, in the county of —, made an assault upon the said *A. B.*, and beat, wounded, and ill-treated him, so that his life was despaired of. *And also*, wherefore, with force and arms, at — aforesaid, in the county aforesaid, the said *C. D.* made another assault upon the said *A. B.*, and again beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to him there did, to the damage of the said *A. B.* and against the peace of our lord the now king. And thereupon the said *A. B.*, by —, his attorney, complains: *For that the*

(c.) See the forms of writs in the first chapter.

(d.) *Ibid.*

(e.) See Appendix, note 59. .

said *C. D.* heretofore, to wit, on the — day of —, in the year of our Lord —, with force and arms, at —, in the county of —, made an assault upon the said *A. B.*, and beat, wounded, and ill-treated him, so that his life was despaired of. *And also for that* the said *C. D.* heretofore, to wit, on the day and year aforesaid, with force and arms, at — aforesaid, in the county aforesaid, made another assault upon the said *A. B.*, and again beat, wounded, and ill-treated him, so that his life was despaired of, and other wrongs to him then and there did, against the peace of our said lord the king, and to the damage of the said *A. B.* of — pounds; and therefore he brings his suit, &c., (*f.*)

DECLARATION.

In assumpsit, for goods sold, work done, money lent, &c.

(*By original.*)

In the King's Bench, — Term, in the — year of the reign of King George the Fourth.

—, to wit, *C. D.* was attached to answer *A. B.* of a plea of trespass on the case. And thereupon the said *A. B.*, by —, his attorney, complains: For that whereas the said *C. D.* heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, was indebted to the said *A. B.* in the sum of — pounds, of lawful money of Great Britain, for divers goods, wares, and merchandises by the said *A. B.* before that time sold and delivered to the said *C. D.*, at his special instance and request; and, being so indebted, he, the said *C. D.*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, undertook and faithfully promised the said *A. B.* to pay him the said sum of money when he, the said *C. D.*, should be thereto afterwards requested. *And whereas also* the said *C. D.* afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, was indebted to the said *A. B.* in the further sum of — pounds, of like lawful money, for work and labor, care and diligence, by the said *A. B.* before that time done, performed, and bestowed, in and about the business of the said *C. D.*, and for the said *C. D.*, at his like instance and request, and, being so indebted, he, the said *C. D.*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, undertook and faithfully promised the said *A. B.* to pay him the last-mentioned sum of money when he, the said *C. D.*, should be thereto afterwards requested. *And whereas also* the said *C. D.* afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, was indebted to the said *A. B.* in the further sum of — pounds, of like lawful money, for so much money by the said *A. B.* before that time lent and advanced to the said *C. D.*, at his like instance and request, and, being so indebted, he, the said *C. D.*, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at —

(*f.*) See the declaration with a count for *one* assault and battery only, *supra*, p. 70.

aforsaid, in the county aforsaid, undertook and faithfully promised the said *A. B.* to pay him the said last-mentioned sum of money when he, the said *C. D.*, should be thereto afterwards requested. *And whereas also* the said *C. D.* afterwards, to wit, on the day and year aforsaid, at ——— aforsaid, in the county aforsaid, was indebted to the said *A. B.* in the further sum of ——— pounds, of like lawful money, for so much money by the said *A. B.* before that time paid, laid out, and expended to and for the use of the said *C. D.*, at his like instance and request; and, being so indebted, he, the said *C. D.*, in consideration thereof, afterwards, to wit, on the day and year aforsaid, at ——— aforsaid, in the county aforsaid, undertook and faithfully promised the said *A. B.* to pay him the said last-mentioned sum of money when he, the said *C. D.*, should be thereto afterwards requested. *And whereas also* the said *C. D.* afterwards, to wit, on the day and year aforsaid, at ——— aforsaid, in the county aforsaid, was indebted to the said *A. B.* in the further sum of ——— pounds, of like lawful money, for so much money by the said *C. D.* before that time had and received, to and for the use of the said *A. B.*, and, being so indebted, he, the said *C. D.*, in consideration thereof, afterwards, to wit, on the day and year aforsaid, at ——— aforsaid, in the county aforsaid, undertook and faithfully promised the said *A. B.* to pay him the said last-mentioned sum of money when he, the said *C. D.*, should be thereto afterwards requested. *And whereas also* the said *C. D.* afterwards, to wit, on the day and year aforsaid, at ——— aforsaid, in the county aforsaid, accounted with the said *A. B.* of and concerning divers other sums of money from the said *C. D.* to the said *A. B.* before that time due and owing, and then in arrear and unpaid; and upon that account the said *C. D.* was then and there found to be in arrear and indebted to the said *A. B.* in the further sum of ——— pounds, of like lawful money, and, being so found in arrear and indebted, he, the said *C. D.*, in consideration thereof, afterwards, to wit, on the day and year aforsaid, at ——— aforsaid, in the county aforsaid, undertook and faithfully promised the said *A. B.* to pay him the said last-mentioned sum of money when he, the said *C. D.*, should be thereto afterwards requested. Yet the said *C. D.*, not regarding his said several promises and undertakings, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the said *A. B.* in this behalf, hath not yet paid the said several sums of money, or any part thereof, to the said *A. B.*, (although oftentimes afterwards requested.) But the said *C. D.*, to pay the same or any part thereof, hath hitherto wholly refused and still refuses, to the damage of the said *A. B.* of ——— pounds; and therefore he brings his suit, &c., (*g.*)

When several counts are thus used, the defendant may, according to the nature of his defense, demur to the whole; or plead a single plea applying to the whole; or may demur to one count and plead to another; or plead a several plea

(*g.*) See the declaration in *assumpsit*, with a count for *goods sold* only, *supra* p. 72.

to each count; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings, and the production of *several issues*. But, whether one or more issues be produced, if the decision, whether in law or fact, be in the plaintiff's favor, as to any one or more counts, he is entitled to judgment pro tanto, though he fail as to the remainder, (*h.*)

The use of several counts, when applied to *distinct causes of action*, is quite consistent with the rule against duplicity; for the object of that rule, as formerly explained, (*i.*) is to prevent several issues in respect of the same demand only; there being no objection to several issues where the demands are several. But it happens more frequently than otherwise that, when various counts are introduced, they do *not* really relate to distinct claims, but are adopted merely as *so many different forms of propounding the same cause of action*, and are therefore a mere evasion of the rule against duplicity. This is a relaxation of very ancient date, and has long since passed, by continual sufferance, into allowable and regular practice. It takes place when the pleader, in drawing the declaration or bill in any action, or in preparing the præcipe (*k.*) for an original writ in trespass, or trespass on the case, after having set forth his case in one view, feels doubtful whether, as so stated, it may not be insufficient in point of law, or incapable of proof in point of fact; and at the same time perceives another mode of statement, by which the apprehended difficulty may probably be avoided. Not choosing to rely on either view of the case exclusively, he takes the course of adopting both; and accordingly inserts the second form of statement in the shape of a second count, in the same manner as if he were proceeding for a separate cause of action. If, upon the same principle, he wishes to vary still further the method of allegation, he may find it necessary to add

(*h.*) See *Phillips v. Howgate*, 5 Barn. & Ald., 220.

(*i.*) *Supra*, p. 245.

(*k.*) As to the præcipe, *vide supra*, p. 56.

many other succeeding counts besides the second; and thus, in practice, a great variety of counts often occurs in respect of the same cause of action; the law not having set any limits to the discretion of the pleader, in this respect, if fairly and rationally exercised, (*l.*)

It may be desirable, however, to explain more particularly in what case, and with what objects, resort is had to several counts in respect of the same cause of action. This may happen either where the state of facts to which each count refers is really different, or where the same state of facts is differently represented. The first case may be exemplified in the instance, formerly cited, of an action of debt on a penal bill, whereby the defendant engaged to pay 7*l.*, as penalty, in the event of non-payment of 10*s.* on the 11th of June, and 10*s.* more on the 10th of July, and 10*s.* every three weeks after, till a certain sum was satisfied. Let it be supposed that the plaintiff complains of a failure in payment both on the 11th June and 10th July. Either failure entitles him to the penal sum for which he brings the action; but, if he states them both in the same count, the declaration, as we have seen, will be double, (*m.*) The case, however, may be such as to make it convenient to rely on both defaults; for there may be a doubt whether one or other of the payments were not made, though it may be certain that there was at least one default; and if, under these circumstances, the plaintiff should set forth one of the defaults, and the defendant should take issue upon it, he might defeat the action by proving payment on the day alleged, though he would have been unable to prove the other payment. To meet this difficulty, the pleader might resort to two counts. The first of these would set forth the penal bill, alleging a default of payment on the 11th of June; the second would again set

(*l.*) See *Meeke v. Oxlade*, 1 N. R., 289; *Gabell v. Shaw*, 2 Chit. Rep., 299; *Thomas v. Hanscombe*, 1 Bing., 281; *Brindley v. Dennet*, 2 Bing., 184; *Nelson v. Griffiths*, *ibid.*, 412; 1 Tidd., 667, 8th edit.

(*m.*) *Supra*, p. 243.

forth the same bill, describing it as "a certain *other* bill," &c., and would aliege a default on the 10th of July. The effect of this would be, that the plaintiff, at the trial, might rely on either default, as he might then find convenient. In this instance, the several counts are each founded on a *different state of facts*, (viz, a different default in payment,) though in support of the same demand. But it more frequently happens that it is the *same state of facts differently represented* which forms the subject of different counts. Thus, where a man has ordered goods of another, and an action is brought against him for the price, the circumstances may be conceived to be such as to raise a doubt whether the transaction ought to be described as one of *goods sold and delivered*, or of *work and labor done*; and, in this case, there would be two counts, setting forth the claim both ways, exactly as in the two first counts of the last example, in order to secure a verdict, at all events, upon one of them. And it may be useful to observe here that, upon this principle, the four last counts of that example, viz, those for *money lent and advanced*, *money paid*, *money had and received*, and *money due on account stated*, (commonly called the *money counts*,) are, some or all of them, generally inserted, as a matter of course, in every præcipe, declaration, or bill in assumpsit, though the cause of action be also stated in a more special form in other counts. This is done because it often happens that, when the special counts are found incapable of proof at the trial, the cause of action will resolve itself into one of these general pecuniary forms of demand, and thus the plaintiff may obtain a verdict on one of these money counts, though he fail as to all the rest. Again, the same state of facts may be varied, by omitting, in one count, some matter stated in another. In such a case the more special count is used, lest the omission of this matter should render the other insufficient in point of law. The more general count is adopted, because, if good in point of law, it will relieve the plaintiff from the necessity of proving such omitted matter in point of fact. If the defendant demurs to the

latter count as insufficient, and takes issue in fact on the former, the plaintiff has the chance of proving the matter alleged, and also the chance of succeeding on the demurrer. If, on the other hand, the defendant does not think proper to demur, but takes issue in fact on both, the plaintiff will have no occasion at the trial to rely at all upon the former count, but will succeed by merely proving the latter.

It is to be observed, that whether the subjects of several counts be *really* distinct or identical, they must always *purport* to be founded on distinct causes of action, and not to refer to the same matter; and this is effected by the insertion of such words as "other," "the further sum," &c., as in the above examples. This is evidently rendered necessary by the rule against duplicity, which, though *evaded*, as to the declaration, by the use of several counts, in the manner here described, is not to be directly *violated*, (*n.*)

The next subjection for consideration is that of *several pleas*.

It has been already stated that the rule against duplicity does not prevent a defendant from giving distinct answers to different claims or complaints on the part of the plaintiff, (*o.*) To several counts, or to distinct parts of the same count, he may, therefore, plead several pleas, *viz.* one to each, (*p.*) Thus, in an action of trespass, for two assaults and batteries, he may plead, as to the first count, not guilty; and as to the second, the statute of limitations, *viz.* that he was not guilty within four years; and the following is an example of the form in which this may be done:

(*n.*) *Hart v. Longfield*, 7 Mod., 148; *West v. Troles*, 1 Salk., 213; *Bac. Ab., Pleas, &c.*, B.

(*o.*) *Supra*, p. 245.

(*p.*) Or he may plead to one count, and demur to another. (See *post*, Rule ii.) And it seems that, in pleading different pleas to different parts of the declaration, the defendant is not confined to pleas of the *same kind*. Thus, it is laid down that he may plead in abatement to part, and demur or plead in bar to the residue. (2 Saund., 209 e, u. 1.) And see *Herries v. Jamieson*, 5 T. R., 553.

PLEAS.

In trespass, for assault and battery, (g.)

And the said *C. D.*, by ———, his attorney, comes and defends the force and injury, when, &c., and, *as to the first count* of the said declaration, the said *C. D.* says, that he is not guilty of the said trespasses therein mentioned, or any part thereof, in manner and form as the said *A. B.* hath above thereof complained; and of this the said *C. D.* puts himself upon the country. And *as to the second count* of the said declaration, the said *C. D.* says, that the said *A. B.* ought not to have or maintain his aforesaid action thereof against him, because, he says, that he, the said *C. D.*, was not, at any time within four years next before the commencement of this suit, guilty of the said trespasses in the said second count mentioned, or any part thereof, in manner and form as the said *A. B.* hath above complained; and this the said *C. D.* is ready to verify. Wherefore he prays judgment if the said *A. B.* ought to have or maintain his aforesaid action thereof against him.

But it may also happen that a defendant may have several distinct answers to give to the *same* claim or complaint. Thus, to an action of trespass for two assaults and batteries, he may have ground to deny both the trespasses, and also to allege that they were neither of them committed within four years. Anterior, however, to the regulation, which will be presently mentioned, it was not competent to him to plead these several answers to both trespasses, as that would have been an infringement of the rule against duplicity. The defendant was, therefore, obliged to elect between his different defenses, where more than one thus happened to present themselves, and to rely on that which, in point of law and fact, he might deem most impregnable. But as a mistake in that selection might occasion the loss of the cause, contrary to the real merits of the case, this restriction against the use of several pleas to the same matter, after being for ages observed in its original severity, was at length considered contrary to the true principles of justice, and was accordingly relaxed by legislative enactment. The stat. 4 Ann., c. 16, s. 4, provides, that "it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead as many several

(g) See the declaration, *supra*, p. 255.

matters thereto as he shall think necessary for his defense." Since this act the course has been for the defendant, if he wishes to plead several matters to the same subject of demand or complaint, to apply previously for a rule of court permitting him to do so; and, upon this, a rule is accordingly drawn up for that purpose, (*r.*) The form of pleading several pleas, where leave is thus granted, will appear by the following example:

PLEAS.

In trespass, for assault and battery, (s.)

And the said *C. D.*, by ———, his attorney, comes and defends the force and injury, when, &c., and says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in manner and form as the said *A. B.* hath above thereof complained; and of this the said *C. D.* puts himself upon the country. *And for a further plea* in this behalf, the said *C. D.*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *A. B.* ought not to have or maintain his aforesaid action against him, because, he says, that he, the said *C. D.*, was not, at any time within four years next before the commencement of this suit, guilty of the said trespasses in the said declaration mentioned, or any part thereof, in manner and form as the said *A. B.* hath above complained; and this the said *C. D.* is ready to verify. Wherefore he prays judgment if the said *A. B.* ought to have or maintain his aforesaid action against him.

When several pleas are pleaded, either to different matters, (as in p. 262,) or (by virtue of the statute of Anne) to the same matter, as in the last example, the plaintiff may, according to the nature of his case, either demur to the whole, or demur to one plea and reply to the other, or make a several replication to each plea; and, in the two latter cases, the result may be a corresponding severance in the subsequent pleadings, and the production of *several issues*. But, whether one or more issues be produced, if the decision, whether in law or fact, be in the defendant's favor, as to any one or more pleas, he is entitled to judg-

(*r.*) But the court have a discretion, either to permit or refuse, according to the nature of the matters proposed to be pleaded. (*Jerkins v. Edwards*, 5 T. R., 97.)

(*s.*) See the declaration, *supra*, p. 255.

ment, though he fail as to the remainder, *i. e.*, he is entitled to judgment in respect of that subject of demand or complaint to which the successful plea relates; and, if it were pleaded to the whole declaration, to judgment generally, though the plaintiff should succeed as to all the other pleas.

By a relaxation similar to that which has obtained with respect to *several counts*, the use of *several pleas* (though presumably intended by the statute to be allowed only in a case where there are really several grounds of defense,) (*t.*) is, in practice, carried much further. For it was soon found that, when there was a matter of defense by way of special plea, it was generally expedient to plead that matter in company with the general issue, whether there were any real ground for denying the declaration or not; because the effect of this is to put the plaintiff to the proof of his declaration before it can become necessary for the defendant to establish his special plea; and thus the defendant has the chance of succeeding, not only on the strength of his own case, but by the failure of the plaintiff's proof. Again, as the plaintiff, in the case of several counts, finds it convenient to vary the mode of stating the same subject of claim, so, for similar reasons, defendants were led, under color of pleading distinct matters of defense, to state variously, in various pleas, the same defense, and this, either by presenting it in an entirely new view, or by omitting in one plea some circumstances alleged in another. To this extent, therefore, is the use of several pleas now carried; and, accordingly, the form of pleading, in the last of the above examples, would, in practice, be adopted, instead of that in the first, whether the truth of the case really warrants a denial of both counts or not. Some efforts, however, were at one time made to restrain this apparent abuse of the indulgence given by the statute. For that *leave of the court* which the statute requires was formerly often refused where the proposed subjects of

(*t.*) See *Lord Clinton v. Morton*, 2 Str., 1000.

plea appeared to be *inconsistent*; and on this ground leave has been refused to plead to the same trespass *not guilty* and *accord* and *satisfaction*, or *non est factum* and *payment* to the same demand, (u.) In modern practice, however, such pleas, notwithstanding the apparent repugnancy between them, are permitted, (x;) and the only pleas, perhaps, which have been uniformly disallowed, on the mere ground of inconsistency, are those of the general issue and a *tender*, (y.)

On the subject of several pleas it is to be further observed, that the statute extends to the case of pleas *only*, and not to *replications* or *subsequent pleadings*. These remain subject to the full operation of the common law against duplicity, so that, though to each plea there may, as already stated, be a separate replication, (z,) yet there cannot be offered to the same plea more than a single replication, nor to the same replication more than one rejoinder; and so to the end of the series. The legislative provision allowing several matters of *plea* was confined to that case, under the impression, probably, that it was in that part of the pleading that the hardship of the rule against duplicity was most seriously and frequently felt, and that the multiplicity of issues which would be occasioned by a further extension of the enactment would have been attended with expense and inconvenience more than equivalent to the advantage. The effect, however, of this state of law is somewhat remarkable. For example: it empowers a defendant to plead to a declaration in assumpsit, for goods sold and delivered, 1, the general issue; 2, that the cause of action did not accrue within six years; 3, that he was an infant at the time of the contract. On the first plea the plaintiff has

(u.) Com. Dig., Pleader, E. 2.

(x.) *Vide* 1 Sel. Pract., 299; 2 Chitty, 582, 1st edit. See Rama, Chitty v. Hume, 13 East., 255.

(y.) But the court of C. P. lately refused to allow the defendant in scire facias, on a judgment, to plead, 1, payment; 2, that the judgment was obtained by fraud; 3, that the warrant of attorney on which judgment was entered was obtained by fraud. (*Shaw v. Lord Alvanley*, 2 Bing., 325.)

(z.) *Supra*, p. 263.

only to join issue, but with respect to each of the two last he may have several answers to give. The case may be such as to afford either of these replications to the statute of limitations, viz, that the cause of action *did* accrue within six years, or that at the time the cause of action accrued he was *beyond sea*, and that he commenced his suit within six years after his return. So, to the plea of infancy he may have ground for replying, either that the defendant was *not* an infant, or that the goods for which the action is brought were *necessaries* suitable to the defendant's condition in life. Yet, though the defendant had the advantage of his three pleas cumulatively, the plaintiff is obliged to make his election between these several answers, and can reply but one of them to each plea.

It is also to be observed, that the power of pleading several matters extends to pleas in *bar* only, and not to those of the *dilatory* class, with respect to which the leave of the court will not be granted, (a.)

Again, it is to be remarked, that the statute does not operate as a total abrogation, even with respect to pleas in *bar*, of the rule against duplicity. For, first, it is necessary (as we have seen) to obtain *the leave of the court* to make use of several matters of defense; and then the several matters are pleaded formally, with the words "by leave of the court for this purpose first had and obtained," in the manner shown in the example, (b.) The several defenses must also each be pleaded as a *new* or *further* plea, with a formal commencement and conclusion as such; so that, notwithstanding the statute and the leave of the court obtained in pursuance of it, to plead several matters, it would still be improper to incorporate several matters in *one plea* in any case in which the plea would be thereby rendered double at common law.

Such is the nature and extent of the rule against double pleading, and of the modifications to which, in practice,

(a.) See 1 Sell. Pract., 275.

(b.) *Supra*, p. 283.

it is subject. Under this rule, it remains only to observe that, if, instead of demurring for duplicity, the opposite party passes the fault by, and pleads over, he is, in that case, bound to answer each matter alleged; and has no right, on the ground of the duplicity, to confine himself to any single part of the adverse statement, (c.)

RULE II.

IT IS NOT ALLOWABLE BOTH TO PLEAD AND TO DEMUR TO THE SAME MATTER, (d.)

This rule depends on exactly the same principles as the last. As it is not allowable to *plead* double, lest several issues in fact in respect of the same matter should arise, so it is not permitted both to *plead and demur* to the same matter, lest an issue in fact and an issue in law, in respect of a single subject, should be produced. The party must, therefore, make his election.

The rule, however, it will be observed, only prohibits the pleading and demurring *to the same matter*. It does not forbid this course as applicable to *distinct statements*. Thus, a man may plead to one count, or one plea, and demur to another. The reason of this distinction is sufficiently explained by the remarks already made on the subject of duplicity in pleading.

Lastly, it is to be remarked, that the statute of Anne, which authorizes the pleading of *several pleas*, gives no authority for *demurring and pleading* to the same matter. The rule now in question, therefore, is not affected by that provision, but remains in the same state as at common law.

SECTION IV.

OF RULES WHICH TEND TO PRODUCE CERTAINTY OR PARTICULARITY IN THE ISSUE.

The rules tending to certainty in the pleadings, and, by consequence, certainty in the issue, are very numerous,

(c.) *Bolton v. Cannon*, 1 Vent., 272.

(d.) Bac. Ab., Pleas, &c., K. 1.

and in their nature do not easily admit of methodical arrangement; but an enumeration shall here be attempted of such of them as appear to be of principal importance.

RULE I.

THE PLEADINGS MUST HAVE CERTAINTY OF PLACE, (c.)

It was formerly explained (*f*) that the nature of the trial by jury, while conducted in the form which first belonged to that institution, was such as to render particularity of *place* absolutely essential in all issues which a jury was to decide. Consisting, as the jurors formerly did, of witnesses, or persons in some measure cognizant of their own knowledge of the matter in dispute, they were of course, in general, to be summoned from the particular place or neighborhood where the fact happened, (*g*;) and, in order to know into what county the venire facias for summoning them should issue, and to enable the sheriff to execute that writ, it was necessary that the issue, and therefore the pleadings out of which it arose, should show particularly what that place or neighborhood was, (*h*.) Such place or neighborhood was called *the venue*, or *visne*, (from vicinetum,) (*i*;) and the statement of it in the pleadings obtained the same name; to allege the place being, in the language of pleading, to *lay the venue*.

The present law of venue may be stated as follows:

First, the *original writ* must be directed to the sheriff of some county; and in that county the *action* is said to be *brought* or *laid*. Each affirmative traversable allegation in the writ is to be laid with a venue or place, comprising

(c.) Com. Dig., Pleader, C. 20; *Ibid*, Abatement, H. 13; Co. Litt., 125 a.

(f.) *Vide supra*, p. 154.

(g.) Co. Litt., by Harg., 125 a, n. 1. "The venire was to bring up the *parcs* of the place where the fact was laid, in order to try the issue; and originally every fact was laid in the place where it was really done; and therefore the written contracts bore date at a certain place." (Gilb. Hist., C. P., 84.)

(h.) *Ilderton v. Ilderton*, 2 H. Bl., 161; per Lord Mansfield, *Mostyn v. Fabrigas*, Cowp., 176; Co. Litt., 125 a, b. See 2 Hen. VII, 4.

(i.) Bac. Ab., Visne or Venue, A.; ? Bl Com., 294.

not only the *county* in which the fact arose, but the *parish*, *town*, (*k*.) or *hamlet* within the county, (*l*;) but in a mere denial, of course, no venue is to be used, nor is any required in respect of facts not traversable; for example, matter of inducement or aggravation, (*m*.) The pleader has his election to lay either the parish, the town, or the hamlet; but a more extensive division than a parish (for example, a hundred) is not a sufficient venue; that having apparently been considered, in ancient times, as too large an allegation of place to instruct the sheriff properly as to the summoning of the jurors, (*n*.) Of the different facts alleged in the writ, it is necessary that some principal one, at least, should be laid in some parish, town, or hamlet, within the county in which *the action is brought*, in order to justify the bringing of the action in that county, (*o*.) and such county, and the particular place so laid within it, are called the *venue in the action*, or the *venue where the action is laid*.

The *declaration*, as it conforms to the writ in other particulars, (*p*.) so it adheres of necessity to the same venue. The county where the action is laid is placed at the commencement, in the margin of the declaration, (*q*;) and all the different affirmative traversable allegations are to be

(*k*.) A *town* is, in pleading, otherwise called *vill*. (1 Bl. Com., 114.) See *Curwen v. Salkeld*, 3 East., 538.

(*l*.) Co. Litt., 125 a; Com. Dig., Abatement, H. 13; *Ibid*, Pleader, C. 20; *Braddish v. Bishop*, Cro. Eliz., 260; *The King v. Holland*, per Buller, J., 5, T. R., 620; *Amory v. Brodrick*, 5 Barn. & Ald., 712. But in *Ware v. Boydell*, 3 M. & S., 148, (which was an action on a promissory note,) the court held it sufficient to allege a county for venue, in the declaration, without a parish, because the jury now come de corpore comitatus.

(*m*.) Com. Dig., Pleader, C. 20; cites Pl. Com., 190 b.

(*n*.) Co. Litt., by Harg., 125, n. 1. If the fact happened out of any parish, town, or hamlet, but in some other *known place*, such as a forest, or the like, such *known place* may be laid for venue. (Co. Litt., 125 a, b; Bac. Ab., Visne, E., in marg.) And if it happened out of any parish, town, hamlet, or *known place*, the venue may be laid in the county generally. (Bac. Ab., *ibid*.)

(*o*.) See *The King v. Burdett*, 4 Barn. & Ald., 175, 176 *Calvin's Case*, 7 Rep., 1; *Scott v. Brest*, 2 T. R., 238.

(*p*.) *Vide supra*, p. 63.

(*q*.) See the forms of declaration in the first chapter.

laid with a venue of parish, town, or hamlet, as well as county, (r,) in the same manner as above explained with regard to the writ, and in accordance with that instrument.

In proceedings by *bill*, the law of venue is exactly the same as that already described, subject only to the difference necessarily introduced by the absence of the original writ, the only effect of which is, that the declaration, instead of the original, first determines where the *action is laid*, and, as in proceedings by original the *action* is said to be *brought or laid* in the county into which the writ issues, so in proceedings by bill it is said to be *brought or laid* in the county named in the margin of the declaration. Again, as in proceedings by original, the county into which the writ issues, and the place within that county at which the principal fact is laid, are called the *venue in the action*, so in proceedings by bill, the same term applies to the county in the margin of the declaration, and the place within that county laid to the principal fact.

Whether the action be by original or by bill, the *plea*, *replication*, and *subsequent pleadings* lay a venue to each affirmative traversable allegation, according to the principles already stated, until issue joined.

It having been stated that the original object of thus laying a venue was to determine the place from which the *venire facias* should direct the jurors to be summoned, in case the parties should put themselves upon the country, it will be proper now to consider how far the same use is made of the venue in modern practice. And, in order to explain clearly the existing law on this subject, it will be convenient to take a short retrospect of its former state and progress.

The most ancient practice, as established at the period when juries were composed of persons cognizant of their own knowledge of the fact in dispute, was, of course, to summon the jury from that venue which had been laid to the particular fact *in issue*, and from the venue of *parish*

(r.) See page 269, note L.

town, or hamlet, as well as county, (s.) Thus, in an action of debt on bond, if the declaration alleged the contract to have been made at Westminster, in the county of Middlesex, and the defendant, in his plea, denied the bond, issue being joined on this plea, it would be tried by a jury from Westminster. Again, if he pleaded an affirmative matter, as, for example, a release, he would lay this new traversable allegation with a venue; and, if this venue happened to differ from that in the declaration, being laid, for example, at Oxford, in the county of Oxford, and issue were taken on the plea, such issue would be tried by a jury from Oxford, and not from Westminster, (*l.*) And it may here be incidentally observed, that as the place or neighborhood in which the fact arose and also the allegation of that place in the pleadings was called the *venue*, so the term was often applied to the jury summoned from thence. Thus it would be said in the case last supposed that *the venue was to come from Oxford*. With respect to the *form* of the venire at this period, it was as follows: venire facias duodecim liberos et legales homines, de vicineto de W., (or O.,) (*i. e.*, the parish, town, or hamlet,) per quos rei veritas melius sciri poterit, &c., (*u.*)

While such appears to have been the most ancient state of practice, (*x.*) it soon sustained very considerable changes. When the jury began to be summoned no longer as witnesses, but as judges, and, instead of being cognizant of the fact on their own knowledge, received the fact from the testimony of others judicially examined before them, the reason for summoning them from the immediate neigh-

(*s.*) Co. Litt., 125 a.; Bac. Ab., Visne or Venue, E.; and see an illustrative case, 43 Ed. III, 1.

(*l.*) Craft v. Boite, 1 Saund., 246 b.; Com. Dig., Action, N. 12; 8 Ed. III, 8, pl., 20; 45 Ed. III, 15; 3 Reeves, 110.

(*u.*) *De vicineto tali* (is the expression of Bracton) per quos rei veritas melius sciri poterit, &c., Bract., 309 b., 310 a., 396 b., 397 a. In the statute 27 Eliz., c. 6, sec. 1, the form is, 12 liberos et legales homines *de vicineto de B.*, per quos rei veritas, &c.; and see Litt., sec. 234.

(*x.*) See Appendix, note 60.

borhood ceased to apply, and it was considered as sufficient if, by way of partial conformity with the original principle, a *certain number of the jury* came from the same *hundred* in which the place laid for venue was situate, though their companions should be of the county only, and neither of the venue nor even of the hundred. This change in the manner of executing the venire did not, however, occasion any alteration in its *form*, which still directed the sheriff, as in former times, to summon the whole jury from the particular venue, (*y.*) The number of hundredors which it was necessary to summon was different at different periods; in later times no more than *two* hundredors were required in a personal action, (*z.*)

In this state of the law was passed the statute 16 and 17 Car. II, c. 8. By this act (which is one of the statutes of jeofails) it is provided, "that after verdict judgment shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county or place *where the action is laid.*" This provision was held to apply to the case (among others) where issue had been taken on a fact laid with a different venue from that *in the action*, but where the venire had improperly directed a jury to be summoned from the *venue in the action*, instead of the venue *laid to the fact in issue*, (*a.*) This had formerly been matter of *error*, and, therefore, ground for arresting or reversing the judgment, (*b.*) but by this act (passed with a view of removing what had become a merely formal objection) the error was cured, and the staying or reversal of the judgment disallowed.

While such was its direct operation, it has had a further effect, not contemplated, perhaps, by those who devised the enactment. For what the statute only purported to cure as an error, it has virtually established as regular and uni-

(*y.*) 27 Eliz., c. 6, s. 1; Litt., sec. 234.

(*z.*) 27 Eliz., c. 6, s. 5. (See Appendix, note 61.)

(*a.*) Craft v. Boite, 1 Saund., 247.

(*b.*) 1 Saund., 247, n. 1; 2 Saund., 5, n. 3; Bowyer's Case, Cro. Eliz., 463; Eden's Case, 6 Rep., 15 b; Co. Litt., by Harg., 125 a., n. 1.

form practice; and issues taken on facts laid with a different venue from that *in the action* have, for a long time past, been constantly tried, not by a jury of the venue laid to the *fact in issue*, but by a jury of the *venue in the action*, (c.)

Another change was introduced by the statute 4 Ann., c. 16, sec. 6. This act provides that "every venire facias for the trial of any issue shall be awarded of the *body* of the proper county where such issue is triable," instead of being (as in the ancient form) awarded from the particular venue of parish, town, or hamlet. From this time, therefore, the form of the venire has been changed, and directs the sheriff to summon twelve good and lawful men, &c., "from the body of his county," (d;) and they are accordingly, in fact, all summoned from the body of the county only, and no part of them necessarily from the hundred in which the particular place laid for venue is situate, (e.)

On the whole, then, by the joint effect of these two statutes, the venire, instead of directing the jury to be summoned from that venue which had been laid to the *fact in issue*, and from the venue of *parish, town, or hamlet*, as well as county, now directs them, in all cases, to be summoned from the *body of the county in which the action is laid*, whether that be the county laid to the fact in issue or not, and without regard to the parish, town, or hamlet.

What has been hitherto said on the subject of venue relates only to the form in which the venue is laid and its effect as to the venire. There is, however, another very important point still remaining to be considered, viz, how far it is necessary to lay the venue *truly*.

Before the change in the constitution of juries above mentioned, the venue was of course always to be laid in the true place where the fact arose, for so the reason of

(c.) 2 Saund., 5, n. 3.

(d.) See the form of the venire, *supra*, p. 115.

(e.) And even in criminal proceedings it is now expressly enacted, that no jurors shall be required to be returned from any hundred or hundreds, or from any particular venue within the county, and that the want of hundredors shall be no cause of challenge. (6 Geo. IV, c. 50, sec. 13.)

the law of venue evidently required. But when, in consequence of that change, this reason ceased to operate, the law began to distinguish between cases in which the truth of the venue was material, or of the substance of the issue, and cases in which it was not so. A difference began now to be recognized between *local* and *transitory* matters. The former consisted of such facts as carried with them the idea of some certain place, comprising all matters relating to the *reality*, and hardly any others; the latter consisted of such facts as might be supposed to have happened anywhere; and, therefore, comprised debts, contracts, and generally all matters relating to the person or personal property. With respect to the former, it was held, that if any local fact were laid in pleading at a certain place, and issue were taken on that fact, the place formed part of the substance of the issue, and must, therefore, be proved as laid, or the party would fail as for want of proof. But as to transitory facts, the rule was, that they might be laid as having happened at one place, and might be proved on the trial to have occurred at another, (*f.*)

The present state of the law, with respect to the necessity of laying the true venue, is accordingly as follows:

Actions are either *local* or *transitory*. An action is local, if all the principal facts on which it is founded be local; and transitory, if any principal fact be of the transitory kind. In a local action, the plaintiff must lay the *venue in the action truly*. In a transitory one, he may lay it in any county, and any parish, town, or hamlet within the county, that he pleases.

From this state of the law, it follows, first, that if an action be local, and the facts arose *out of the realm*, such action cannot be maintained in the English courts, (*g.*) for, as the *venue in the action* is to be laid truly, there is no county into which, consistently with that rule, the original writ can be directed. But, on the other hand, if the

(*f.*) Vin. Ab., Trial, M. f.; Co. Litt., 282 a. See Appendix, note 62.

(*g.*) Per Buller, J., *Doulson v. Matthews*, 4 T. R., 503.

action be transitory, then, though all the facts arose abroad, the action may be maintained in this country; because the *venue in the action* may be laid in any English county, at the option of the plaintiff.

The same state of law also leads to the following inference: that, in a transitory action, the plaintiff may have the action tried in any county that he pleases; for (as we have seen) he may lay the *venue in the action* in any county, and upon issue joined the venire issues into the county where the *venue in the action* is laid. And such, accordingly, is the rule, subject only to a check interposed by another regulation, viz, that which relates to the *changing of the venue*. The courts established, about the reign (as it is said) of James I, (*h.*) a practice, by which defendants were enabled to protect themselves from any inconvenience they might apprehend from the venue being laid contrary to the fact, and enforce, if they pleased, a compliance with the stricter and more ancient system, (*i.*) By this practice, when the plaintiff in a transitory action lays a false venue, the defendant is entitled to *move the court to have the venue changed, i. e.*, altered to the right place; and the court, upon affidavit that the cause of action arose wholly in the county to which it is proposed to change the venue, will in most cases grant the application, and oblige the plaintiff to amend his declaration in this particular, unless he, on the other hand, will undertake to give, at the trial, some material evidence arising in the county where the venue was laid.

Whether the action be local or transitory, every *local fact* alleged in the *writ and declaration* must still be laid with its true venue, on peril of a variance, if the fact should be brought in issue; but transitory facts may be laid with any venue, at the choice of the plaintiff; though it is the usual and most proper course to lay all these with the *venue in the action*. As in the writ and declaration, so

(*h.*) *Knight v. Farnaby*, 2 Salk., 870.

(*i.*) See Appendix, note 63.

in the *plea* and *subsequent pleadings*, every *local* fact must be laid with its true venue, under peril of variance; but with respect to *transitory* ones, the rule is, that they must be laid with the *venue in the action*, (*k*;) and even to lay the true place is, in this case, not allowable, if it differ from that venue. Thus, in the example already supposed, of an action on a bond, where the action is laid in Middlesex, if the defendant should plead a release at Oxford, this departure from the *venue in the action*, would be bad, (*l*;) though the release should really have been executed there. For as the plaintiff may, for a transitory matter, choose any venue that he likes, in his writ and declaration, so, upon the same principle, it would have followed, that the defendant might also, for a transitory matter, have chosen any venue in his plea; and thus, whoever happened to make the last affirmative allegation, and, therefore, to lay the last venue, would have been able (prior to the alteration of practice introduced by the statute of Charles II,) to draw the venire facias and the trial to any place that he pleased. But it was thought more reasonable and convenient that this option should rest with the plaintiff, who, having in the first instance chosen a venue, ought not to be removed from it without cause. The defendant, therefore, is obliged to follow the venue that the plaintiff has laid; and, in consequence of the establishment of this rule, it seems now to be held that, to transitory matters, *no* venue need now be laid in pleadings subsequent to the declaration, because, with respect to every matter of this description, the original venue will be taken to be *implied*, (*m*.) In practice, however, it is usual to lay a venue in these as well as in the declaration; and perhaps, in point of strict form, it is the more proper course.

Another point to be noticed on this subject of the true allegation of venue, is, that when transitory matters are

(*k*.) Wright *v.* Ramscot, 1 Saund., 85; 2 Saund., 5, n. 3

(*l*.) Co. Litt., 282, b.

(*m*.) See 1 Cnitty, 517, 1st edit.

alleged out of their true place, it seems to be necessary that they should be laid, as the phrase is, *under a videlicet*, *i. e.*, with the prior intervention of the words "to wit," or "that is to say;" for the form of which the reader may be referred to many of the past examples of pleadings in this work. The effect and object of the *videlicet*, is to mark that the party does not undertake to prove the precise place. And, accordingly, there is some doubt whether the omission of a *videlicet* does not occasion a necessity, in the event of a traverse even of a transitory matter, of proving the place alleged, (*n.*) On the other hand, however, it is clear, that where the place is material, or, in other words, where the matter is local, the use of *videlicet* will not prevent the necessity of proving the venue laid. This doctrine as to a *videlicet*, it will be observed, is not peculiar to venue, but applies (as will afterwards appear) to many other of the points on which certainty is required in pleading.

The last point of remark that occurs on this subject, relates to the case where a *local* matter, occurring *out of the realm*, is alleged in the course of the pleading. This was formerly considered as a case of difficulty; for, on the one hand, all local facts are to be alleged (as has been shown) in the true place, and, on the other hand, if a place out of the realm be laid for venue, and issue be joined on the fact, it was, at one time, supposed that the issue could not be tried, because no jury could be summoned from the place; and prior to the statute of Charles, it was, by the general rule, essential (as already stated) that the jury should be summoned from the venue laid to the fact in issue, (*o.*) It was, however, early decided, that notwith-

(*n.*) Mr. Chitty inclines to consider the omission as immaterial. (See 1 Chitty, 308, note *b*, 1st edit.) Opposed, however, to the authorities on which the learned author relies, are *Symmons v. Knox*, 3 T. R., 68; *Arnfield v. Bate*, 3 M. & S., 173; 2 Saund., 291 c., n. 1; *Bray v. Freeman*, 2 J. B. Moore, 114; *Corporation of Arundel v. Bowman*, *ibid.*, 93; *Crispin v. Williamson*, 8 Taunt., 107; *Draper v. Garratt*, 2 Barn. & Cres., 2.

(*o.*) See a curious instance of the difficulty formerly found in such cases,

standing that general rule, such matter might be tried by a jury from the *venue in the action*, (p.) And, by way of more effectually preventing the objection, a form has long been in use, which satisfies the double object of conforming to the true place, and, at the same time, laying a venue within the realm; the venue of a fact arising abroad being often alleged with a *videlicet*, under the following form of expression: "In parts beyond the seas, at Fort St. George, in the East Indies," (the real place,) "to wit, at Westminster, in the county of Middlesex," (the *venue in the action*,) (q.) With respect to this method, indeed, of laying the true place, with the addition of the venue in the action, under a *videlicet*, we may take occasion to observe, that it is usually applied, not only to local facts arising out of the realm, but to those arising *in this country* also, if they happened at a different venue from that *in the action*.

RULE II.

THE PLEADINGS MUST HAVE CERTAINTY OF TIME, (r.)

In personal actions, the pleadings must allege the *time*; that is, the day, month, and year when each traversable fact occurred; and, when there is occasion to mention a continuous act, the period of its duration ought to be shown, (s.)

The necessity of laying a time, like that of laying a venue, extends to *traversable* facts only, and therefore no time need be alleged to matter of inducement or aggravation. The courts, indeed, are in the habit of considering the allegations of place and time as connected together; and have

cited per Abbott, C. J., *The King v. Burdett*, 4 Barn. & Ald., 172; and another instance, cited *Dowdale's Case*, 6 Rep., 47 b.; and see *Broddeck v. Briggs*, Carth., 265; *Nichols v. Pawlett*, *ibid.*, 302; *Holding v. Haling*, 3 Keb., 150.

(p.) *Dowdale's Case*, 6 Rep., 46 b.; *Calvin's Case*, 7 Rep., 27 a.

(q.) Com. Dig., Action, n. 7.

(r.) Com. Dig., Pleader, C 19; *Halsey v. Carpenter*, Cro. Jac., 359; *Denison v. Richardson*, 14 East., 291.

(s.) *Ibid.*

laid down this general principle, that wherever it is necessary to lay a venue, it is also necessary to mention time, (*t.*)

As the place, in transitory matters, is considered as forming no material part of the issue, so that one place may be alleged and another proved, the same law has obtained with respect to time, in all matters generally, (*u.*) The pleader, therefore, in general, assigns any time that he pleases to a given fact. This option, however, is subject to certain restrictions: 1. He should lay the time under a *videlicet*, if he does not wish to be held to prove it strictly, (*x.*) 2. He should not lay a time that is *intrinsically impossible*, or *inconsistent with the fact to which it relates*. A time so laid would, in general, be sufficient ground for demurrer. But, on the other hand, there is no ground for demurrer, where such time is laid to a fact not traversable, or where, for any other reason, the allegation of time was unnecessarily made; for an unnecessary statement of time, though impossible or inconsistent, will do no harm, upon the principle that *utile, per inutile, non vitatur*, (*y.*) 3. Again, there are some instances in which time happens to form a *material point in the merits of the case*; and in these instances, if a traverse be taken, the time laid is of the substance of the issue, and must be strictly proved; just as in local matters it is necessary to prove the alleged venue. The pleader, therefore, with respect to all facts of this description, must state the time truly, at the peril of failure, as for a variance. And here, as in the case of a local fact, the insertion of a *videlicet* will give no help. Thus, where the declaration stated a usurious contract, made on

(*t.*) Per Buller, J., *The King v. Holland*, 5 T. R., 620.

(*u.*) Co. Litt., 283 a; *The King v. Bishop of Chester*, 2 Salk., 561; Cooke v. Birt, 5 Taunt., 765.

(*x.*) As to the meaning and effect of a *videlicet*, *vide supra*, p. 277.

(*y.*) This appears to be a correct general statement of the law with respect to demurrer for an impossible or inconsistent date; but the current of authorities is not quite clear and uniform on this subject. (See Com. Dig., Pleader, C. 19; 2 Saund., 291 c, n. 1; *ibid.*, 171 a, n. 1.) N. B. The objection is often aided, after verdict, or cured by the statutes of jeofails. (See Appendix, note 64.)

the 21st day of December, 1774, for giving day of payment of a certain sum to the 23d day of December, 1776, and the proof was that the contract was on the 23d December, 1774, giving day of payment for two years, it was held that the verdict must be for the defendant; the principle of this decision being, that the time given for payment being of the substance of an usurious contract, such time must be proved as laid, (*z.*) So, where the declaration stated a usurious agreement on the 14th of the month, to forbear and give day of payment for a certain period, but it was proved that the money was not advanced till the 16th, the plaintiff was nonsuited, (*a.*) it being held by Lord Mansfield at the trial, and afterwards by the court in banc, that the day from whence the forbearance took place was material, though laid under a *videlicet*, (*b.*)

Where the time needs not to be truly stated, (as is generally the case,) it is subject to a rule of the same nature with one that applies to venue in transitory matters, (*c.*) viz, that the plea and subsequent pleadings should follow the day alleged in the writ and declaration, (*d.*) and if, in these cases, *no time at all* be laid, the omission is aided, after verdict, or judgment by confession or default, by the operation of the statute of jeofails, (*e.*) But where, in the plea or subsequent pleadings, the time happens to be material, it must be alleged; and there (as in the case of a venue

(*z.*) *Carlisle v. Trears*, Cowp., 671.

(*a.*) The nature of judgment of *nonsuit* has been stated in the first chapter, *supra*, p. 126. It will be proper to explain here, however, that when, on account of a variance, or any other matter of form, the plaintiff understands that the judge is going to direct the jury to find a verdict against him, he usually takes the course of avoiding a verdict, by voluntarily submitting to judgment of nonsuit; and for that purpose he is supposed to absent himself from the court. The reason is, that such judgment does not prevent his bringing another action, but by a verdict he is barred forever. (See 3 Bl. Com., 376.)

(*b.*) *Johnson v. Picket*, cited *Grimwood v. Barritt*, 6 T. R., 463; see also *Hardy v. Cathcart*, 5 Taunt., 2.

(*c.*) *Supra*, p. 275.

(*d.*) 2 Saund., 5, n. 3; *Hawe v. Planner*, 1 Saund., 14.

(*e.*) *Higgins v. Highfield*, 13 East., 407.

to a local fact) the pleader may be obliged to depart from the day in the writ and declaration.

Certainty of time is said to be required in *personal* actions only; it being held that in *real* and *mixed* actions it is in general not necessary to allege the day, month, and year, and that it is sufficient to show in what king's reign the matter arose, (*f.*)

RULE III.

THE PLEADINGS MUST SPECIFY QUALITY, QUANTITY, AND VALUE, (*g.*)

It is, in general, necessary, where the declaration alleges any injury to *goods and chattels*, or any contract relating to them, that their *quality, quantity, and value* or *price*, should be stated. And in any action brought for *recovery of real property*, its *quality* should be shown, as, whether it consists of houses, lands, or other hereditaments, and in general it should be stated whether the lands be meadow, pasture, or arable, &c. And the *quantity* of the lands or other real estate must also be specified, (*h.*) So, in an action brought for *injuries* to real property, the *quality* should be shown, as, whether it consists of houses, lands, or other hereditaments.

Thus, in an action of trespass, for breaking the plaintiff's close and taking away his fish, without showing the number or nature of the fish, it was, after verdict, objected, in arrest of judgment, first, "that it did not appear by the declaration of what nature the fish were: pikes, tenches, breams, &c.;" and, secondly, that "the certain number of them did not appear." And the objection was allowed by the whole court, (*i.*) So, where, in an action of trespass, the declara-

(*f.*) Com. Dig., Pleader, C. 19; *The King v. Bishop of Chester*, 2 Salk., 561; *Skin.*, 660, 9 Henry VI, 115, 116.

(*g.*) *Oportet quod petens rem designet, quam petit, videlicet, qualitatem, &c., item quantitatem, &c.*, Bract. 431 a., *Harpur's Case*, 11 Rep., 25 b.; *Doct. Pl.*, 85, 86; *Knight v. Symms*, Carth., 204; *Doe v. Ploughman*, 1 East., 441; *Goodtitle v. Otway*, 8 East., 375; *Andrew v. Whitehead*, 13 East., 102; 1 Saund., 333, n. 7; 2 Saund., 74, n. 1.

(*h.*) See the authorities last cited.

(*i.*) *Playter's Case*, 5 Rep., 34 b.

N. B.—Sergeant Williams observes, that in this case the omission would

tion charged the taking of cattle, the declaration was held to be bad, because it did not show of what species the cattle were, (*k.*) So, in an action of trespass, where the plaintiff declared for taking goods generally, without specifying the particulars, a verdict being found for the plaintiff, the court arrested the judgment for the uncertainty of the declaration, (*l.*) So, in a modern case, where, in an action of replevin, the plaintiff declared that the defendant, "in a certain dwelling house, took divers goods and chattels of the plaintiff;" without stating what the goods were, the court arrested the judgment, for the uncertainty of the declaration, after judgment by default and a writ of inquiry executed, (*m.*) So, in an action of dower, where blanks were left in the count for the number of acres claimed, the judgment was reversed after verdict, (*n.*) So, in ejectment, the plaintiff declared for five closes of land, arable and pasture, called Long Furlongs, containing ten acres; upon not guilty pleaded the plaintiff had a verdict, and it was moved, in arrest of judgment, that the declaration was ill, because the quantity and quality of the lands were not distinguished and ascertained, so as to show how many acres of arable there were and how many of pasture. And for this reason the declaration was held ill, and the judgment arrested, (*o.*)

With respect to *value*, it is to be observed, that it should be specified in reference to the *current coin of the realm*, thus: "divers, to wit, three tables of great value, to wit, the value of twenty pounds, of lawful money of Great Britain." With respect to *quantity*, it should be specified

perhaps, *now* be held to be aided, after verdict, or cured, by the statutes of jeofails; and as the action was not merely for taking fish, but also for breaking the close, he doubts if the declaration would now be held bad, even on special demurrer. (2 Saund., 74, n. 1.) And see Chamberlain v. Greenfield, 3 Wils., 292.

(*k.*) Dale v. Phillipson, 2 Lutw., 1374.

(*l.*) Bertie v. Pickering, 4 Burr, 2455; Wiat v. Essington, Ld. Ray., 1410, S. P.

(*m.*) Pope v. Tillman, 7 Taunt., 642.

(*n.*) Lawley v. Gattacre, Cro. Jac., 498.

(*o.*) Knight v. Symms, Carth., 204; see Appendix, note 65.

by the ordinary measures of extent, weight, or capacity, thus: "divers, to wit, fifty acres of arable land," "divers, to wit, three bushels of wheat."

The rule in question, however, is not so strictly construed, but that it sometimes admits the specification of *quality* and *quantity* in a *loose and general way*. Thus, a declaration in trover, for two *packs* of flax and two *packs* of hemp, without setting out the weight or quantity of a pack, is good after verdict, and, as it seems, even upon special demurrer, (*p.*) So, a declaration in trover, for a *library* of books, has been allowed, without expressing what they were. So, where the plaintiff declared in trespass for entering his house, and taking *several keys* for the opening of the doors of his said house, it was objected, after verdict, that the kind and number ought to be ascertained. But it was answered and resolved, that the keys are sufficiently ascertained by reference to the house, (*q.*) So, it was held, upon special demurrer, that it was sufficient to declare, in trespass for breaking and entering a house, damaging the goods and chattels, and wrenching and forcing open the doors, without specifying the goods and chattels, or the number of doors forced open; for that the essential matter of the action was the breaking and entering of the house, and the rest merely aggravation, (*r.*)

There are also some *kinds of action*, to which the rule requiring specification of quality, quantity, and value, does not apply in modern practice. Thus, in actions of *debt* and *indebitatus assumpsit*, (*s.*) (where a more general form of declaration obtains than in most other actions,) if the debt is claimed in respect of goods sold, &c., the quality, quantity, or value of the goods sold, is never specified. The amount

(*p.*) 2 Saund., 94 b, n. 1.

(*q.*) Layton v. Grindall, 2 Salk., 643; and see many other instances, 2 Saund., 74 b, n. 1.

(*r.*) Chamberlain v. Greenfield, 3 Wils., 292.

(*s.*) *Indebitatus assumpsit* is that species of the action of *assumpsit* in which the plaintiff first alleges a debt, and then a promise in consideration of the debt. The promise so laid is, generally, an *implied* one only. See the form of a declaration in *indebitatus assumpsit*, for goods sold, *supra*, p. 72.

of the debt, or sum of money due upon such sale, must, however, be shown.

As with respect to *place* and *time*, so, with respect to *quantity* and *value*, it is not necessary, when these matters are brought into issue, that the proof should correspond with the averment. The pleader may, in general, allege any quantity and value that he pleases, (at least if it be laid under a *videlicet*,) without risk from the variance, in the event of a different amount being proved, (*t.*) But it is to be observed, that *a verdict cannot, in general, be obtained for a larger quantity or value than is alleged.* The pleader, therefore, takes care to lay them to an extent large enough to cover the utmost case that can be proved. And it is also to be observed, that, as with respect to *place* or *time*, so with respect to *quantity* or *value*, there may be instances in which it forms part of the substance of the issue; and there the amount must be strictly proved as laid. For example, to a declaration in *assumpsit* for 10*l.* 4*s.*, and other sums, the defendant pleaded, as to all but 4*l.* 7*s.* 6*d.*, the general issue; and, as to the 4*l.* 7*s.* 6*d.*, a tender. The plaintiff replied that, after the cause of action accrued, and before the tender, the plaintiff demanded the said sum of 4*l.* 7*s.* 6*d.*, which the defendant refused to pay; and on issue joined, it was proved that the plaintiff had demanded not 4*l.* 7*s.* 6*d.*, but the whole 10*l.* 4*s.* This proof was held not to support the issue, (*u.*)

With respect to the allegation of *quality*, this generally requires to be strictly proved as laid, (*x.*)

RULE IV.

THE PLEADINGS MUST SPECIFY THE NAMES OF PERSONS, (*y.*)

First, this rule applies to the *parties to the suit.*

The original writ and the declaration must both set forth

(*t.*) *Crispin v. Williamson*, 8 Taunt., 107.

(*u.*) *Rivers v. Griffith*, 5 Barn. & Ald., 630.

(*x.*) See Appendix, note 66.

(*y.*) Com. Dig., *Abatemen'* E. 18, E. 19, F. 17, F. 18; Com. Dig., *Pleader* C. 18; Bract., 301 b.

accurately the names of both parties, (z.) The plaintiff must be described by his Christian name and surname; and, if either be mistaken or omitted, it is ground for plea in abatement. The case is the same with respect to the defendant. If either party have a name of *dignity*, such as *earl*, &c., he must be described accordingly; and an omission or mistake in such description has the same effect as in the Christian name and surname of an ordinary person, (a.)

Secondly, the rule relates to persons not parties to the suit, of whom mention is made in the pleading.

The names of such persons, viz, the Christian name and surname, or name of dignity, must in general be given; but, if not within the knowledge of the party pleading, an allegation to that effect should be made, and such allegation will excuse the omission of name, (b.)

A mistake in the name of a *party to the suit* is ground for plea in abatement only, and cannot be objected as a variance at the trial; but the name of a person not party, is a point on which the proof must correspond with the averment, under peril of a fatal variance. Thus, where a bill of exchange drawn by John *Couch* was declared upon as drawn by John *Crouch*, and the defendant pleaded the general issue, the plaintiff was nonsuited, (c.) So, where the declaration stated that the defendant went before Richard Cavendish, Baron Waterpark, of *Waterfork*, one of the justices, &c., for the county of Stafford, and falsely charged the plaintiff with felony, &c., and, upon the general issue, it appeared in evidence that the charge was made before Richard Cavendish, Baron Waterpark, of *Waterpark*—this was held a fatal variance in the name of dignity, (d.)

(z.) Com. Dig., Abatement, E. 18, E. 19, F. 17, F. 18; Com. Dig., Pleader, C. 18; Bract., 301 b.

(a.) Com. Dig., Abatement, E. 20, F. 19.

(b.) Buckley v. Rice Thomas, Plowd., 128 a; Rowe v. Roach, 1 M. & S. 304.

(c.) Whitwell v. Bennett, 3 Bos. & Pull., 559; see also Bowditch v. Mawley, 1 Camp., 195; Hutchinson v. Piper, 4 Taunt., 810.

(d.) Walters v. Mace, 2 Barn. & Ald., 756.

RULE V.

THE PLEADINGS MUST SHOW TITLE, (e.)

When, in pleading, any right or authority is set up in respect of property, personal or real, some *title* to that property must of course be alleged in the party, or in some other person from whom he derives his authority, (f.) So, if a party be charged with any *liability*, in respect of property, personal or real, his title to that property must be alleged.

It is proposed, first, to consider the case of a party's alleging title *in himself, or in another whose authority he pleads*; next, that of his alleging it *in his adversary*.

I. Of the case where a party alleges a title *in himself, or in another whose authority he pleads*.

1. It is often sufficient to allege *a title of possession* only.

The form of laying a title of possession, in respect of *goods and chattels*, is either to allege that they were the "goods and chattels of the plaintiff," or that he was "lawfully possessed of them as of his own property," (g.) With respect to *corporeal hereditaments*, the form is, either to allege that the close, &c., was the "close of" the plaintiff, (h.) or that he was "lawfully possessed of a certain close," &c., (i.) With respect to *incorporeal hereditaments*, a title of possession is generally laid by alleging that the plaintiff was possessed of the corporeal thing, in respect of which the right is claimed, and by reason thereof was entitled to the right at the time in question; for example, that he "was possessed of a certain messuage, &c., and by reason thereof, during all the time aforesaid, of right ought to have had common of pasture," &c., (k.)

A title of possession is *applicable*, that is, will be suffi-

(e.) Com. Dig., Pleader, 3 M., 9; Bract., 372 b, 373 b.

(f.) *Ibid.*

(g.) As in the examples, *supra*, pp. 74, 73.

(h.) As in the example, *supra*, p. 70.

(i.) See an example, 2 Chitty, 531, 1st edit.

(k.) See an example, 2 Chitty, 354, 1st edit.

ciently sustained by the proof, in all cases where the interest is of a present and immediate kind. Thus, when a title of possession is alleged, with respect to *goods and chattels*, the statement will be supported by proof of any kind of *present interest* in them, whether that interest be temporary and special, or absolute in its nature; as, for example, whether it be that of a carrier or finder only, or that of an owner and proprietor, (*l.*) So, where a title in possession is alleged in respect of *corporeal* or *incorporeal hereditaments*, it will be sufficiently maintained by proving any kind of *estate in possession*, whether fee simple, fee tail, for life, for term of years, or otherwise. On the other hand, with respect to any kind of property, a title of possession would not be sustained in evidence by proof of an interest in *remainder* or *reversion* only; and, therefore, when the interest is of that description, the preceding forms are inapplicable, and title must be laid in remainder or reversion, according to the fact, and, upon the principles that will be afterwards stated, on the subject of alleging title in its *full and precise extent*.

Where a title of possession is *applicable*, the allegation of it is, in many cases, *sufficient*, in pleading, without showing title of a superior kind. The rule on this subject is as follows: *That it is sufficient to allege possession as against a wrong-doer, (m.)* or, in other words, that it is enough to lay a title of possession against a person who is stated to have committed an injury to such possession, having, as far as it appears, no title himself. Thus, if the plaintiff declares in trespass, for breaking and entering his close, or in trespass on the case, for obstructing his right of way, it is enough to allege in the declaration, in the first case, that it is the "close of the plaintiff," (*n.*) in the second case, that "he was possessed of a certain messuage, &c., and,

(*l.*) 2 Saund., 47 a., n. 1.

(*m.*) Com. Dig., Pleader, C. 39; C. 41; Taylor v. Eastwood, 1 East., 212; Grimstead v. Marlwo, 4 T. R., 717; Greenhow v. Ilsley, Willes, 619; Waring v. Griffiths, 1 Burr., 440; Langford v. Webber, 3 Mod., 132.

(*n.*) See the form of the declaration, *supra*, p. 70.

by reason of such possession, of right ought to have had a certain way," &c. For, if the case was that the plaintiff, being possessed of the close, the defendant having himself no title, broke and entered it, or, that the plaintiff, being possessed of a messuage and right of way, the defendant being without title, obstructed it, then, whatever was the nature and extent of the plaintiff's title, in either case, the law will give him damages for the injury to his possession; and it is the possession, therefore, only that needs to be stated. It is true that it does not yet appear that the defendant had no title, and, by his plea, he may possibly set up one superior to that of the plaintiff; but as, on the other hand, it does not yet appear that he *had* title, the effect is the same, and till he pleads he must be considered as a mere *wrong-doer*, that is, he must be taken to have committed an injury to the plaintiff's possession, without having any right himself. Again, in an action of trespass for assault and battery, if the defendant justifies, on the ground that the plaintiff wrongfully entered his house and was making a disturbance there, and that the defendant gently removed him, the form of the plea is, that "the defendant was lawfully possessed of a certain dwelling-house, &c., and, being so possessed, the said plaintiff was unlawfully in the said dwelling-house," &c.; and it is not necessary for the defendant to show any title to the house beyond this of mere possession, (*o.*) For the *plaintiff* has, at present, set up no title at all to the house; and, on the face of the plea, he has committed an injury to the defendant's possession, without having any right himself. So, in an action of trespass for seizing cattle, if the defendant justifies, on the ground that the cattle were damage-feasant on his close, it is not necessary for him to show any title to his close, except that of mere possession, (*p.*)

It is to be observed, however, with respect to this rule,

(*o.*) 2 Chitty, 529, 1st edit.; *Skevil v. Avery*, Cro. Car., 138.

(*p.*) 1 Saund., 221, n. 1, 346 e., n. 2; 2 Saund., 285, n. 3; Anon., Salk., 643; *Scarl v. Bunnion*, 2 Mod., 70; *Osway v. Bristow*, 10 Mod., 37; 2 Bos & Pull.,

us to alleging possession against a wrong-doer, that it seems not to hold in *replevin*. For, in that action, it is held not to be sufficient to state a title of possession, even in a case where it would be allowable in trespass, by virtue of the rule above mentioned. Thus, in *replevin*, if the defendant, by way of avowry, pleads that he was possessed of a messuage, and entitled to common of pasture, as appurtenant thereto, and that he took the cattle damage-feasant, it seems that this pleading is bad, and that it is not sufficient to lay such mere title of possession in this action, (*q.*) It is to be observed, too, that this rule has little or no application in *real* or *mixed* actions; for, in these, an injury to the possession is seldom alleged; the question in dispute being, for the most part, on the *right of possession*, or the *right of property*.

Where this rule as to alleging possession against a wrong-doer does not apply, there, though the interest be present or possessory, it is, in general, not sufficient to state a title of possession, but some *superior* title must be shown. Thus, in trespass for breaking the plaintiff's close, if the defendant's justification is that the close was his own copyhold estate of inheritance, his plea, as it does not make the plaintiff a wrong-doer, but, on the contrary, admits his possessory title in the close, and pleads in confession and avoidance of it, must allege not merely a possession, but a seizin in fee of the copyhold. So, in a similar action, if the defendant relies on a right of way over the plaintiff's close, it will not be sufficient to plead that he, the defendant, was lawfully *possessed* of another close, and,

361, n. α; *Langford v. Webber*, 3 Mod., 132; but see *S. C. Carth.*, 9; 3 Salk., 356.

N. B.—It is sometimes said, that the reason why it is sufficient to lay a possessory title in such cases is, that the title is matter of *inducement* only to the main subject of the plea. But this doctrine, if well examined, resolves itself into the broader and more satisfactory rule given in the text.

(*q.*) *Hawkins v. Eccles*, 2 Bos. & Pull., 359, 361, n. α; per Buller, J., *Dovaston v. Payne*, H. Bl., 530; 1 Saund., 346 e., n. 2; 2 Saund., 285, n. 3; *Saunders v. Hussey*, 2 Lutw., 1231; *Carth.*, 9; *Ld. Ray.*, 333, S. C.; but see *Adams v. Cross*, 2 Vent., 181

by reason of such possession, was entitled to a right of way over the plaintiff's, but he must set forth some superior title to his close and right of way; as, for example, that of seizin in fee of the close, and a prescription in a *que estate* (r) to the right of way, (s.) With respect to the manner of stating a superior title to that of possession, it will be shown under the following head, relative to the allegation of title, in its *full and precise extent*.

2. Where a *title of possession* is, upon the principles above explained, either not applicable, or not sufficient, the title should, in general, be stated in its *full and precise extent*, (t.)

Upon this head, two subjects of remark present themselves—the *allegation of the title itself*, and the *statement of its derivation*.

With respect to the *allegation of the title itself*, there are certain forms used in pleading, appropriate to each different kind of title, according to all the different distinctions as to *tenure, quantity of estate, time of enjoyment, and number of owners*, (u.) These forms are too various to be here stated, and it will be sufficient to refer the reader to the copious stores in the printed precedents, (x.)

With respect to the *derivation of the title*, there are certain rules of which it will be necessary to give some account.

There is a leading distinction, on this subject, between *estates in fee simple* and *particular estates*.

In general, it is sufficient to state a *seizin in fee simple per se*; that is, simply to state (according to the usual form

(r.) As to prescription in a *que estate*, see 2 Bl. Com., 264; 1 Saund., 346, n. 3.

(s.) See the precedents, 2 Chitty, 554, 573, 1st edit. But where copyholders claim common in the lord's soil by custom, it is not necessary to show what estate they have in their several copyhold tenements. (*Hoskins v. Robins*, 2 Saund., 320; *Potter v. North*, 1 Saund., 353.)

(t.) Therefore, to allege mere *seizin*, without showing whether in fee, in tail, or for life, is, in general, not sufficient. (*Saunders v. Hussey, Carth.*, 9 2 Lutw., 1231; *Ld. Ray.*, 333, S. C.)

(u.) *Vide* 2 Bl. Com., 103; 2 Chitty, 199-212, 1st edit.

(x.) See 2 Chitty, 199-212, 1st edit.

of alleging that title) that the party was "seized in his demesne as of fee of and in a certain messuage," &c., (*y.*) without showing the *derivation*, or (as it is expressed in pleading) the *commencement* of the estate, (*z.*) For, if it were requisite to show from whom the present tenant derived his title, it might be required, on the same principle, to show from whom that person derived *his*, and so ad infinitum. Besides, as mere seizin will be sufficient to give an estate in fee simple, the estate may, for anything that appears, have had no other commencement than the seizin itself which is alleged. So, though the fee be *conditional* or *determinable* on a certain event, yet a seizin in fee may be alleged, without showing the commencement of the estate, (*a.*)

However, it is sometimes necessary to show the derivation of the fee; viz, where, in the pleading, the seizin has already been alleged in another person, from whom the present party claims. In such case it must, of course, be shown how it passed from one of these persons to the other. Thus, in debt or covenant brought on an indenture of lease by the heir of the lessor, the plaintiff, having alleged that his ancestor was seized in fee and made the lease, must proceed to show how the fee passed to himself, viz, by descent, (*b.*) So, if, in trespass, the defendant plead that *E. F.*, being seized in fee, demised to *G. H.*, under whose command the defendant justifies the trespass on the land, (giving color,) and the plaintiff, in his replication, admits *E. F.*'s seizin, but sets up a subsequent title in himself to the same land, in fee simple, prior to the alleged demise, he must show the derivation of the fee from *E. F.* to himself, by conveyance antecedent to the lease under which *G. H.* claims, (*c.*)

With respect to *particular estates*, the general rule is, *that*

(*y.*) As in the examples, *supra*, pp. 66, 67, 181.

(*z.*) Co. Litt., 303 b; *Scavage v. Hawkins*, Cro. Car., 571.

(*a.*) Doct. Pl., 287.

(*b.*) As in the example, *supra*, p. 181.

(*c.*) See Upper Bench Precedents, 196, cited 9 Went., Index, xl, xli.

the commencement of particular estates must be shown., (d.) If, therefore, a party sets up in his own favor an estate tail, an estate for life, a term of years, or a tenancy at will, he must show the derivation of that title from its commencement, that is, from the last seizin in fee simple; and, if derived by alienation or conveyance, the substance and effect of such conveyances should be precisely set forth. For examples of the manner of thus showing the commencement of particular estates, under all the different kinds of conveyances, and other media of title, the reader must again have recourse to the books of precedents, (e.)

Under this rule, *that the commencement of particular estates must be shown*, it is necessary to show the commencement of a copyhold, even though it be copyhold of inheritance, (f.) This is on the ground that a copyhold, even in fee, is in the nature of a particular estate, in respect of the freehold inheritance in the lord. And the difficulty that would arise, if the title were to be deduced from the earliest or original grantee, is obviated by the practice of going back to the admittance of the last heir or surrenderee only; which admittance is considered as in the nature of a grant from the lord, and is so pleaded, (g.) It is in this manner that the commencement of a copyhold estate is, in general, alleged, namely, by stating it as a grant from the lord, (h.) But, where an estate has been already laid in another copyholder, from whom the present party claims, and it becomes

(d.) Co. Litt., 303 b; Scilly v. Dally, 2 Salk., 562; Carth., 444, S. C.; Searl v. Bunnion, 2 Mod., 70; Johns v. Whitley, 3 Wils., 72; Hendy v. Stephenson, 10 East., 60; Rast. Ent., 656; and the case of title derived from the king is no exception. (1 Saund., 186 d, n. 1.)

(e.) See 2 Chitty, 213-232, 1st edit.

(f.) Pyster v. Hemling, Cro. Jac., 103; Shephard's Case, Cro. Car., 199; Robinson v. Smith, 4 Mod., 346.

(g.) See same cases, and Brown's Case, 4 Rep., 22 b; Bac. Ab., Fleas, &c., p. 422, 5th edit.

(h.) As to customary freeholds, see Croucher v. Oldfield, Salk., 365; Roe v. Vernon, 5 East., 51; Burrell v. Dodd, 3 Bos. & Pull., 378; 2 Chitty, 207, 1st edit.

necessary, therefore, to show how the estate passed from one to the other, the conveyances between the copyhold tenants, by surrender, and the admittance by the lord, &c., must then be set forth according to the fact, (i.)

To the rule *that the commencement of particular estates must be shown*, there is this exception, that it need not be shown where the title is alleged by way of *inducement* only, (k.) Thus, if an action of debt or covenant be brought on an indenture of lease by the executor or assignee of a lessor, who had been entitled for a term of years, it is necessary, in the declaration, to state the title of the lessor, in order to show that the plaintiff is entitled to maintain the action, as his representative or assignee. But as the title is, in that case, alleged by way of *inducement* only, (the action being mainly founded on the lease itself,) and therefore it is probable that the title may not come into question, the particular estate for years, may be alleged in the lessor, without showing its commencement.

On the subject of the *derivation of title*, the following additional rules may be collected from the books :

First, *where a party claims by inheritance, he must, in general, show how he is heir, viz, as son or otherwise, (l,) and if he claims by mediate, not immediate, descent, he must show the pedigree; for example, if he claims as nephew, he must show how nephew, (m.)*

Secondly, *where a party claims by conveyance or alienation, the nature of the conveyance or alienation must, in general, be stated; as whether it be by devise, feoffment, &c., (n.)*

Thirdly, *the nature of the conveyance or alienation should*

(i.) See the forms, 2 Chitty, 205, 229, 1st edit.

(k.) Com. Dig., Pleader, E. 19, C. 43; Blockley v. Slater, Lutw., 120; Searl v. Bunnion, 2 Mod., 70; Silly v. Daliy, Carth., 444; Skevill v. Avery, Cro. Car., 138; Lodge v. Frye, Cro. Jac., 52; Adams v. Cross, 2 Vent., 181; Wade v. Baker, Ld. Ray., 130.

(l.) Denham v. Stephenson, 1 Salk., 355; The Duke of Newcastle v. Wright, 1 Lev., 190; 1 Ld. Raym., 202. See the example, *supra*, 182.

(m.) Dumsday v. Hughes 3 Bos. & Pull., 453; Blackborough v. Davis, 12 Mod., 619; and see Roe v. Lord, 2 Black. Rep., 1099, and the cases there cited.

(n.) See Com. Dig., Pleader, E. 23, E. 24.

be stated according to its legal effect, rather than its form of words. This depends on a more general rule, which we shall have occasion to consider in another place, viz, "that things are to be pleaded according to their legal effect or operation." For the present, the doctrine, as applicable to conveyances, may be thus illustrated. In pleading a conveyance for *life*, with livery of seizin, the proper form is to allege it as a "demise" for life, (*o*), for such is its effect in proper legal description. So, a conveyance in *tail*, with livery, is always pleaded, on the same principle, as a "gift" in tail, (*p*), and a conveyance of the fee, with livery, is described by the term "enfeoffed," (*q*). And such would be the form of pleading, whatever might be the words of donation, used in the instrument itself; which, in all the three cases, are often the same, viz, those of "give" and "grant," (*r*). So, in a conveyance by lease and release, though the words of the deed of release be "grant, bargain, sell, alien, release, and confirm," yet it should be pleaded as a *release* only, for that is the legal effect, (*s*). So, a surrender (whatever words are used in the instrument) should be pleaded with *sursum reddidit*, which alone, in pleading, describes the operation of a conveyance as a surrender, (*t*).

Fourthly, *where the nature of the conveyance is such, that it would, at common law, be valid without deed or writing, there no deed or writing need be alleged in the pleading, though such document may in fact exist; but where the nature of the con-*

(*o*.) Rast. Ent., 617 a, 11 d.

(*p*.) See Co. Ent., tit. Formedon, &c., &c.

(*q*.) Upper Bench Prec., 196; see 2 Chitty, 214, 1st edit. "Feoffment properly betokeneth a conveyance in fee; and yet, sometimes improperly, it is called a feoffment, when an estate of freehold only doth passe." (Co. Litt., 9 a.) *Feoffare* dicitur, qui feodum simplex feoffatorio confert; *donare*, qui feodum talliatum. (Speln. Gloss., verbo *feoffare*.) And Lord Coke, in another place, makes the distinction laid down in the text between *feoffment*, *gift*, and *demise*. (Vynior's Case, 8 Rep., 82 b.)

(*r*.) "Do, or dedi, is the aptest word of feoffment." (Co. Litt., 9 a.)

(*s*.) 2 Chitty, 220, note i, 1st edit.; 1 Arch., 127; 3 Went., 483, 515.

(*t*.) 1 Saund., 235 b, n. 9.

veyance requires, at common law, a deed, or other written instrument, such instrument must be alleged, (u.) Therefore, a conveyance, with livery of seizin, either in fee, tail, or for life, is pleaded, without alleging any charter, or other writing of feoffment, gift, or demise, whether such instrument, in fact, accompanied the conveyance or not. For such conveyance might, at common law, be made by parol only, (x;) and though, by the statute of frauds, 29 Car. II, c. 3, s. 1, it will not now be valid unless made in writing, yet the form of *pleading* remains the same as before the act of parliament, (y.) On the other hand, a *devise* of lands (which, at common law, was not valid, and authorized only by the statutes 32 Hen. VIII, c. 1, and 34 Hen. VIII, c. 5,) must be alleged to have been made in writing, (z,) which is the only form in which the statutes authorize it to be made. So, if a conveyance by way of *grant* be pleaded, a deed must be alleged, (a,) for matters that "lie in grant" (according to the legal phrase) can pass by deed only, (b.)

There is one case, however, in which a deed is usually alleged in pleading, though not necessary, at common law, to the conveyance, and which, therefore, in practice, at least, forms an exception to the above rule. For, in making title under a lease for years, by indenture, it is usual to plead the indenture, (c,) though the lease was good at common law by parol; and needs to be in writing only where the term is of more than three years' duration, and then only by the statute of frauds.

On the other hand, in the case where a demise by hus-

(u.) Vin. Ab., Facts or Deeds, M. a, 11.

(x.) Vin. Ab., Feoffment, Y.; Co. Litt., 121 b.

(y.) This depends upon a more general rule, viz, that regulations introduced by statute do not alter the form of pleading at common law. This rule will be noticed hereafter, in its proper place. (See Index to this work, tit. Statute.)

(z.) 1 Saund., 276 a, n. 2.

(a.) Porter v. Gray, Cro. Eliz., 245; 1 Saund., 234, n. 3, Lathbury v. Arnold, 1 Bing., 217.

(b.) Vin. Ab., tit. Grants, G. a.

(c.) See the example, 2 Chitty, 555, 1st edit.

band and wife is pleaded, it seems that it is not necessary to show that it was by deed; and yet the lease, if without deed, is at common law void as to the wife, after the death of the husband, and is not within the stat. 32 Hen. VIII, c. 28, sect. 1, which gives efficacy to leases by persons having an estate in right of their wives, &c., only where such leases are "by writing indented, under seal." The reason seems to be that a lease by husband and wife, though without deed, is good during the life of the husband, (*d.*)

Thus far with respect to the allegation of title, in its *full and precise extent*. Another mode, however, of laying title, still remains to be considered.

3. Where a *title of possession* is inapplicable or insufficient, it is not always necessary to allege the title in its *full and precise extent*; for in lieu of this, it is occasionally sufficient to allege what may be called a *general freehold title*. In a plea in trespass *quare clausum fregit*, or an *avowry* in *replevin*, (*e.*) if the defendant claim an estate of freehold in the locus in quo, he is allowed to plead generally that the place is his "*close, soil, and freehold.*" This is called the plea or *avowry of liberum tenementum*, and it may be convenient here to give the form of it.

PLEA

Of liberum tenementum, in trespass quare clausum fregit.

And for a further plea in this behalf, as to the breaking and entering the said close, in which, &c., in the said declaration mentioned, and with feet in walking, treading down, trampling upon, consuming, and spoiling the grass and herbage then and there growing, the said *C. D.*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *A. B.* ought not to have or maintain his aforesaid action thereof against him, because, he says, that the said close, in the said declaration mentioned, and in which, &c., now is, and at the said several times when, &c., was the close, soil, and freehold of him, the said *C. D.* Wherefore he, the said *C. D.*, at the said several times, when, &c., broke and entered the said close, in which, &c., and with feet, in

(*d.*) 2 Saund., 180 a, n. 9; *Wiscot's Case*, 2 Rep., 61 b.; *Bateman v Allen*, Cro. Eliz., 438; *Childes v Westcot*, *ibid*, 482; *Dyer*, 91 b.

(*e.*) 1 Saund., 347 d, n. 6.

walking, trod down, trampled upon, consumed, and spoiled the grass and herbage then and there growing, as he lawfully might, for the cause aforesaid, which are the same trespasses in the introductory part of this plea mentioned, and whereof the said *A. B.* hath above complained; and this the said *C. D.* is ready to verify. Wherefore he prays judgment if the said *A. B.* ought to have or maintain his aforesaid action thereof against him, (*f.*)

This allegation of a *general freehold title* will be sustained by proof of *any* estate of *freehold*, whether in fee, in tail, or for life only, and whether in possession or expectant on the determination of a term of years, (*g.*) But it does not apply to the case of a freehold estate in remainder or reversion, expectant on a particular estate of freehold, nor to copyhold tenure.

The plea of avowry of *liberum tenementum* is the only case of usual occurrence in modern practice in which the allegation of a *general freehold title*, in lieu of a *precise* allegation of title, is sufficient, (*h.*)

In alleging a general freehold title, it is not necessary (as appears by the above example) to *show its commencement*.

II. Having discussed the case where a party alleges title *in himself or some other, whose authority he pleads*, next is to be considered the case where a party alleges title *in his adversary*.

The rule on this subject appears in general to be, *that it is not necessary to allege title more precisely than is sufficient to show a liability in the party charged or to defeat his present claim*. Except as far as these objects may require, a party is not compellable to show the precise estate which his adversary holds, even in a case where, if the same person

(*f.*) 2 Chitty, 551, 1st edit.

(*g.*) See 5 Henry VII, 10 a., pl. 2, which shows, that where there is a lease for years it must be replied in confession and avoidance, and is no ground for traversing the plea of *liberum tenementum*.

(*h.*) See 1 Saund., 347 d., n. 6. This form of allegation occurred, however, in the now disused actions of assize, the count or plaint in which lays only a general freehold title. (Doct. Pl., 239.) It occurs also in the count on a writ of entry sur disseizin, brought by tenant for life or in tail. (Booth, 177; 33 Hen. VI, 14 b.; *Creswell v. Vaughan*, 2 Saund., 30.)

were pleading his own title, such precise allegation would be necessary. The reason of this difference is, that a party must be presumed to be ignorant of the particulars of his adversary's title, though he is bound to know his own, (i.)

To answer the purpose of showing a liability in the party charged, according to the rule here given, it is, in most cases, sufficient to allege a *title of possession*, the forms of which are similar to those in which the same kind of title is alleged in favor of the party pleading.

A title of possession, however, cannot be sustained in evidence, except by proving some *present interest* in chattels or *actual possession* of land, (k.) If, therefore, the interest be by way of reversion or remainder, it must be laid accordingly, and the title of possession is *inapplicable*. So, there are cases, in which to charge a party with mere possession would not be *sufficient* to show his liability. Thus, in declaring against him in debt for rent, as assignee of a term of years, it would not be sufficient to show that he was possessed, but it must be shown that he was possessed as assignee of the term.

Where a title of possession is thus inapplicable or insufficient, and some other or superior title must be shown, it is yet not necessary to allege the title of an adversary with as much precision as in the case where a party is stating his own, (l;) and it seems sufficient that it be laid fully enough to show the liability charged. Therefore, though it is the rule, with respect to a man's own title, *that the commencement of particular estates should be shown*, (m,) unless alleged by way of *inducement*, (n,) yet, in pleading the title of an adversary, it seems that this is, in general, not necessary, (o.) So, in cases where it happens to be requisite to

(i.) *Rider v. Smith*, 3 T. R., 766; *Derisley v. Custance*, 4 T. R., 77; *The Attorney General v. Meller*, Hardr., 459.

(k.) *Vide supra*, pp. 286, 287.

(l.) *Com. Dig.*, Pleader, C. 42; *Hill v. Saunders*, 4 Barn. & Cres., 536.

(m.) *Vide supra*, p. 291.

(n.) *Vide supra*, p. 293.

(o.) *Plake v. Foster*, 8 T. R., 487.

show whence the adversary derived his title, this may be done with less precision than where a man alleges his own. And, in general, it is sufficient to plead such title by a *que estate*; that is, to allege that the opposite party has the same estate, or that the same estate is vested in him, as has been precedently laid in some other person, without showing in what manner the estate passed from the one to the other, (*p.*) Thus, in debt, where the defendant is charged for rent, as assignee of the term, after several mesne assignments, it is sufficient, after stating the original demise, to allege that, "after making the said indenture, and during the term thereby granted, to wit, on the — day of —, in the year —, at —, all the estate and interest of the said *E. F.*" (the original lessee) "of and in the said demised premises, by assignment, came to and vested in the said *C. D.*;" without further showing the nature of the mesne assignments, (*q.*) But, if the case be reversed, that is, if the plaintiff, claiming as assignee of the reversion, sue the lessee for rent, he must precisely show the conveyances, or other media of title, by which he became entitled to the reversion; and to say, generally, that it came by assignment, will not, in this case, be sufficient, without circumstantially alleging all the mesne assignments, (*r.*) Upon the same principle, if title be laid in an adversary by descent, as, for example, where an action of debt is brought against an heir on the bond of his ancestor, it is sufficient to charge him as *heir*, without showing *how* he is heir, viz, as son, or otherwise, (*s.*) but if a party entitle himself by inheritance, we have seen that the mode of descent must be alleged, (*t.*)

(*p.*) As to making title by a *que estate*, see the Attorney General *v.* Meller, Hardr., 459; Doct. Pl., 302; Com. Dig., Pleader, E. 23, E. 24; Co. Litt., 121 a.

(*q.*) 1 Saund., 112, n. 1; The Attorney General *v.* Meller, Hardr., 459; The Duke of Newcastle *v.* Wright, 1 Lev., 190; Derisley *v.* Custance, 4 T. R., 77; 2 Chitty, 196, 1st edit.

(*r.*) 1 Saund., 112, n. 1; Pitt *v.* Russell, 3 Lev., 19.

(*s.*) Denham *v.* Stephenson, 1 Salk., 355.

(*t.*) *Vide supra*, p. 293.

The manner of showing title, both where it is laid in the party himself, or the person whose authority he pleads, and where it is laid in his adversary, having been now considered, it may next be observed, that the title so shown must, in general, when issue is taken upon it, be strictly *proved*. With respect to the allegations of *place, time, quantity, and value*, it has been seen, that when issue is taken upon them, they, in most cases, do not require to be proved as laid—at least, if laid under a *videlicet*. But with respect to *title*, it is, ordinarily, of the substance of the issue; and, therefore, according to the general principle stated in the first chapter of this work, (u,) requires to be maintained accurately by the proof. Thus, in an action on the case, the plaintiff alleged, in his declaration, that he demised a house to the defendant for seven years, and that, during the term, the defendant so negligently kept his fire, that the house was burned down; and the defendant having pleaded *non demisit modo et forma*, it appeared in evidence, that the plaintiff had demised to the defendant several tenements, of which the house in question was one; but that, with respect to this house, it was, by an exception in the lease, demised at will only. The court held, that, though the plaintiff might have declared against the defendant as tenant at will only, and the action would have lain, yet, having stated a demise for seven years, the proof of a lease at will was a variance, and *that* in substance, not in form only; and, on the ground of such variance, judgment was given for the defendant, (x.)

The rule which requires that title should be shown having been now explained, it will be proper to notice an exception to which it is subject. This exception is, that no title need be shown where the opposite party is *estopped* from denying the title. Thus, in an action for goods sold and delivered, it is unnecessary, in addition to the allega-

(u.) *Supra*, p. 118, *et vide supra*, p. 199.

(x.) *Cudlip v. Rundle*, Carth., 202.

tion that the plaintiff sold and delivered them to the defendant, to state that they were the goods of the plaintiff, (y.) for a buyer who has accepted and enjoyed the goods cannot dispute the title of the seller. So, in debt or covenant, brought by the lessor against the lessee, on the covenants of the lease, the plaintiff need allege no title to the premises demised; because a tenant is estopped from denying his landlord's title. On the other hand, however, a tenant is not bound to admit title to any extent greater than might authorize the lease; and, therefore, if the action be brought not by the lessor himself, but by his heir, executor, or other representative or assignee, the title of the former must be alleged, in order to show that the reversion is now legally vested in the plaintiff, in the character in which he sues. Thus, if he sue as heir, he must allege that the lessor was seized in fee; for the tenant is not bound to admit that he was seized in fee; and, unless he was so, the plaintiff cannot claim as heir.

Another exception to the general rule, requiring title to be shown, has been introduced by statute, and is as follows: In making avowry or conusance in replevin, upon distresses, for rent, quit-rents, reliefs, heriots, or other services, the defendant is enabled, by the provision of the act 11 Geo. II, c. 19, s. 22, "to avow or make conusance generally that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same, under a grant or demise, at such a certain rent, during the time wherein the rent distrained for accrued, which rent was then and still remains due, or that the place where the distress was taken was parcel of such certain tenements held of such honor, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for, was, at the time of such distress, and still remains, due, without further setting forth the grant, tenure, demise, or title of such landlord or landlords, lessor

(y.) B. N. P., 139.

or lessors, owner or owners of such manor, any law or usage to the contrary notwithstanding," (z.)

RULE VI.

THE PLEADINGS MUST SHOW AUTHORITY, (a.)

In general, when a party has occasion to justify under a writ, warrant, precept, or any other authority whatever, he must set it forth particularly in his pleading. And he ought also to show that he has substantially pursued such authority.

Thus, in trespass for taking a mare, the defendant pleaded that Sir *J. S.* was seized in fee of the manor of *B.*, and that he, and all those whose estate he had in the said manor, had always held a lawful court twice a year, to which the tenants of the manor used to resort; that such as had right of common were appointed by the steward to be of the jury; that by-laws were accustomed to be made there, and that such as had right of common obeyed those laws or paid a forfeiture of a reasonable sum to be imposed on them; that at one of these courts a jury was sworn and a law made, that every person who had common should pay forty shillings for depasturing his cattle on any place where corn was standing; that the plaintiff had right of common, and permitted his sheep to depasture on certain ground on which corn was standing; that such offense was presented at the next court; and that the defendant, *being bailiff of the lord of the said manor*, did take the mare for the forfeiture, &c. Upon demurrer, the court held the plea bad; "for the bailiff cannot take a forfeiture *ex officio*. There must be a precept directed to him for

(z.) See remarks on this enactment and on the previous state of the law, 2 Saund., 284 c., n. 3. And see the form of any avowry under the statute, 2 Chitty, p. 512, 1st edit.

(a.) "Regularly, whensoever a man doth anything by force of a warrant or authority, he must plead it." (Co. Litt., 283 a.; *Ibid.*, 303 b.; Com. Dig., Pleader, E. 17.; 1 Saund., 298, n. 1; *Lamb v. Mills*, 4 Mod., 377; *Matthews v. Cary*, 3 Mod., 137; *Carth.*, 73, S. C.; *Collet v. Lord Keith*, 2 East., 260; *Selw.*, N. P. 826.)

that purpose, which he must show in pleading," &c. And judgment was given for the plaintiff, (b.)

So, in all cases where the defendant justifies under judicial process, he must set it forth particularly in his plea, and it is not sufficient to allege *generally* that he committed the act in question by virtue of a certain writ or warrant directed to him, (c.) But on this subject there are some important distinctions as to the degree of particularity which the rules of pleading in different cases require: 1. It is not necessary that any person, justifying under judicial process, should set forth *the cause of action* in the original suit in which that process issued, (d.) 2. If the justification be by the officer executing the writ, he is required to plead such *writ* only, and not the *judgment* on which it was founded, for his duty obliged him to execute the former, without inquiring about the validity or existence of the latter. But, if the justification be by a party to the suit, or by any stranger, except an officer, the judgment, as well as the writ, must be set forth, (e.) 3. Where it is an officer who justifies, he must show that the writ was *returned*, if it was such as it was his duty to return, and all mesne process is of that description. But in general a writ of execution need not be returned, and therefore no return of it need in general be alleged, (f.) However, it is said that, "if any ulterior process in execution is to be resorted to to complete the justification, there it may be necessary to show to the court the return of the prior writ, in order

(b.) *Lamb v. Mills*, 4 Mod., 377.

(c.) 1 Saund., 298, n. 1; Co. Litt., 303 b.

(d.) *Rowland v. Veale*, Cowp., 18; *Belk v. Broadbent*, 3 T. R., 183; 1 Saund., 92, n. 2.

(e.) Per Holt, C. J., *Britton v. Cole*, Carth., 443; 1 Salk., 408, S. C.; *Turner v. Felgate*, 1 Lev., 95; *Cotes v. Michill*, 3 Lev., 20; per De Grey, C. J., *Barker v. Braham*, 3 Wils., 368. But in *Britton v. Cole*, 1 Salk., 408, it is said that the court "seemed to hold that, if one comes in aid of the officer at his request, he may justify as the officer may do." (See *Morse v. James*, 122.)

(f.) *Middleton v. Price*, Str., 1184; 1 Wils., 17, S. C.; *Cheasley v. Barnes*, 10 East., 73; *Rowland v. Veale*, Cowp., 18; *Hoe's Case*, 5 Rep., 90; 1 Saund., 92, n. 2.

to warrant the issuing of the other," (g.) Again, there is a distinction as to this point between a principal and a subordinate officer: "The former shall not justify under the process, unless he has obeyed the order of the court in returning it; otherwise it is of one who has not the power to procure a return to be made," (h.) 4. Where it is necessary to plead the judgment, that may be done (if it was a judgment of a superior court) without setting forth any of the previous proceedings in the suit, (i.) 5. Where the justification is founded on process issuing out of an inferior English court, or (as it seems) a court of foreign jurisdiction, the nature and extent of the jurisdiction of such court ought to be set forth, and it ought to be shown that the cause of action arose within that jurisdiction, though a justification founded on process of any of the superior courts need not contain such allegations, (k.) And in pleading a judgment of inferior courts, the previous proceedings are, in some measure, stated. But it is allowable to set them forth with a *taliter processum est*; thus, that *A. B.*, at a certain court, &c., held at, &c., levied his plaint against *C. D.*, in a certain plea of trespass on the case, or debt, &c., (as the case may be,) for a cause of action arising within the jurisdiction, and *thereupon such proceedings were had*, that afterwards, &c., it was considered by the said court that the said *A. B.* should recover against the said *C. D.*, &c., (l.)

Notwithstanding the general rule under consideration, it is allowable, where an authority may be constituted verbally and generally, to plead it in general terms. Thus, in replevin, where the defendant makes conusance, confessing the taking of the goods or cattle, as bailiff of

(g.) *Cheasley v. Barnes*, 10 East, 73.

(h.) Per Holt, C. J., *Freemen v. Blewett*, Ld. Ray., 633; 1 Salk., 409, S. C.; *Moore v. Taylor*, 5 Taunt., 69.

(i.) See the precedents, 9 Went., 22, 53, 120, 351; 2 Chitty, 584, 1st edit.

(k.) *Collet v. Lord Keith*, 2 East., 274; *Moravia v. Sloper*, Willes, 30.

(l.) 1 Saund., 92, n. 2; *Rowland v. Veale*, Cowp., 18; *Moore v. James*, Willes, 122; *Johnson v. Warner*, *ibid.*, 528; *Titley v. Foxall*, *ibid.*, 688.

another person, for rent in arrear, or as damage feasant, it is sufficient to say that, "as bailiff of the said *E. T.*, he well acknowledges the taking, &c., as for and in the name of a distress," &c., without showing any warrant for that purpose, (*m.*)

The allegation of *authority*, like that of *tille*, must in general be strictly proved as laid.

The above-mentioned particulars of *place*, *time*, *quality*, *quantity*, and *value*, *names of persons*, *tille*, and *authority*, though, in this work, made the subject of distinct rules, in a view to convenient classification and arrangement, are to be considered but as examples of that infinite variety of circumstances, which it may become necessary, in different cases and forms of action, to particularize, for the sake of producing a certain issue; for it may be laid down as a comprehensive rule, that—

RULE VII.

IN GENERAL, WHATEVER IS ALLEGED IN PLEADING, MUST BE ALLEGED WITH CERTAINTY, (*n.*)

This rule being very wide in its terms, it will be proper to illustrate it by a variety of examples.

In pleading *the performance of a condition or covenant*, it is a rule, though open to exceptions that will be presently noticed, that the party must not plead generally that he performed the covenant or condition, but must show specially the time, place, and manner of performance; and even though the subject to be performed should consist of several different acts, yet he must show in this special way the performance of each, (*o.*) Thus, in debt on bond, con-

(*m.*) *Matthews v. Cary*, 3 Mod., 138.

(*n.*) Com. Dig., Pleader, C. 17, C. 22, E. 5, F. 17.

(*o.*) Com. Dig., Pleader, E. 25, E. 26, 2 W., 33; *Halsey v. Carpenter*, Cro. Jac., 359; *Wimbleton v. Holdrip*, 1 Lev., 303; *Woodcock v. Cole*, 1 Sid., 215; *Stone v. Bliss*, 1 Bulst., 43; *Fitzpatrick v. Robinson*, 1 Show., 1; *Austin v. Jervoise*, Hob., 69, 77; *Brown v. Rands*, 2 Vent., 156; *Lord Evers v. Buckton*, Benl., 65; *Braban v. Bacon*, Cro. Eliz., 916; *Codner v. Dalby*, Cro. Jac., 363; *Leneret v. Rivet*, *ibid.*, 503; 1 Saund., 116, n. 1.

ditioned for the payment of 30*l.* to *H. S.*, *I. S.*, and *A. S.*, tam cito as they should come to the age of twenty-one years, the defendant pleaded that he paid those sums tam cito as they came of age, and the plaintiff demurred, because it was not shown when they came of age, and the certain times of the payment. "And for this cause all the court held the plea to be ill; for although it be a good plea, regularly, to the condition of a bond, to pursue the words of the condition, and to show the performance, yet Coke said there was another rule, that he ought to plead in certainty the time and place and manner of the performance of the condition, so as a certain issue may be taken; otherwise it is not good. Wherefore, because he did not plead here in certainty, it was adjudged for the plaintiff. And between the same parties, in another action of debt upon an obligation, the condition being for performance of legacies in such a will, he pleaded performance generally, and, not showing the will, nor what the legacies were, it was adjudged for the plaintiff." (*p.*) So, in debt on a bond, conditioned for the performance of several specific things, "the defendant pleaded performavit omnia, &c. Upon demurrer it was adjudged an ill plea; for, the particulars being expressed in the condition, he ought to plead to each particularly, by itself," (*q.*)

Yet this rule, requiring performance to be specially shown, admits of relaxation where the subject comprehends such multiplicity of matter as would lead to great prolixity; and a more general mode of allegation is in such cases allowable. It is open also to the following exceptions: Where the condition is for the performance of matters set forth in another instrument, and these matters are in an affirmative and absolute form, and neither in the negative nor the disjunctive, a general plea of performance is sufficient. And where a bond is conditioned for indemnifying the plaintiff from the consequences of a cer-

(*p.*) *Halsey v. Carpenter*, Cro. Jac., 359.

(*q.*) *Wimbleton v. Holdrip*, 1 Lev., 303.

tain act, a general plea of *non damnificatus*, viz, that he has not been damnified, is proper, without showing how the defendant has indemnified him. These variations from the ordinary rule, and the principles on which they are founded, will be explained hereafter, (*r.*)

When in any of these excepted cases, however, a general plea of performance is pleaded, the rule under discussion still requires the *plaintiff* to show particularly in his replication in what way the covenant or condition has been *broken*; for otherwise no sufficiently certain issue would be attained. Thus, in an action of debt on a bond, conditioned for performance of affirmative and absolute covenants contained in a certain indenture, if the defendant pleads generally (as in that case he may) that he performed the covenants according to the condition, the plaintiff cannot in his replication tender issue with a mere traverse of the words of the plea, viz, that the defendant did not perform any of the covenants, &c.; for this issue would be too wide and uncertain; but he must assign a breach, showing specifically in what particular, and in what manner, the covenants have been broken, (*s.*)

Not only on the subject of *performance*, but in a variety of other cases, the books afford illustration of this general rule.

Thus, in debt on bond, the defendant pleaded that the instrument was executed in pursuance of a certain corrupt contract, made at a time and place specified, between the plaintiff and defendant, whereupon there was reserved above the rate of 5*l.* for the forbearing of 100*l.* for a year, contrary to the statute in such case made and provided. To this plea there was a demurrer, assigning for cause, that the particulars of the contract were not specified, nor the time of forbearance, nor the sum to be forborne, nor the sum to be paid for such forbearance. And the court

(*r.*) See Index to this work, tit. Performance.

(*s.*) *Plower v. Ross*, 5 Taunt., 386; per Lord Mansfield, *Sayre v. Binns*, Cowp. 577; Com. Dig., Pleader, F. 14.

held that the plea was bad, for not setting forth particularly the corrupt contract and the usurious interest; and Bayley, J., observed, that he "had always understood that the party who pleads a contract must set it out, if he be a party to the contract," (t.)

To an action on the case for a libel, imputing that the plaintiff was connected with swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons, the defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned with, and was one of, a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons with whom he had had dealings and transactions. To this plea there was a special demurrer, assigning for cause, inter alia, that the plea did not state the *particular instances of fraud*; and though the court of common pleas gave judgment for the defendant, this judgment was afterwards reversed upon writ of error, and the plea adjudged to be insufficient, on the ground above mentioned, (u.)

In an action of trespass for false imprisonment, the defendants pleaded, that before the said time, when, &c., certain persons unknown had forged receipts on certain forged dividend warrants, and received the money purporting to be due thereon, in Bank of England notes, amongst which was a note for 100*l.*, which was afterwards exchanged at the bank for other notes, amongst which was one for 10*l.*, the date and number of which were afterwards altered; that afterwards, and a little before the said time, when, &c., the plaintiff was *suspiciously* possessed of the altered note, and did in a *suspicious* manner dispose of the same to one A. B., and afterwards, in a *suspicious* manner, left England and went to Scotland; whereupon the defendants had *reasonable cause to suspect*, and did suspect, that the plaintiff had forged the said receipts, and so proceeded to

(t.) Hill v. Mortagu, 2 M. & S., 377; Hinton v. Roffey, 3 Mod., 35, S. P.

(u.) J'Anson v. Stuart, 1 T. R., 748.

justify the taking and detaining his person, to be dealt with according to law. Upon general demurrer, this plea was considered as clearly bad, because it did not show the *grounds* of suspicion with sufficient certainty to enable the court to judge of their sufficiency; and it was held that the use of the word *suspiciously* would not compensate that omission, (x.)

In an action of trover, for taking a ship, the defendant pleaded that he was captain of a certain man-of-war, and that he seized the ship mentioned in the declaration as prize; that he carried her to a certain port in the East Indies; and that the admiralty court there gave sentence against the said ship as prize. Upon demurrer, it was resolved that it was necessary for the plea to show some special cause for which the ship became a prize, and that the defendant ought to show who was the judge that gave sentence and to whom that court of admiralty did belong. And for the omission of these matters the plea was adjudged insufficient, (y.)

In an action of debt on bond, conditioned to pay so much money yearly, while certain letters patent were in force, the defendant pleaded, that from such a time to such a time he did pay, and that then the letters patent became void and of no force. The plaintiff having replied, it was adjudged, on demurrer to the replication, that the plea was bad, because it did not show *how* the letters patent became void, (z.)

Where the defendant justified an imprisonment of the plaintiff, on the ground of a contempt committed *tam factis quam verbis*, the plea was held bad upon demurrer, because it set forth the contempt in this general way, without showing its nature more particularly, (a.)

With respect to all points on which certainty of allega-

(x.) *Mure v. Kaye*, 4 Taunt., 34.

(y.) *Beak v. Tyrrell*, Carth., 31.

(z.) *Lewis v. Preston*, 1 Show., 290; *Skin.*, 303. S. C.

(a.) *Collet v. The Bailiffs of Shrewsbury*, 2 Leo., 34.

tion is required, it may be remarked, in general, that the allegation, when brought into issue, requires to be proved, in substance, as laid; and that the relaxation from the ordinary rule on this subject, which is allowed with respect to *place, time, quantity, and value*, does not, generally speaking, extend to other particulars.

Such are the principal rules which tend to certainty; but it is to be observed, that these receive considerable *limitation and restriction* from some other rules of a subordinate kind, to the examination of which it will now be proper to proceed.

1. *It is not necessary in pleading to state that which is merely matter of evidence, (b.)*

In other words, it is not necessary, in alleging a fact, to state such circumstances as merely tend to prove the truth of the fact. This rule may be illustrated by the following case: In an action of replevin, for seventy cocks of wheat, the defendant avowed under a distress for rent arrear. The plaintiff pleaded in bar, that before the said time, when, &c., one *H. L.* had recovered judgment against *G. S.*, and sued out execution; that *G. S.* was tenant at will to the defendant, and had sown seven acres of the premises with wheat, and died possessed thereof as tenant at will; that, after his death, the sheriff took the said wheat in execution, and sold it to the plaintiff; that the plaintiff suffered the wheat to grow on the locus in quo till it was ripe and fit to be cut; that he afterwards cut it, and made it into cocks, whereof the said seventy cocks were parcel; that, the said cocks being so cut, the plaintiff suffered the same to lie on the said seven acres until the same, in the course

(b.) "Evidence shall never be pleaded, because it tends to prove matter in fact; and therefore the matter in fact shall be pleaded." (Dowman's Case, 9 Rep., 9 b.; and see 9 Ed. III, 5 b., 6 a., there cited; *Eaton v. Southby*, Willes, 131; *Jermy v. Jenny*, Raym., 8; *Groenvelt v. Burnell*, Carth., 491.) See also 18 Ed. II, 614, where the pleader objects to an allegation, ceon'est forsque un evidence a l'enqueste.

of husbandry, were fit to be carried away; and that, while they were so lying, the defendant, of his own wrong, took and distrained the same, under pretense of a distress, the said wheat not then being fit to be carried away, according to the course of husbandry, &c. The defendant demurred, and, among other objections, urged that it ought to have been particularly shown how long the wheat remained on the land after the cutting, that the court might judge whether it were a reasonable time or not. But the court decided against the objection. "For though it is said (in Co. Litt., 56 b) that, in some cases, the court must judge whether a thing be reasonable or not, as in case of a reasonable fine, a reasonable notice, or the like, it is absurd to say that, in the present case, the court must judge of the reasonableness; for, if so, it ought to have been set forth in the plea, not only how long the corn lay on the ground, but likewise what sort of weather there was during that time, and many other incidents, which would be ridiculous to be inserted in a plea. We are of opinion, therefore, that this matter is sufficiently averred, and that the defendant might have traversed it, if he had pleased, and then it would have come before a jury, who, upon hearing the evidence, would have been the proper judges of it." (c.)

The reason of this rule is evident, if we revert to the general object which all the rules, tending to certainty, contemplate, viz, the attainment of a certain issue. This implies (as has been shown) a development of the question in controversy in a specific shape; and the degree of specification with which this should be developed it has been elsewhere attempted, in a general way, to define, (d.) But, so that that object be attained, there is, in general, no necessity for further minuteness in the pleading; and, therefore, those subordinate facts, which go to make up the evidence by which the affirmative or negative of the issue is to be established, do not require to be alleged, and

(c.) *Eaton v. Southby*, Willes, 131.

(d.) See *Supra*, pp. 153-155.

may be brought forward, for the first time, at the trial, when the issue comes to be decided. Thus, in the above example, if we suppose issue joined, whether the wheat cut was afterwards suffered to lie on the ground a reasonable time or not, there would have been sufficient certainty, without showing on the pleadings any of those circumstances (such as the number of days, the state of the weather, &c.) which ought to enter into the consideration of that question. These circumstances, being matter of evidence only, ought to be proved before the jury, but need not appear on the record.

This is a rule so elementary in its kind, and so well observed in practice, as not to have become frequently the subject of illustration by decided cases; and (for that reason, probably) is little, if at all, noticed in the digests and treatises. It is, however, a rule of great importance, from the influence which it has on the general character of English pleading; and it is this, perhaps, more than any other principle of the science, which tends to prevent that minuteness and prolixity of detail, in which the allegations, under other systems of judicature, are involved.

Another rule, that much conduces to the same effect, is that

2. *It is not necessary to state matter of which the court takes notice ex officio, (e.)*

Therefore it is unnecessary to state matter of law, (*f*), for this the judges are bound to know, and can apply for themselves to the facts alleged. Thus, if it be stated in pleading, that an officer of a corporate body was removed for misconduct, by the corporate body at large, it is unnecessary to aver that the power of removal was vested in such corporate body; because that is a power by law incidental to them, unless given by some charter, by-law, or

(e.) Co. Litt., 303 b.; Com. Dig., Pleader, C. 78; Deybel's Case, 4 Barn. & Ald., 243.

(f.) Doct. Fl., 102, per Buller, J.; *The King v. Lyme Regis*, Dong., 159.

other authority, to a select part only, (*g.*) Nor is it the principles of the *common law* alone, which it is unnecessary to state in pleading. The *public statute law* falls within the same reason and the same rule; as the judges are bound, officially, to notice the tenor of every public act of Parliament, (*h.*) It is, therefore, never necessary to set forth a public statute, (*i.*) The case, however, of *private acts* of Parliament is different; for these the court does not officially notice, (*k.*) and therefore, where a party has occasion to rely on an act of this description, he must set forth such parts of it as are material, (*l.*)

It may be observed, however, that though it is in general unnecessary to allege matter of law, yet there is sometimes occasion to make mention of it, for the convenience or intelligibility of the statement of fact. Thus, in an action of assumpsit on a bill of exchange, the form of the declaration is to state that the bill was drawn or accepted by the defendant, &c., (according to the nature of the case,) and that the defendant, as drawer or acceptor, &c., *became liable* to pay; and, being so liable, in consideration thereof promised to pay. So, it is sometimes necessary to refer to a public statute in general terms, to show that the case is intended to be brought within the statute; as, for example, to allege that the defendant committed a certain act against the *form of the statute in such case made and provided*; but the reference is made in this general way only, and there is no need to set the statute forth.

This rule, by which matter of law is omitted in the pleadings, by no means prevents (it will be observed) the attainment of the requisite certainty of issue. For even though the dispute between the parties should turn upon matter of law, yet they may evidently obtain a sufficiently specific issue of that description without any *allegation* of

(*g.*) *The King v. Lyme Regis*, Doug., 148.

(*h.*) 1 Bl. Com., 85.

(*i.*) *Boyce v. Whitaker*, Doug., 97; *Partridge v. Strange*, Pl. & C., 84.

(*k.*) 1 Bl. Com., *ibid.*; *Platt v. Hill*, Ld. Ray., 381.

(*l.*) *Boyce v. Whitaker*, Doug., 97.

law: for *ex facto jus oritur*; that is, every question of law necessarily arises out of some given state of facts; and therefore nothing more is necessary than for each party to state, alternately, his case in point of fact; and, upon demurrer to the sufficiency of some one of these pleadings, the issue in law must at length (as formerly demonstrated) arise.

As it is unnecessary to allege matter of law, so, if it be alleged, it is improper (as it has been elsewhere stated) to make it the subject of traverse, (*m.*)

Besides points of *law*, there are many other matters of a public kind, of which the court takes official notice, and with respect to which, it is, for the same reason, unnecessary to make allegation in pleading, such as matters antecedently alleged in the same record, (*n.*) the time of the king's accession, his proclamations, his privileges, the time and place of holding Parliament, the time of its sessions and prorogations, and its usual course of proceeding; the ecclesiastical, civil, and maritime laws; the customary course of descent in gavel-kind, and borough-English tenure; the course of the almanac, (*o.*) the division of England into counties, (*p.*) provinces, and dioceses; the meaning of English words, and terms of art, (even when only local in their use;) legal weights and measures, and the ordinary measurement of time; the existence and course of proceeding of the superior courts at Westminster, and the other courts of general jurisdiction; and the privileges of the officers of the courts at Westminster, (*q.*)

3. *It is not necessary to state matter which would come more properly from the other side, (r.)*

(*m.*) *Vide supra*, p. 201.

(*n.*) Co. Litt., 303 b.; *The King v. Knollys*, Ld. Ray., 13.

(*o.*) But see *Mayor of Guilford v. Clarke*, 2 Vent., 247.

(*p.*) But not the local situation and distances of the different places in a county from each other. (*Deybel's Case*, 4 Barn. & Ald., 243.)

(*q.*) This enumeration is principally taken from 1 Chitty, 216-226, 1st edit., where further information on the subject will be found.

(*r.*) Com. Dig., Pleader, C., 81; *Stowell v. Ld. Zouch*, Plow., 376; Wal-

This, which is the ordinary form of the rule, does not fully express its meaning. The meaning is, that it is not necessary to anticipate the answer of the adversary, which, according to Hale, C. J., is "like leaping before one comes to the stile," (*s.*) It is sufficient that each pleading should, in itself, contain a good *prima facie* case, without reference to possible objections not yet urged. Thus, in pleading a devise of land by force of the statute of wills, (32 Hen. VIII, c. 1,) it is sufficient to allege that such an one was seized of the land in fee, and devised it by his last will, in writing, without alleging that such devisor was of full age. For, though the statute provides that wills made by *femes covert*, or persons within age, &c., shall not be taken to be effectual, yet, if the devisor were within age, it is for the other party to show this in his answer, (*t.*) and it need not be denied by anticipation. So, in a declaration of debt upon a bond, it is unnecessary to allege that the defendant was of full age when he executed it, (*u.*) So, where an action of debt was brought upon the statute 21 Henry VI, against the bailiff of a town, for not returning the plaintiff, a burgess of that town, for the last Parliament, (the words of the statute being that the sheriff shall send his precept to the mayor, and, if there be no mayor, then to the bailiff,) the plaintiff declared that the sheriff had made his precept unto the bailiff, without averring that there was no mayor. And, after verdict for the plaintiff, this was moved in arrest of judgment. But the court was of opinion, clearly, that the declaration was good, "for we shall not intend that there was a mayor, except it be showed; and if there were one, it should come more properly on the other side," (*x.*) So, where there was a covenant in a

ingham's Case, 564; *St. John v. St. John*, Hob., 78; *Hotham v. East India Company*, 1 T. R., 638; *Palmer v. Lawson*, 1 Sid., 333; *Lake v. Raw*, Carth., 8; *Williams v. Fowler*, Str., 410.

(*s.*) *Sir Ralph Bovy's Case*, 1 Vent., 217.

(*t.*) *Stowell v. Ld. Zouch*, Plow., 376.

(*u.*) *Walsingham's Case*, Plow., 564; *Sir Ralph Bovy's Case*, 1 Vent., 217.

(*x.*) *St. John v. St. John*, Hob., 78.

charter-party, "that no claim should be admitted, or allowance made for short tonnage, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights, to be indifferently chosen by both parties;" and, in an action of covenant, brought to recover for short tonnage, the plaintiff had a verdict, the defendant moved, in arrest of judgment, that it had not been averred in the declaration that a survey was taken, and short tonnage made to appear. But the court held that, if such survey had *not* been taken, this was matter of defense, which ought to have been shown by the defendants, and refused to arrest the judgment, (*y.*)

But where the matter is such, that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, there it ought to be affirmed or denied by him in the first instance, though it may be such as would otherwise properly form the subject of objection on the other side. Thus, in an action of trespass on the case, brought by a commoner against a stranger, for putting his cattle on the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleaded a license from the lord to put his cattle there, but did not aver that there was sufficient common left for the commoners. This was held, on demurrer, to be no good plea, for, though it may be objected that the plaintiff may reply that there was not enough common left, yet, as he had already alleged in his declaration that his enjoyment of the common was obstructed, the contrary of this ought to have been shown by the plea, (*z.*)

There is an exception to the rule in question, in the case of certain pleas, which are regarded unfavorably by the courts, as having the effect of excluding the truth. Such are all pleadings in *estoppel*, (*a.*) and the plea of *alien enemy*. It is said that these must be *certain in every particu-*

(*y.*) *Hotham v. East India Company*, 1 T. R., 638.

(*z.*) *Smith v. Feverell*, 2 Mod., 6; 1 Freeman, 190, S. C.; *Greenhow v. Illey*, Willes, 619.

(*a.*) Co. Litt., 352 b., 303 a.; *Dovaston v. Payne*, 2 H. Bl., 530.

lar; which seems to amount to this, that they must meet and remove, by anticipation, every possible answer of the adversary. Thus, in a plea of alien enemy, the defendant must state not only that the plaintiff was born in a foreign country, now at enmity with the king, but that he came here without letters of safe conduct from the king, (*b*;) whereas, according to the general rule in question, such safe conduct, if granted, should be averred by the plaintiff in reply, and need not, in the first instance, be denied by the defendant.

4. *It is not necessary to allege circumstances necessarily implied, (c.)*

Thus, in an action of debt on a bond, conditioned to stand to and perform the award of *W. R.*, the defendant pleaded that *W. R.* made no award. The plaintiff replied that, after the making of the bond, and before the time for making the award, the defendant, by his certain writing, revoked the authority of the said *W. R.*, contrary to the form and effect of the said condition. Upon demurrer, it was held that this replication was good, without averring that *W. R.* had notice of the revocation, because that was implied in the words "revoked the authority;" for there could be no revocation without notice to the arbitrator; so that, if *W. R.* had no notice, it would have been competent to the defendant to tender issue "that he did not revoke in manner and form as alleged," (*d.*) So, if a foeffment be pleaded, it is not necessary to allege livery of seizin, for it is implied in the word "enfeoffed," (*e.*) So, if a man plead that he is heir to *A.*, he need not allege that *A.* is dead, for it is implied, (*f.*)

(*b.*) *Casseres v. Bell*, 8 T. R., 166.

(*c.*) *Vynior's Case*, 8 Rep., 81 b.; Bac. Ab., Pleas, &c., I. 7; Com. Dig., Pleader, E. 9; Co. Litt., 303 b.; 2 Saund., 305 a., n. 13; Reg. Plac., 101; *Sheers v. Brooks*, 2 H. Bl., 120; *Handford v. Palmer*, 2 Brod. & Bing., 361; *Marsh v. Bulteel*, 5 Barn. & Ald., 507.

(*d.*) *Vynior's Case*, 8 Rep., 81 b.; *Marsh v. Bulteel*, 5 Barn. & Ald., 507, S P.

(*e.*) Co. Litt., 303 b.; Doct. Pl., 48, 49; 2 Saund., 305 a., n. 13.

(*f.*) 2 Saund., 305 a. n. 13; Com. Dig., Pleader, E. 9; Dal., 67.

5. *It is not necessary to allege what the law will presume, (g.)*

Thus, in debt on a replevin bond, the plaintiffs declared that, at the city of *C.*, and within the jurisdiction of the mayor of the city, they distrained the goods of *W. H.* for rent, and that *W. H.*, at the said city, made his plaint to the mayor, &c., and prayed deliverance, &c., whereupon the mayor took from him and the defendant the bond on which the action was brought, conditioned that *W. H.* should appear before the mayor or his deputy, at the next court of record of the city, and there prosecute his suit, &c., and thereupon the mayor replevied, &c. It was held not to be necessary to allege in this declaration a custom for the mayor to grant replevin and take bond, and show that the plaint was made in court, because all these circumstances must be *presumed* against the defendant, who executed the bond and had the benefit of the replevin, (*h.*) So, in an action for slander, imputing theft, the plaintiff need not aver that he is not a thief, because the law presumes his innocence till the contrary be shown, (*i.*)

6. *A general mode of pleading is allowed where great prolixity is thereby avoided, (k.)*

It has been objected, with truth, that this rule is indefinite in its form, (*l.*) Its extent and application, however, may be collected with some degree of precision from the examples by which it is illustrated in the books, and by

(*g.*) *Wilson v. Hobday*, 4 M. & S., 125; *Chapman v. Pickersgill*, 2 Wils., 147; 1 Chitty, 226, 1st edit.

(*h.*) *Wilson v. Hobday*, 4 M. & S., 125.

(*i.*) *Chapman v. Pickersgill*, 2 Wils., 147; 1 Chitty, 226, 1st edit.

(*k.*) Co. Litt., 303 b.; 2 Saund., 116 b., 411, n. 4; Bac. Ab., Pleas, &c., I. 3; *Jerry v. Jenny*, Raym., 8; *Aglionby v. Towerson*, Raym., 400; *Parke v. Middleton*, Lutw., 421; *Keating v. Irish*, 590; *Cornwallis v. Savery*, 2 Burr., 772; *Mints v. Bethil*, Cro. Eliz., 749; *Braban v. Bacon*, 916; *Church v. Brownwick*, 1 Sid., 334; *Cryps v. Baynton*, 3 Bulst., 31; *Banks v. Pratt*, Sty., 428; *Huggins v. Wiseman*, Carth., 110; *Groenvelt v. Burnell*, 491; *J'Anson v. Stuart*, 1 T. R., 753; *Shum v. Farrington*, 1 Bos. & Pull., 640, *Barton v. Webb*, 8 T. R., 459; *Hill v. Montagu*, 2 M. & S., 378.

(*l.*) 1 Arch., 211.

considering the limitations which it necessarily receives from the rules tending to certainty, as enumerated in a former part of this section.

In assumpsit, on a promise by the defendant to pay for all such necessaries as his friend should be provided with by the plaintiff, the plaintiff alleged that he provided necessaries amounting to such a sum. It was moved, in arrest of judgment, that the declaration was not good, because he had not shown what necessaries in particular he had provided. But Coke, C. J. said, "this is good, as is here pleaded, for avoiding such multiplicities of reckonings;" and Doddridge, J., "this general allegation, that he had provided him with all necessaries, is good, without showing in particular what they were." And the court gave judgment unanimously for the plaintiff, (*m.*) So, in assumpsit for labor and medicines, for curing the defendant of a distemper, the defendant pleaded infancy. The plaintiff replied that the action was brought for necessaries generally. On demurrer to the replication, it was objected, that the plaintiff had not assigned, in certain, how or in what manner the medicines were necessary; but it was adjudged that the replication, in this general form, was good; and the plaintiff had judgment, (*n.*) So, in debt on a bond, conditioned that the defendant shall pay, from time to time, the moiety of all such money as he shall receive, and give account of it, he pleaded, generally, that he had paid the moiety of all such money, &c. Et per curiam, "This plea of payment is good, without showing the particular sums, and that in order to avoid stuffing the rolls with multiplicity of matter." Also, they agreed that, if the condition had been to pay the moiety of such money as he should receive, without saying *from time to time*, the payment should have been pleaded specially, (*o.*)

(*m.*) *Crype v. Baynton*, 3 Bulst., 31.

(*n.*) *Huggins v. Wiseman*, Carth., 110.

(*o.*) *Church v. Brownwick*, 1 Sid., 334; and see *Mints v. Bethil*, Cro. Elis.,

In an action on a bond, conditioned that *W. W.*, who was appointed agent of a regiment, should pay all such sum and sums of money as he should receive from the paymaster general for the use of the regiment, and faithfully account to and indemnify the plaintiff, the defendant pleaded a general performance, and that the plaintiff was not damnified. The plaintiff replied, that *W. W.* received from the paymaster general, for the use of the said regiment, several sums of money, amounting in the whole to 1,400*l.*, for and on account of the said regiment and of the commissioned and non-commissioned officers and soldiers of the same, according to their respective proportions, and that he had not paid a great part thereof among the colonel, officers, and soldiers, &c., according to the several proportions of their pay. Upon demurrer, the court said, that "there was no need to spin out the proceedings to a great prolixity, by entering into the detail, and stating the various deductions out of the whole pay, upon various accounts, and in different proportions." (*p.*) So, in debt on bond, conditioned that *R. S.* should render to the plaintiff a just account, and make payment and delivery of all moneys, bills, &c., which he should receive as his agent, the defendant pleaded performance. The plaintiff replied, that *R. S.* received, as such agent, divers sums of money, amounting to 2,000*l.*, belonging to the plaintiff's business, and had not rendered a just account, nor made payment and delivery of the said sum, or any part thereof. The defendant demurred specially, assigning for cause, that it did not appear by the replication from whom, or in what manner, or in what proportions, the said sums of money, amounting to 2,000*l.*, had been received. But the court held the replication "agreeable to the rules of law and precedents," (*q.*)

7. *A general mode of pleading is often sufficient, where the*

(*p.*) *Cornwallis v. Savery*, 2 Burr., 772.

(*q.*) *Shum v. Farrington*, 1 Bos. & Pull., 640; and see a similar decision, *Burton v. Webb*, 8 T. R., 459.

allegation on the other side must reduce the matter to certainty, (r.)

This rule comes into most frequent illustration in pleading *performance*, in *actions of debt on bond*. It has been seen that the general rule as to certainty requires that the time, place, and manner of such performance should be specially shown, (s.) Nevertheless, by virtue of the rule now under consideration, it may be sometimes alleged in general terms only; and the requisite certainty of issue is in such cases secured by throwing on the plaintiff the necessity of showing a special breach in his replication. This course, for example, is allowed in cases where a more special form of pleading would lead to inconvenient prolixity. Thus, in debt on bond, conditioned that the defendant should at all times, upon request, deliver to the plaintiff all the fat and tallow of all beasts which he, his servants, or assigns, should kill or dress before such a day, the defendant pleaded that, upon every request made unto him, he delivered unto the plaintiff all the fat and tallow of all beasts which were killed by him, or any of his servants or assigns, before the said day. On demurrer, it was objected, "that the plea was not good in such generality; but he ought to have said that he had delivered so much fat or tallow, which was all, &c.; or that he had killed so many beasts, whereof he had delivered all the fat." But the court held "that the plea was good; for where the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls shall be encumbered with the length thereof, the law allows of a general pleading in the affirmative. And it hath been resolved, by all the justices of England, that in debt, upon an obligation to perform the covenant in an indenture, it sufficeth to allege performance generally. So, where one is obliged to deliver all his evidences, or to assure all his lands, it sufficeth to allege that he hath delivered

(r.) Co. Litt., 303 b.; *Mints v. Bethil*, Cro. Eliz., 749; 1 Saund., 117, n. 1; 2 Saund., 410, n. 3; *Churc' v. Brownwick*, 1 Sid., 334.

(s.) *Supra*, p. 305.

all, &c., or assured all his lands, and it ought to come on the other side to show the contrary in some particular," (l.)

Another illustration is afforded by the plea of *non damnificatus*, on an action of debt on an indemnity bond, or bond conditioned "to keep the plaintiff harmless and indemnified," &c. This is in the nature of a plea of performance, being used where the defendant means to allege that the plaintiff has been kept harmless and indemnified, according to the tenor of the condition; and it is pleaded in general terms, without showing the particular manner of the indemnification. Thus, if an action of debt be brought on a bond, conditioned that the defendant "do, from time to time, acquit, discharge, and save harmless the churchwardens of the parish of P., and their successors, &c., from all manner of costs and charges, by reason of the birth and maintenance of a certain child;" if the defendant means to rely on the performance of the condition, he may plead in this general form: "That the churchwardens of the said parish, or their successors, &c., from the time of making the said writing obligatory, were not in any manner damnified by reason of the birth or maintenance of the said child," (u;) and it will then be for the plaintiff to show in the replication how the churchwardens were damnified. But with respect to the plea of *non damnificatus*, the following distinctions have been taken: First, if, instead of pleading in that form, the defendant alleges affirmatively that he "has saved harmless," &c., the plea will in this case be bad, unless he proceeds to show specifically *how* he saved harmless, (x.) Again, it is held that if the condition does not use the words "indemnify," or "save harmless," or some equivalent term, but stipulates

(l.) *Mints v. Bethil*, Cro. Eliz., 749; and see *Church v. Brownwick*, 1 Sid., 334.

(u.) *Richard v. Hodges*, 2 Saund., 84; *Hayes v. Bryant*, 1 H. Bl., 253; Com. Dig., Pleader, E. 25, 2 W., 33; *Manser's Case*, 2 Rep., 4 a.; 7 Went., Index, 615; 5 Went., 531.

(x.) 1 Saund., 117, n. 1; *White v. Cleaver*, Str., 681; *Hillier v. Plympton*, 422.

for the performance of some *specific act*, intended to be by way of indemnity, such as the payment of a sum of money by the defendant to a third person, in exoneration of the plaintiff's liability to pay the same sum, the plea of non damnificatus will be improper; and the defendant should plead performance specifically, as, "that he paid the said sum," &c., (*y.*) It is also laid down that, if the condition of the bond be to "discharge" or "acquit" the plaintiff from a particular thing, the plea of *non damnificatus* will not apply, but the defendant must plead performance specially, "that he discharged and acquitted," &c., and must also show the manner of such acquittal and discharge, (*z.*) But, on the other hand, if a bond be conditioned to "discharge and acquit the plaintiff *from any damage*" by reason of a certain thing, *non damnificatus* may then be pleaded, because that is, in truth, the same thing with a condition to "indemnify and save harmless," &c., (*a.*)

The rule under consideration is also exemplified in the case where the condition of a bond is for performance of covenants, or other matters, *contained in an indenture, or other instrument collateral to the bond, and not set forth in the condition.* In this case, also, the law often allows (upon the same principle as in the last) a general plea of performance, without setting forth the manner, (*b.*) Thus, in an action of debt on bond, where the condition is, that *T. J.*, deputy postmaster of a certain stage, "shall and will, truly, faithfully, and diligently, do, execute, and perform all and every the duties belonging to the said office of deputy postmaster of the said stage, and shall faithfully, justly, and exactly observe, perform, fulfill, and keep all and every the instructions, &c., from his majesty's postmaster gen-

(*y.*) *Holmes v. Rhodes*, 1 Bos. & Pull., 638.

(*z.*) 1 Saund., 117, n. 1; *Bret v. Audar*, 1 Leon., 71; *White v. Cleaver*, Str., 681; *Leneret v. Rivet*, Cro. Jac., 503; *Harris v. Prett*, 5 Mod., 243; *Carth.*, 375, S. C.

(*a.*) 1 Saund., 117, n. 1.

(*b.*) *Mints v. Bethil*, Cro. Eliz., 749; Bac. Ab., Pleas, &c., I, 3; 2 Saund., 410, n. 3; 1 Saund., 117, n. 1; Com. Dig., Pleader, 2, V. 13; *Earl of Kerry v. Baxter*, 4 East., 340.

eral," and such instructions are in an affirmative and absolute form, as follows: "You shall cause all letters and packets to be speedily and without delay, carefully and faithfully, delivered, that shall from time to time be sent unto your said stage, to be dispersed there, or in the towns and parts adjacent, that all persons receiving such letters may have time to send their respective answers," &c., it is sufficient for the defendant to plead (after setting forth the instructions) "that the said *T. J.*, from the time of the making the said writing obligatory, hitherto hath well, truly, faithfully, and diligently done, executed, and performed all and every the duties belonging to the said office of deputy postmaster of the said stage, and faithfully, justly, and exactly observed, performed, fulfilled, and kept all and every the instructions, &c., according to the true intent and meaning of the said instructions," without showing the manner of performance, as that he did cause certain letters or packets to be delivered, &c., being all that were sent, (*c.*) So, if a bond be conditioned for fulfilling all and singular the covenants, articles, clauses, provisos, conditions, and agreements, comprised in a certain indenture, on the part and behalf of the defendant, which indenture contains covenants of an affirmative and absolute kind only, it is sufficient to plead (after setting forth the indenture) that the defendant always hitherto hath well and truly fulfilled all and singular the covenants, articles, clauses, provisos, conditions, and agreements comprised in the said indenture, on the part and behalf of the said defendant, (*d.*)

But the adoption of a mode of pleading so general as in these examples will be improper, where the covenants, or other matters mentioned in the collateral instrument, are either in the *negative* or the *disjunctive* form, (*e.*) and,

(*c.*) 2 Saund., 403 b., 410, n. 3.

(*d.*) *Gainsford v. Griffith*, 1 Saund., 55, 117, n. 1; *Earl of Kerry v. Baxter*, 4 East., 340; 2 Chitty, 483, 1st edit.

(*e.*) *Earl of Kerry v. Baxter*, 4 East, 340; *Oglethorpe v. Hyda Cro. Eliz.*, 33; *Lord Arlington v. Merricke*, 2 Saund., 410, and n. 3, *ibid.*

with respect to such matters, the allegation of performance should be more specially made, so as to apply exactly to the tenor of the collateral instrument. Thus, in the example above given, of a bond conditioned for the performance of the duties of a deputy postmaster, and for observing the instructions of the postmaster general, if, besides those in the *positive* form, some of these instructions were in the *negative*, as, for example, "you shall not receive any letters or packets directed to any seaman, or unto any private soldier, &c., unless you be first paid for the same, and do charge the same to your account as paid," it would be improper to plead merely that *T. J.* faithfully performed the duties belonging to the office, &c., and all and every the instructions, &c. Such plea will apply sufficiently to the positive, but not to the negative part of the instructions, (*f.*) The form, therefore, should be as follows: "That the said *T. J.*, from the time of making the said writing obligatory, hitherto hath well, truly, faithfully, and diligently executed and performed all and every the duties belonging to the said office of deputy postmaster of the said stage, and faithfully, justly, and exactly observed, performed, fulfilled, and kept all and every the instructions, &c., according to the true intent and meaning of the said instructions. And the said defendant further says, that the said *T. J.*, from the time aforesaid, did not receive any letters or packets directed to any seaman, or private soldier, &c., unless he, the said *T. J.*, was first paid for the same, and did so charge himself, in his account, with the same as paid," &c., (*g.*) And the case is the same where the matters mentioned in the collateral instrument are in the *disjunctive or alternative* form; as, where the defendant engages to do either one thing or another. Here, also, a general allegation of performance is insufficient; and he should show which of the alternative acts was performed, (*h.*)

(*f.*) Lord Arlington v. Merricke, 2 Saund., 410, and n. 3, *ibid.*

(*g.*) 2 Saund., *ibid.*

(*h.*) Oglethorpe v. Hyde, Cro. Eliz., 233.

The reasons why the general allegation of performance does not properly apply to negative or disjunctive matters are, that, in the first case, the plea would be indirect or *argumentative* in its form; in the second, equivocal; and would, in either case, therefore, be objectionable, in reference to certain rules of pleading, which we shall have occasion to consider in the next section.

It has been stated in a former part of this work (i) that where a party founds his answer upon any matter not set forth by his adversary, but contained in a deed, of which the latter makes profert, he must demand *oyer* of such deed, and set it forth. In pleading performance, therefore, of the condition of a bond, where (as is generally the case) the plaintiff has stated in his declaration nothing but the bond itself, without the condition, it is necessary for the defendant to demand *oyer* of the condition, and set it forth, (k.) And in pleading performance of matters contained in a *collateral* instrument, it is necessary not only to do this, but also to make profert, and set forth the whole substance of the collateral instrument, (l,) for otherwise it will not appear that that instrument did not stipulate for the performance of negative or disjunctive matters, (m,) and, in that case, the general plea of performance of the matters therein contained would (as above shown) be improper.

8. *No greater particularity is required than the nature of the thing pleaded will conveniently admit, (n.)*

Thus, though generally, in an action for injury to goods, the *quantity* of the goods must be stated, (o,) yet, if they

(i.) *Supra*, p. 102.

(k.) 2 Saund., 410, n. 2.

(l.) *Ibid.*

(m.) See *Earl of Kerry v. Baxter*, 4 East., 340.

(n.) Bac. Ab., Pleas, &c., B. 5, 5, and p. 409, 5th edit.; *Buckley v. Rice Thomas*, Plow., 118; *Wimbish v. Tailbois*, 54; *Partridge v. Strange*, 85; Plow., 118, 54, 85; *Hartley v. Herring*, 8 T. R., 130.

(o.) *Vide supra*, p. 281.

cannot, under the circumstances of the case, be conveniently ascertained by number, weight, or measure, such certainty will not be required. Accordingly, in trespass for breaking the plaintiff's close, with beasts, and eating his peas, a declaration, not showing the quantity of peas, has been held sufficient; "because nobody can measure the peas that beasts can eat," (*p.*) So, in an action on the case for setting a house on fire, per quod the plaintiff, amongst divers other goods, ornatus pro equis amisit, after verdict for the plaintiff, it was objected, that this was uncertain; but the objection was disallowed by the court. And, in this case, Windham, J., said, that if he had mentioned only diversa bona, yet it had been well enough, as a man cannot be supposed to know the certainty of his goods when his house is burnt; and added, that, to avoid prolixity, the law will sometimes allow such a declaration, (*q.*) So, in an action of debt brought on the statute 23 Hen. VI, c. 15, against the sheriff of Anglesea, for not returning the plaintiff to be a knight of the shire in Parliament, the declaration alleged that the plaintiff "was chosen and nominated a knight of the same county, &c., by the greater number of men then resident within the said county of Anglesea, present, &c., each of whom could dispend 40s. of freehold by the year," &c. On demurrer, it was objected that the plaintiff "does not show the certainty of the number; as to say, that he was chosen by 200, which was the greater number; and thereupon, a certain issue might arise, whether he was elected by so many, or not." But it was held that the declaration was "good enough, without showing the number of electors; for the election might be made by voices, or by hands, or such other way, wherein it is easy to tell who has the majority, and yet very difficult to know the certain number of them." And it was laid down that, to put the plaintiff "to declare a certainty, where he cannot, by any possibility, be pre-

(*p.*) Bac. Ab., *ubi supra*.

(*q.*) Bac. Ab., Pleas, &c., 409, 5th edit.

sumed to know or remember the certainty, is not reasonable nor requisite in our law," (r.) So, in an action for false imprisonment, where the plaintiff declared that the defendant imprisoned him until he made a certain bond, by duress, to the defendant, "and others unknown," the declaration was adjudged to be good, without showing the names of the others; "because it might be that he could not know their names; in which case, the law will not force him to show that which he cannot," (s.)

9. *Less particularity is required, when the facts lie more in the knowledge of the opposite party, than of the party pleading, (t.)*

This rule is exemplified in the case of alleging title in an adversary, where (as formerly explained) a more general statement is allowed, than when title is set up in the party himself, (u.) So, in an action of covenant, the plaintiff declared that the defendant, by indenture, demised to him certain premises, with a covenant that he, the defendant, had full power and lawful authority to demise the same, according to the form and effect of the said indenture; and then the plaintiff assigned a breach, that the defendant had not full power and lawful authority to demise the said premises, according to the form and effect of the said indenture. After verdict for the plaintiff, it was assigned for error, that he had not in his declaration shown, "what person had right, title, estate, or interest, in the lands demised, by which it might appear to the court that the defendant had not full power and lawful authority to demise." But, "upon conference and debate amongst the justices, it was resolved that the assignment of the

(r.) Buckley v. Rice Thomas, Plow., 118,

(s.) Cited *ibid.* See also Wimbish v. Tailbois, Plow., 54, 55; Partridge v. Strange, Plow., 85.

(t.) Rider v. Smith, 3 T. R., 766; Derisley v. Custance, 4 T. R., 77; Attorney General v. Meller, Hard., 459; Denham v. Stephenson, 1 Salk., 355; Robert Bradshaw's Case, 9 Rep., 60 b.; Gale v. Nevil, 8 East., 80; Com. Dig., Pleader, C. 26.

(u.) *Vide supra*, pp. 298, 299.

breach of covenant was good; for he has followed the words of the covenant negatively, and it lies more properly in the knowledge of the lessor, what estate he himself has in the land which he demises, than the lessee, who is a stranger to it," (x.) So, where the defendant had covenanted that he would not carry on the business of a rope-maker, or make cordage for any person, except under contracts for government, and the plaintiff, in an action of covenant, assigned for breach, that after the making of the indenture, the defendant carried on the business of a rope-maker, and made cordage for divers and very many persons, other than by virtue of any contract for government, &c.; the defendant demurred specially, on the ground that the plaintiff "had not disclosed any and what particular person or persons for whom the defendant made cordage, nor any and what particular quantities or kinds of cordage the defendant did so make for them, nor in what manner, nor by what acts, he carried on the said business of a rope-maker, as is alleged in the said breach of covenant." But the court held, "that as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be presumed conscious of his own dealings, than of the plaintiff's, there was no occasion to state them with more particularity;" and gave judgment accordingly, (y.)

10. *Less particularity is necessary in the statement of matter of inducement, or aggravation, than in the main allegations, (z.)*

This rule is exemplified in the case of the derivation of title; where, though it is a general rule *thct the commencement of a particular estate must be shown*, yet an exception is

(x.) Robert Bradshaw's Case, 9 Rep., 60 b.

(y.) Gale v. Read, 8 East., 80.

(z.) Co. Litt., 303 a.; Bac. Ab., Pleas, &c., pp. 322, 348, 5th edit.; Com Dig., Bleader, C. 31, C. 43, E. 10, E. 18; Doct. Pl., 283; Wetherell v. Clerkson, 12 Mod., 597; Chamberlain v. Greenfield, 3 Wils., 292; Alsop v. Sytwell, Yelv., 17; Riggs v. Bullingham, Cro. Eliz., 715; Woolston v. Webb, Hob., 18; Bishop of Salisbury's Case, 10 Rep., 59 b.; 1 Saund., 374, n 1.

allowed, if the title be alleged by way of *inducement* only, (a.) So, where, in *assumpsit*, the plaintiff declared that, in consideration that, at the defendant's request, he had given and granted to him, by deed, the next avoidance of a certain church, the defendant promised to pay 100*l.*, but the declaration did not set forth any time or place at which such grant was made; upon this being objected, in arrest of judgment, after verdict, the court resolved, that "it was but an inducement to the action, and therefore needed not to be so precisely alleged;" and gave judgment for the plaintiff, (b.) So, in *trespass*, the plaintiff declared that the defendant broke and entered his dwelling-house, and "wrenched and forced open, or caused to be wrenched and forced open, the closet-doors, drawers, chests, cupboards, and cabinets of the said plaintiff." Upon special demurrer, it was objected, that the number of closet-doors, drawers, chests, cupboards, and cabinets, was not specified. But it was answered, "that the breaking and entering the plaintiff's house was the principal ground and foundation of the present action; and all the rest are not foundations of the action, but matters only thrown in to aggravate the damages; and on that ground need not be particularly specified." And of that opinion was the whole court; and judgment was given for the plaintiff, (c.)

11. *With respect to acts valid at common law, but regulated, as to the mode of performance, by statute, it is sufficient to use such certainty of allegation, as was sufficient before the statute,* (d.)

Thus, by the common law, a lease for any number of years might be made by parol only; but, by the statute of *frauds*, (29 Car. II, c. 3, s. 1, 2,) all leases and terms for years made by parol, and not put into writing, and signed

(a.) *Vide supra*, p. 293.

(b.) *Riggs v. Bullingham*, Cro. Eliz., 715.

(c.) *Chamberlain v. Greenfield*, 3 Wils., 292.

(d.) 1 Saund., 276, n. 2; 211, n. 2; Anon., 2 Salk., 519; *Birch v. Bellamy* 12 Mod., 540; Bac. Ab., Statute, L. 3; 4 Hen. VII, 8.

by the lessors or their agents authorized by writing, shall have only the effect of leases at will, except leases not exceeding the term of three years from the making. Yet in a declaration of debt for rent on a demise, it is sufficient (as it was at common law) to state a demise for any number of years, without showing it to have been in writing, (e.) So, in the case of a promise to answer for the debt, default, or miscarriage of another person, (which was good by parol, at common law, but by the statute of frauds, section 4, is not valid unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party, &c.,) the declaration, on such promise, need not allege a written contract, (f.)

And on this subject, the following difference is to be remarked, that "where a thing is originally made by act of Parliament, and required to be in writing, it must be pleaded with all the circumstances required by the act; as in the case of a will of lands, it must be alleged to have been made in writing; but where an act makes writing necessary to a matter, where it was not so at the common law, as where a lease for a longer term than three years is required to be in writing by the statute of frauds, it is not necessary to plead the thing to be in writing, though it must be proved to be so, in evidence," (g.)

As to the rule under consideration, however, a distinction has been taken between a *declaration* and a *plea*; and it is said, that though in the former the plaintiff need not show the thing to be in writing, in the latter the defendant must. Thus, in an action of *indebitatus assumpsit*, for necessaries provided for the defendant's wife, the defendant pleaded, that before the action was brought, the plaintiff and defendant, and one *J. B.*, the defendant's son, entered into a certain agreement, by which the plaintiff, in discharge of the debt mentioned in the declaration, was

(e.) 1 Saund., 276, n. 1; *vide supra*, p. 295.

(f.) 1 Saund., 211, n. 2; Anon., 2 Salk., 519.

(g.) 1 Saund., 276, d. e., n. 2.

to accept the said *J. B.* as her debtor for 9*l.*, to be paid when he should receive his pay as a lieutenant; and that the plaintiff accepted the said *J. B.* for her debtor, &c. Upon demurrer, judgment was given for the plaintiff, for two reasons: first, because it did not appear that there was any consideration for the agreement; secondly, that, admitting the agreement to be valid, yet, by the statute of frauds, it ought to be in writing, or else the plaintiff could have no remedy thereon; "and though, upon such an agreement, the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court that an action will lie upon it; for he shall not take away the plaintiff's present action, and not give her another, upon the agreement pleaded," (*h.*)

SECTION V.

OF RULES WHICH TEND TO PREVENT OBSCURITY AND CONFUSION
IN PLEADING.

RULE I.

PLEADINGS MUST NOT BE INSENSIBLE NOR REPUGNANT, (i.)

First, if a pleading be unintelligible, (or, in the language of pleading, *insensible*,) by the omission of material words, &c., this vitiates the pleading, (*k.*)

Again, if a pleading be inconsistent with itself, or *repugnant*, this is ground for demurrer.

Thus, where, in an action of trespass, the plaintiff declared for taking and carrying away certain timber, lying in a certain place, for the completion of a house then lately

(*h.*) *Case v. Barber*, Raym., 450. It is to be observed, that the plea was at all events a bad one in reference to the first objection. The case is, perhaps, therefore, not decisive as to the validity of the second.

(*i.*) Com. Dig., Pleader, C. 23; *Wyat v. Aland*, 1 Salk., 324; Bac. Ab., Pleas, &c., I. 4; *Nevill v. Soper*, 1 Salk., 213; *Butt's Case*, 7 Rep., a.; *Hutchinson v. Jackson*, 2 Lut., 1324; Vin. Ab., Abatement, D. a.

(*k.*) Com. Dig., Pleader, C. 23; *Wyat v. Aland*, 1 Salk., 324.

built,—this declaration was considered as bad for repugnancy; for the timber could not be for the building of a house already built, (*l.*) So, where the defendant pleaded a grant of a rent, out of a *term of years*, and proceeded to allege that, by virtue thereof, he was seized in his demesne, *as of freehold*, for the term of his life, the plea was held bad for repugnancy, (*m.*) But there is this exception: that, if the second allegation, which creates the repugnancy, is merely superfluous and redundant, so that it may be rejected from the pleading, without materially altering the general sense and effect, it shall, in that case, be rejected, at least, if laid under a *videlicet*, and shall not vitiate the pleading; for the maxim is, *utile, per inutile, non vitatur*, (*n.*)

RULE II.

PLEADINGS MUST NOT BE AMBIGUOUS, OR DOUBTFUL, IN MEANING; AND WHEN TWO DIFFERENT MEANINGS PRESENT THEMSELVES, THAT CONSTRUCTION SHALL BE ADOPTED, WHICH IS MOST UNFAVORABLE TO THE PARTY PLEADING, (*o.*)

Thus, if in trespass *quare clausum fregit*, the defendant pleads, that the locus in quo was his freehold, he must allege that it was his freehold *at the time of the trespass*; otherwise the plea is insufficient, (*p.*) So, in debt on a bond, conditioned to make assurance of land, if the defendant pleads that he executed a release, his plea is bad, if it does not express *that the release concerns the same land*, (*q.*) In trespass *quare clausum fregit*, and for breaking down two gates and three perches of hedges, the defendant

(*l.*) *Nevill v. Soper*, 1 Salk., 213.

(*m.*) *Butt's Case*, 7 Rep., 25 a.

(*n.*) *Gilb.*, C. P., 131-2; *The King v. Stevens*, 5 East, 255; *Wyat v. Aland*, 1 Salk., 324-5; 2 Saund., 291, n. 1; 306, n. 14; *Co. Litt.*, 303 b.

(*o.*) *Co. Litt.*, 303 b.; *Purcell v. Bradley*, *Yelv.*, 36; *Rose v. Standen*, 2 Mod., 295; *Dovaston v. Payne*, 2 H. Bl., 530; *Thornton v. Adams*, 5 M. & S., 38; *Lord Huntingtower v. Gardiner*, 1 Barn. & Cres., 297; *Fletcher v. Fogson*, 3 Barn. & Cres., 192.

(*p.*) *Com. Dig.*, *Pleader*, E. 5.

(*q.*) *Com. Dig.*, *ubi supra*; *Mauver's Case*, 2 Rep., 3.

pleaded that the said close was within the parish of *R.*, and that all the parishioners there, from time immemorial, had used to go over the said close, upon their perambulation in rogation week; and because the plaintiff had wrongfully erected *two gates and three perches of hedges*, in the said way, the defendant, being one of the parishioners, broke down those gates and those three perches of hedges. On demurrer, it was objected, that though the defendant had justified the breaking down two gates and three perches of hedges, it does not appear that they were the *same gates and hedges*, in respect of which the plaintiff complained; it not being alleged that they were the *gates and hedges "aforesaid,"* or the *gates and hedges "in the declaration mentioned."* "And thereto agreed all the justices, that this fault in the bar was incurable. For Walmsley said, that he thereby doth not answer to that for which the plaintiff chargeth him." And he observed, that the case might be, that the plaintiff had erected *four gates and six perches of hedges*; and that the defendant had broken down the whole of these, having the justification mentioned in the plea, in respect of two gates and three perches only, and no defense as to the remainder; and that the action might be brought in respect of the latter only, (*r.*)

A pleading, however, is not objectionable, as ambiguous or obscure, if it be *certain to a common intent*, (*s.*) that is, if it be clear enough, according to reasonable intendment or construction, though not worded with absolute precision, (*t.*) Thus, in debt on a bond, conditioned to procure *A. S.* to surrender a copyhold to the use of the plaintiff,—

(*r.*) Goodday *v.* Michell, Cro. Eliz., 441.

(*s.*) Com. Dig., Pleader, E. 7, F. 17; 1 Saund., 49, n. 1; Long's Case, 5 Rep., 121 a.; Doct. Pl., 58; Colthirst *v.* Bejushin, Plow., 26, 28, 33; Fulmerston *v.* Steward, *ibid.*, 102; Cooper *v.* Monke, Willes, 52; The King *v.* Lyme Regis, 1 Doug., 158; Hamond *v.* Dod, Cro. Car., 5; Poynter *v.* Poynter, *ibid.*, 194; Dovaston *v.* Payne, 2 H. Bl., 530; Jacobs *v.* Nelson, 3 Taunt., 423.

(*t.*) It will be observed, that the word "certain" is here used, not in the sense of *particular* or *specific*, as in former parts of this work,—but in its other meaning, of *clear* or *distinct*. See the double use of this word, noticed *supra*, p. 153.

a plea that *A. S.* surrendered and released the copyhold to the plaintiff, in full court, and the plaintiff accepted it, without alleging that the surrender was *to the plaintiff's use*, is sufficient; for this shall be intended, (*u.*) So, in debt on a bond, conditioned that the plaintiff shall enjoy certain land, &c.,—a plea that after the making of the bond, until the day of exhibiting the bill, the plaintiff did enjoy, is good, though it be not said, that *always* after the making, until, &c., he enjoyed; for this shall be intended, (*x.*)

It is under this head, of *ambiguity*, that the doctrine of *negatives pregnant* appears most properly to range itself. A *negative pregnant* is such a form of negative expression as may imply, or carry within it, an affirmative. This is considered as a fault in pleading; and the reason why it is so considered, is, that the meaning of such a form of expression is ambiguous. In trespass, for entering the plaintiff's house, the defendant pleaded, that the plaintiff's daughter gave him license to do so; and that he entered by that license. The plaintiff replied, that *he did not enter by her license*. This was considered as a *negative pregnant*; and it was held, that the plaintiff should have traversed the entry by itself, or the license by itself, and not both together, (*y.*) It will be observed that this form of traverse may imply, or carry within it, that a license was given, though the defendant did not enter by that license. It is, therefore, in the language of pleading, said to be pregnant with that admission, viz, that a license was given, (*z.*) At the same time, the license is not expressly admitted; and the effect, therefore, is to leave it in doubt whether the plaintiff means to deny the license or to deny that the defendant entered by virtue of that license. It is this *ambiguity* which appears to constitute the fault, (*a.*) The following

(*u.*) Hamond v. Dod, Cro. Car., 6.

(*x.*) Harlow v. Wright, *ibid.*, 195.

(*y.*) Myn v. Cole, Cro. Jac., 87.

(*z.*) Bac. Ab., Pleas, &c., p. 420, 5th edit.

(*a.*) 23 Hen. VI, 7; Slade v. Drake, Hob., 295; Styles' Pract. Reg. tit. Negative Pregnant. See Appendix, note 67.

is another example. In trespass, for assault and battery, the defendant justified, for that he, being master of a ship, commanded the plaintiff to do some service in the ship; which he refusing to do, the defendant moderately chastised him. The plaintiff traversed, with an *absque hoc*, *that the defendant moderately chastised him*; and this traverse was held to be a negative pregnant;—for, while it apparently means to put in issue only the question of excess, (admitting, by implication, the chastisement) it does not necessarily and distinctly make that admission; and is, therefore, ambiguous in its form, (b.) If the plaintiff had replied *that the defendant immoderately chastised him*, the objection would have been avoided; but the proper form of traverse would have been *de injuria sua propria absque tali causa*, (c.) This, by traversing the whole “cause alleged,” would have distinctly put in issue all the facts in the plea; and no ambiguity or doubt, as to the extent of the denial, would have arisen.

This rule, however, against a negative pregnant, appears in modern times, at least, to have received no very strict construction. For many cases have occurred in which, upon various grounds of distinction from the general rule, that form of expression has been held free from objection, (d.) Thus, in debt on a bond, conditioned to perform the covenants in an indenture of lease, one of which covenants was that the defendant, the lessee, would not deliver possession to any but the lessor, or such persons as should lawfully evict him, the defendant pleaded, that he *did not deliver the possession to any but such as lawfully evicted him*. On demurrer to this plea, it was objected, that the same was ill, and a *negative pregnant*; and that he ought to have said that such a one lawfully evicted him, to whom he delivered the possession; or that he did not deliver the possession to any;—but the court held the plea,

(b.) *Auberie v. James*, Vent., 70; 1 Sid., 444; 2 Keb., 623, S. C.

(c.) *Auberie v. James*, Vent., 70. See, as to the traverse *de injuria*, *supra*, p 179.)

(d.) See several instances, mentioned in Com. Dig., Pleader, R. 6.

as *pursuing the words of the covenant*, good—being in the negative—and that the plaintiff ought to have replied, and assigned a breach; and therefore judgment was given against him, (e.)

RULE III.

PLEADINGS MUST NOT BE ARGUMENTATIVE, (f.)

In other words, they must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only.

Thus, in an action of trover, for ten pieces of money, the defendant pleaded that there was a wager between the plaintiff and one *C.*, concerning the quantity of yards of velvet in a cloak; and the plaintiff and *C.* each delivered into the defendant's hand ten pieces of money, to be delivered to *C.* if there were ten yards of velvet in the cloak, and if not, to the plaintiff; and proceeded to allege *that, upon measuring of the cloak, it was found that there were ten yards of velvet therein*; whereupon the defendant delivered the pieces of money to *C.* Upon demurrer, "Gawdy held the plea to be good enough; for the measuring thereof is the fittest way for trying it: and when it is so found by the measuring, he had good cause to deliver them out of his hands, to him who had won the wager. But Fenner and Popham held that the plea was not good; for it may be that the measuring was false; and therefore he ought to have averred, in fact, that there were ten yards, and that it was so found upon the measuring thereof," (g.) So, in an action of trespass, for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. "This is an infallible *argument*, that

(e) Pullin v. Nicholas, 1 Lev., 83; see Com. Dig., Pleader, R. 6; Semb., cont. Lea v. Luthell, Cro. Jac., 559.

(f) Bac. Ab., Pleas, &c., I. 5; Com. Dig., E. 3; Co. Litt., 303 a.; Dyer, 43 a.; Wood v. Butts, Cro. Eliz., 260; Ledesham v. Lubram, *ibid.*, 870; Blackmore v. Tidderley, 11 Mod., 38; 2 Salk., 423 S. C.; Murray v. East India Company, 5 Barn & Ald., 215.

(g.) Ledesham v. Lubram, Cro. Eliz., 870.

the defendant is not guilty, and yet it is no plea," (h.) Again, in ejectment, the defendant pleaded a surrender of a copyhold, by the hand of Fosset, then steward of the manor. The plaintiff traversed *that Fosset was steward*. All the court held this to be no issue, and that the traverse ought to be *that he did not surrender*; for if he were not steward, the surrender is void, (i.) The reason of this decision appears to be, that to deny that Fosset was steward could be only so far material as it tended to show that the surrender was a nullity; and that it was, therefore, an argumentative denial of the surrender; which, if intended to be traversed, ought to be traversed in a direct form.

It is a branch of this rule *that two affirmatives do not make a good issue*, (k.) The reason is, that the traverse by the second affirmative is argumentative in its nature. Thus, if it be alleged by the defendant that a party died seized in fee, and the plaintiff allege that he died seized in tail, this is not a good issue, (l,) because the latter allegation amounts to a denial of a seizin in fee, but denies it by argument or inference only. It is this branch of the rule against *argumentativeness* that gave rise (as in part already explained) (m) to the form of a *special traverse*. Where, for any of the reasons mentioned in a preceding part of this work, it becomes expedient for a party traversing to set forth new affirmative matter tending to explain or qualify his denial, he is allowed to do so; but as this, standing alone, will render his pleading *argumentative*, he is required to add to his affirmative allegation an express denial, which is held to cure or prevent the argumentativeness, (n.) Thus, in the example last given, the plaintiff

(h.) Doct. Pl., 41; Dyer, 43 a.

(i.) Wood v. Butts, Cro. Eliz., 260.

(k.) Com. Dig., Pleader, R. 3; Co. Litt., 126 a; per Butler, J., Chandler v. Roberts, Doug., 60; Doct. Pl., 43, 360; Zouch and Bamfield's Case, 1 Leon., 77

(l.) Doct. Pl., 349; 5 Hen. VII, 11, 12.

(m.) *Supra*, p. 191.

(n.) Bac. Ab., Pleas, &c., H. 3; Courtney v. Phelps, Sid., 301; Herring v. Blacklow, Cro. Eliz., 30; 10 Hen. VI, 7. pl. 21.

may allege, if he pleases, that the party died seized in tail; but then he must add, *absque hoc, that he died seized in fee*, and thus resort to the form of a special traverse, (o.) The doctrine, however, that two affirmatives do not make a good issue, is not taken so strictly but that the issue will, in some cases, be good, if there is sufficient negative and affirmative in *effect*, though, in the *form of words*, there be a double affirmative. Thus, in debt on a lease for years, where the defendant pleaded that the plaintiff had nothing at the time of the lease made, and the plaintiff replied that he was seized in fee, this was held a good issue, (p.)

Another branch of the rule against argumentativeness is *that two negatives do not make a good issue*, (q.) Thus, if the defendant plead that he requested the plaintiff to deliver an abstract of his title, but that the plaintiff did not, when so requested, deliver such abstract, but neglected so to do, the plaintiff cannot reply that *he did not neglect and refuse to deliver* such abstract, but should allege affirmatively that *he did deliver*, (r.)

RULE IV.

PLEADINGS MUST NOT BE IN THE ALTERNATIVE, (s.)

Thus, in an action of debt against a jailor for the escape of a prisoner, where the defendant pleaded that *if* the said prisoner did, at any time or times after the said commitment, &c., go at large, he so escaped without the knowledge of the defendant, and against his will; and that, *if* any such escape was made, the prisoner voluntarily returned into custody before the defendant knew of the escape, &c.; the court held the plea bad: for "he cannot plead hypothetically that if there has been an escape there has

(o.) Doct. Pl., 349.

(p.) Co. Litt., 126 a.; Reg. Plac., 297, 298; and see *Tomlin v. Burlace*, 1 Wils., 6.

(q.) Com. Dig., Pleader, R. 3.

(r.) *Martin v. Smith*, 6 East, 557.

(s.) *Griffith's v. Eyles*, 1 Bos. & Pul., 413; *Cook v. Cox*, 2 M. & S., 114; *The King v. Brereton*, 8 Mod., 330; *Witherley v. Sarsfield*, 1 Show., 127.

also been a return. He must either stand upon an averment that there has been no escape, or that there have been one, two, or ten escapes, after which the prisoner returned," (*l.*)

So, where it was charged that the defendant wrote and published, or caused to be written and published, a certain libel, this was considered as bad for uncertainty, (*u.*)

RULE V.

PLEADINGS MUST NOT BE BY WAY OF RECITAL, BUT MUST BE POSITIVE IN THEIR FORM, (*x.*)

The following example may be adduced to illustrate this kind of fault. If a declaration in trespass, for assault and battery, make the charge in the following form of expression: "and thereupon the said *A. B.*, by ———, his attorney, complains, for that *whereas* the said *C. D.* heretofore, to wit, &c., made an assault," &c., instead of "for *that* the said *C. D.* heretofore, to wit, &c., made an assault," &c.—this is bad; for nothing is positively affirmed, (*y.*)

So, where a deed or other instrument is pleaded, it is in general not proper to allege (though in the words of the instrument itself) that *it is witnessed (testatum existit)* that such a party granted, &c.; but it should be stated absolutely and directly that he granted, &c. But as to this point, a difference has been established between declarations and other pleadings. In the former (for example, in a declaration of covenant) it is sufficient to set forth the

(*l.*) Griffith v. Eyles, 1 Bos. & Pul., 413.

(*u.*) The King v. Brereton, 8 Mod., 330.

(*x.*) Bac. Ab., Pleas, &c., B. 4; Sherland v. Heaton, 2 Bulst., 214; Wettenhall v. Sherwin, 2 Lev., 206; Mors v. Thacker, *ibid.*, 193; Hore v. Chapman, 2 Salk., 636; Dunstall v. Dunstall, 2 Show., 27; Gourney v. Fletcher, *ibid.*, 295; Dobbs v. Edmunds, Lord Ray., 1413; Wilder v. Handy, Str., 1151; Marshall v. Riggs, *ibid.*, 1162.

(*y.*) See the authorities last cited. It will be observed, however, that in *trespass on the case*, the "whereas" is unobjectionable, being used only as introductory to some subsequent positive allegation. See the same cases and the forms of declaration in the first chapter.

instrument with a *testatum existit*, though not in the latter. And the reason given is, that, in a declaration, such statement is merely inducement; that is, introductory to some other direct allegation. Thus, in covenant, it is introductory to the assignment of the breach, (z.)

RULE VI.

THINGS ARE TO BE PLEADED ACCORDING TO THEIR LEGAL EFFECT OR OPERATION, (a.)

The meaning is, that in stating an instrument or other matter in pleading, it should be set forth, not according to its *terms*, or its *form*, but according to its *effect in law*; and the reason seems to be, that it is under the latter aspect that it must principally and ultimately be considered; and therefore, to plead it in terms or form only, is an indirect and circuitous method of allegation. Thus, if a joint tenant conveys to his companion by the words "gives," "grants," &c., his estate in the lands holden in jointure, this, though in its terms a *grant*, is not properly such in operation of law, but amounts to that species of conveyance called a *release*. It should therefore be pleaded, not that he "granted," &c., but that he "released," &c., (b.) So, if a tenant for life grant his estate to him in reversion, this is, in effect, a *surrender*, and must be pleaded as such, and not as a *grant*, (c.) So, where the plea stated that *A.* was entitled to an equity of redemption, and, subject thereto, that *B.* was seized in fee, and that they, by lease and release, granted, &c., the premises, excepting and reserving to *A.* and his heirs, &c., a liberty of hunting, &c., it was held upon general demurrer, and afterwards

(z.) *Bultivant v. Holman*, Cro. Jac., 537; 1 Saund., 274, n. 1. (See the form of declaring with a *testatum existit*. (3 Went., 352, 523.)

(a.) Bac. Ab., Pleas, &c., I. 7; Com. Dig., Pleader, C. 37; 2 Saund., 97, and 97 b., n. 2; *Barker v. Lade*, 4 Mod., 150; *Hewel v. Richards*, 11 East., 633; *Moore v. Earl of Plymouth*, 3 Barn. & Ald., 66; *Stroud v. Lady Gerar* 1, 1 Salk., 8; 1 Saund., 235 b., n. 9.

(b.) 2 Saund., 97; *Barker v. Lade*, 4 Mod., 150, 151.

(c.) *Barker v. Lade*, 4 Mod., 151.

upon writ of error, that as *A.* had no legal interest in the land there could be no *reservation* to him; that the plea, therefore, alleging the right (though in terms of the deed) by way of *reservation* was bad; and that if (as was contended in argument) the deed would operate as a *grant* of the right, the plea should have been so pleaded, and should have alleged a *grant* and not a *reservation*, (*d.*)

The rule in question is, in its terms, often confined to *deeds* and *conveyances*. It extends, however, to all instruments in writing, and contracts, written or verbal; and, indeed, it may be said, generally, to all matters or transactions whatever which a party may have occasion to allege in pleading, and in which the form is distinguishable from the legal effect, (*e.*) But there is an exception in the case of a declaration for written or verbal *slander*, where (as the action turns on the words themselves) the words themselves must be set forth; and it is not sufficient to allege that the defendant published a libel, containing false and scandalous matters, in substance as follows, &c., or used words to *the effect* following, &c., (*f.*)

RULE VII.

PLEADINGS SHOULD OBSERVE THE KNOWN AND ANCIENT FORMS OF EXPRESSION, AS CONTAINED IN APPROVED PRECEDENTS, (*g.*)

Thus, so long ago as in the time of Bracton, in the count on a writ of right there were certain words of form, be-

(*d.*) Moore *v.* Earl of Plymouth, 3 Barn. & Ald., 66; *et vide supra*, p. 293.

(*e.*) Stroud *v.* Lady Gerard, 1 Salk., 8.

(*f.*) Wright *v.* Clements, 3 Barn. & Ald., 503; Cook *v.* Cox, 3 M. & S., 110; Newton *v.* Stubbs, 2 Show., 435. See an example of the manner in which a libel is set forth, *supra*, p. 73. But in an action for a malicious prosecution, if the declaration states merely that the defendant, without reasonable or probable cause, indicted the plaintiff for perjury, without setting forth the indictment, this is sufficient after verdict. (Pippet *v.* Hearn, 5 Barn. & Ald., 634.) See also Blizard *v.* Kelly, 2 Barn. & Cres., 283; Davis *v.* Noake, 6 M. & S., 33.

(*g.*) Com. Dig., Abatement, G. 7; Buckley *v.* Rice Thomas, Plow., 123; Dally *v.* King, 1 H. Bl., 1; Slade *v.* Dowland, 2 Bos. & Pul., 570; Dowland *v.* Slade, 5 East, 272; King *v.* Fraser, 6 East, 351; Dyster *v.* Battye, 3 Barn. & Ald., 448; Per Abbott, C. J., Wright *v.* Clements, *ibid.*, 507.

sides those contained in the writ, which were considered as essential to be inserted. It was necessary to allege "the seizin" of the ancestor "in his demesne as of fee"—and "of right"—"by taking the esplees"—"in the time of such a king"—and (if the seizin were alleged at a period of civil commotion) "in time of peace," (*h.*) And all this is equally necessary in framing a count on a writ of right at the present day; and no parallel or synonymous expressions will supply the omission, (*i.*) So, too, the *general issues* are examples of forms of expression fixed by ancient usage from which it is improper to depart. And another illustration of this rule occurs in the following modern case. To an action on the case, the defendants pleaded the statute of limitations, viz, *that they were not guilty within six years, &c.* The court decided, upon special demurrer, that this form of pleading was bad, upon the ground that "from the passing of the statute to the present case the invariable form of pleading the statute to an action on the case for a wrong has been to allege *that the cause of action did not accrue within six years, &c.*;" and that "it was important to the administration of justice that the usual and established forms of pleading should be observed," (*k.*)

It may be remarked, however, with respect to this rule, that the allegations to which it relates are of course only those of frequent and ordinary recurrence; and that even as to these, it is rather of uncertain application, as it must be often doubtful whether a given form of expression has been so fixed by the course of precedent as to admit of no variation, (*l.*)

Another rule, connected in some measure with the last, and apparently referable to the same object, is the following:

(*h.*) Bract., 373 a. b.

(*i.*) *Slade v. Dowland*, 2 Bos. & Pul., 570; *Dally v. King*, 1 H. Bl. 1; *Dowland v. Slade*, 5 East, 272.

(*k.*) *Dyster v. Battye*, 3 Barn. & Ald., 448.

(*l.*) See Appendix, note 68.

RULE VIII.

PLEADINGS SHOULD HAVE THEIR PROPER FORMAL COMMENCEMENTS AND CONCLUSIONS, (m.)

This rule refers to certain formulæ occurring at the *commencement* of pleadings subsequent to the declaration, and to others occurring at the *conclusion*.

A formula of the latter kind, inasmuch as it prays the judgment of the court for the party pleading, is often denominated the prayer of judgment, and occurs (it is to be observed) in all pleadings that do not tender issue, but in those only.

A PLEA TO THE JURISDICTION has usually no *commencement* of the kind in question, (n.) Its *conclusion* is as follows:

—the said *C. D.* prays judgment if the court of our lord the king here will or ought to have further cognizance of the plea (o) aforesaid.

or (in some cases) thus:

—the said *C. D.* prays judgment if he ought to be compelled to answer to the said plea here in court, (p.)

A PLEA IN SUSPENSION seems also to be in general pleaded without a formal *commencement*, (q.) Its *conclusion* (in the case of a plea of *nonage*) is thus:

—the said *C. D.* prays that the parol may demur (or that the said plea may stay and be respited) until the full age of him the said *C. D.*, &c., (r.)

(m.) Co. Litt., 303 b.; Com. Dig., Pleader, E. 27, E. 28, E. 32, E. 33, F. 4 F. 5, G. 1; Com. Dig., Abatement, I. 12; 2 Saund., 209, n. 1; per Holt, C. J., *Bowyer v. Cook*, 5 Mod., 145.

(n.) 1 Chitty, 450, 1st edit. But sometimes it has such commencement. (See *ibid.*)

(o.) 1 Went., 49; 3 Bl. Com., 303; *Powers v. Cook*, Lord Ray., 53.

(p.) 1 Went., 41, 49; Bac. Ab., Pleas, &c., E. 2; Per Holt, C. J., *Bowyer v. Cook*, 5 Mod., 146; *Powers v. Cook*, Ld. Ray., 63.

(q.) 2 Chitty, 472, 1st edit.; *Plasket v. Boeby*, 4 East, 485.

(r.) *Ibid.*, and 1 Went., 43. As to the form, in *other* pleas in suspension, see Lib. Plac., 9. 10; 1 Went., 15; 1 Saund., 210, n. 1; *John Trollop's Case* 8 Rep., 69; Reg. Plac., 180; *Onslow v. Smith*, 2 Bos. & Pul., 334; 1 Chitty 650, 1st edit.

A PLEA IN ABATEMENT is also usually pleaded without a formal commencement, within the meaning of this rule, (s.) The conclusion is thus :

in case of plea to the writ or bill,

—prays judgment of the said writ and declaration, (or bill,) and that the same may be quashed, (t.)

in case of plea to the person,

—prays judgment if the said A. B. ought to be answered to his said declaration (or bill,) (u.)

A PLEA IN BAR has this commencement :

—says that the said A. B. ought not to have or maintain his aforesaid action against him, the said C. D., because, he says, &c.

This formula is commonly called *actio non*.

The conclusion is,

—prays judgment if the said A. B. ought to have or maintain his aforesaid action against him.

A REPLICATION TO A PLEA TO THE JURISDICTION has this commencement :

—says that notwithstanding anything by the said C. D. above alleged, the

(s.) 2 Saund., 209 a., n. 1; 1 Arch., 305; Lutw., 11, (Qu.? See the precedents, 2 Chitty, 1st edit., tit. Pleas in Abatement; 1 Went., tit. Abatement.) But if a matter *apparent on the face of the writ* be pleaded (a thing which does not occur in modern practice, *vide supra*, p. 87) there should be a commencement. See this matter explained, Saund. and Arch., *ibid.*, to which the reader is referred generally for the learning on the subject of these formula parts of pleas in abatement.

(t.) Powers v. Cook, Ld. Ray., 63; 2 Saund., 209 a., n. 1; Com. Dig., Abatement, I. 12; 2 Chitty, 414, 1st edit. Yet in some instances, it seems, it may be *si curia cognoscere velit*. (*Ibid.*, 411; Chatland v. Thornly, 12 East., 544.) In proceedings by bill, it seems that it is informal to pray judgment of the declaration, or of the bill and declaration. (1 Chitty Ref., 706 n., a.)

(u.) Co. Litt., 128 a; Com. Dig., Abatement, I. 12; 1 Went., 58, 62. See Appendix, note 69.

court of our lord the king here ought not to be precluded from having further cognizance of the plea aforesaid, because, he says, &c., (x.)

or this:

—says that the said *C. D.* ought to answer to the said plea here in court, because, he says, &c., (y.)

and this *conclusion*:

—wherefore he prays judgment, and that the court here may take cognizance of the plea aforesaid, and that the said *C. D.* may answer over, &c., (z.)

A REPLICATION TO A PLEA IN SUSPENSION (in the case of a plea of *nonage*) has this *commencement*:

—says that notwithstanding anything by the said *C. D.* above alleged, the parol ought not further to demur, (or, the said plea ought not further to stay, or be respited,) because, he says, &c., (a.)

And (if there be any case in which such replication does not tender issue) it should probably have this *conclusion*:

—wherefore he prays judgment if the parol ought further to demur, (or, if the said plea ought further to stay, or be respited,) and that the said *C. D.* may answer over.

A REPLICATION TO A PLEA IN ABATEMENT has this *commencement*:

where the plea was to the *writ* or *bill*,

—says that his said writ and declaration, (or bill,) by reason of anything in the said plea alleged, ought not to be quashed; because, he says, &c., (b.)

where the plea was to the *person*,

—says that notwithstanding anything in the said plea alleged, he, the said

(x.) 1 Went., 60; Lib. Plac., 348.

(y.) 1 Went., 39.

(z.) Lib. Plac., 348; 1 Went., 39.

(a.) Liber Intrat.

(b.) 2 Chitty, 589, 1st edit.; 1 Arch., 309; Rast. Ent., 126 a.; Sabine v. Johnstone, 1 Bos. & Pul., 60.

A. B. ought to be answered to his said declaration, (or bill;) because he says, &c., (c.)

The *conclusion*, in most cases, is thus:

where the plea was to the *writ* or *bill*,

—wherefore he prays judgment, and that the said writ and declaration (or bill) may be adjudged good, and that the said C. D. may answer over, &c.

where the plea was to the *person*,

—wherefore he prays judgment, and that the said C. D. may answer over, &c., (d.)

A REPLICATION TO A PLEA IN BAR has this *commencement*:

—says that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against him, the said C. D.; because, he says, &c.

This formula is commonly called *precludi non*.

The *conclusion* is thus:

in *debt*,

—wherefore he prays judgment, and his debt aforesaid, together with his damages by him sustained by reason of the detention thereof, to be adjudged to him.

in *covenant*,

—wherefore he prays judgment, and his damages by him sustained by reason of the said breach of covenant, to be adjudged to him.

in *trespass*,

—wherefore he prays judgment, and his damages by him sustained by reason of the committing of the said trespasses, to be adjudged to him.

(c.) 1 Went., 42; 1 Arch., 309.

(d.) 1 Went., 43, 45, 54; 1 Arch., 309; Rast. Ent., 126 a.; Bisse v. Harcourt, 3 Mod., 281; 1 Salk., 177; 1 Show., 155; Carth., 137, S. C. As to the cases in which the *conclusions* should be different, and should pray damages, see 2 Saund., 211, n. 1; Medina v. Stoughton, Ld. Ray., 594; Co. Fut., 160 a.; Iul. Ent., 123; Lib. Plac., 1.

in trespass on the case, in assumpsit,

—wherefore he prays judgment, and his damages by him sustained by reason of the not performing of the said several promises and undertakings, to be adjudged to him.

in trespass on the case in general,

—wherefore he prays judgment, and his damages by him sustained by reason of the committing of the said several grievances, to be adjudged to him.

And so, in all *other actions*, the replication concludes with a prayer of judgment for damages or other appropriate redress, according to the nature of the action, (*e.*)

With respect to PLEADINGS SUBSEQUENT TO THE REPLICATION, it will be sufficient to observe, in general, that those on the part of the defendant follow the same form of *commencement* and *conclusion* as the plea; those on the part of the plaintiff, the same as the replication.

These forms are subject to the following variations.

First, with respect to *pleas in abatement*. Matters of abatement, in general, only render the writ *abatable* upon plea; but there are others, such as the death of the plaintiff or defendant before verdict or judgment by default, that are said to abate it *de facto*; that is, by their own immediate effect, and before plea; the only use of the plea, in such cases, being to give the court notice of the fact, (*f.*) Where the writ is merely *abatable*, the forms of *conclusion* above given are to be observed; but, when abated *de facto*, the *conclusion* must pray, “whether the court will further proceed;” for the writ being already, and ipso facto, abated, it would be improper to pray “that it may be quashed,” (*g.*)

Again, when a plea in bar is pleaded *puis darreign continuance*, (*h.*) it has, instead of the ordinary *actio non*, a *com-*

(*e.*) See the forms, 2 Chitty, 615, 628, 630, 641, 1st edit.; 1 Arch., 410, 442.

(*f.*) Bac. Ab., Abatement, K., G., F.; Com. Dig., Abatement, E. 17; 2 Saund., 210, n. 1.

(*g.*) Com. Dig., Abatement, H. 33, I. 12; 2 Saund., 210, n. 1; Hallows v Lucy, 3 Lev., 120.

(*h.*) As to this kind of plea, see *supra*, p. 97.

commencement and conclusion of actio non ulterius; as in the example, (*supra*, p. 98.)

So, if a plea in bar be founded on any matter arising *after the commencement of the action*, though it be not pleaded *after a previous plea*, and therefore not puis darreign continuance, yet it pursues, in that case also, in its *commencement and conclusion*, the same form of *actio non ulterius*, instead of *actio non generally*, (*i*;) for the *actio non* is taken to refer, in point of time, to the commencement of the suit, and not to the time of plea pleaded, and would, therefore, in the case supposed, be improper, (*k*.)

Again, all pleadings by way of *estoppel* have a *commencement and conclusion* peculiar to themselves. A *plea in estoppel* has the following *commencement*: "says that the said *A. B.* ought not to be admitted to say," (stating the allegation to which the *estoppel* relates;) and the following *conclusion*: "wherefore he prays judgment if the said *A. B.* ought to be admitted, against his own acknowledgment, by his deed aforesaid," (or otherwise, according to the matter of the *estoppel*), "to say that," (stating the allegation to which the *estoppel* relates,) (*l*.) A *replication*, by way of *estoppel*, to a plea, either in abatement or bar, has this *commencement*: "says that the said *C. D.* ought not to be admitted to plead the said plea by him above pleaded; because, he says, &c., (*m*.) Its *conclusion*, in case of a plea in *abatement*, is as follows: "wherefore he prays judgment if the said *C. D.* ought to be admitted to his said plea, contrary to his own acknowledgment, &c., and that he may answer over," &c., (*n*.) In case of a plea in *bar*: wherefore he prays "judgment if the said *C. D.* ought to be admitted, contrary to his own acknowledgment, &c., to plead, that," (stating the allegation to which the *estoppel*

(i.) *Le Bret v. Papillon*, 4 East, 502; 2 Chitty, 421, 1st edit.

(k.) *Le Bret v. Papillon*, 4 East, 502; *Evans v. Prosser*, 3 T. R., 186; Selw., Ni. Pri., 138.

(l.) 1 Arch., 202; *Veale v. Warner*, 1 Saund., 325; 3 Ed. III, 21.

(m.) *Took v. Glascock*, 1 Saund., 257; 2 Chitty, 590, 592, 1st edit.

(n.) 2 Chitty, 590.

relates,) (o.) *Rejoinders and subsequent pleadings* follow the forms of pleas and replications respectively, (p.)

Again, if any pleading be intended to apply to part only of the matter adversely alleged, it must be qualified accordingly, in its *commencement* and *conclusion*, (q.)

Another variation occurs in the action of *replevin*. *Avowries* and *cognizances*, instead of being pleaded with *actio non*, commence thus: an *avowry*, that the defendant "*well avows*;" a *cognizance*, that he "*well acknowledges*" the taking, &c.; and conclude thus: that the defendant "*prays judgment and a return of the said goods and chattels, together with his damages, &c., according to the form of the statute in such case made and provided, to be adjudged to him,*" &c. And the subsequent pleadings have correspondent variations, (r.)

Lastly, when, in an action of *debt on bond*, some matter is pleaded in bar, tending to show that the plaintiff *never had any right of action*, and not matter *in discharge of a right once existing*, (as, for example, when it is pleaded that the bond was void for some illegality,) the plea in that case, instead of *actio non*, has the following *commencement*, commonly called *onerari non*: "says that he ought not to be charged with the said debt, by virtue of the said supposed writing obligatory, because, he says," &c. And the conclusion is thus: "wherefore he prays judgment if he ought to be charged with the said debt by virtue of the said supposed writing obligatory," (s.)

While pleadings have thus, in general, the formal *commencements* and *conclusions*, (t.) there is an exception (as already noticed) in the case of all such pleadings as *tender issue*. These, instead of the conclusion with a *prayer of*

(o.) 2 Chitty, 592, 1st edit.

(p.) Veale v. Warner, 1 Saund., 325.

(q.) Weeks v. Peach, 1 Salk., 179. (See the example, *supra*, p. 262.)

(r.) See examples, 8 Went., 106, 107, 109, 112, &c.

(s.) Com. Dig., Pleader, E. 27; Brown v. Cornish, Salk., 516; Bennet v. Filkins, 1 Saund., 14 b.; *ibid.*, 290, n. 3.

(t.) See Appendix, note 70.

judgment, as in the above forms, conclude (in the case of the trial by jury) *to the country*; or (if a different mode of trial be proposed) with other appropriate formulæ, as explained under the second rule of the first section, (u.) Pleadings which tender issue have, however, the formal *commencements*, with the exception of the *general issues*, which have neither formal commencement nor conclusion, in the sense to which the present rule refers.

In general, a defect or impropriety in the *commencement* and *conclusion* of a pleading is ground for demurrer, (x.) But if the *commencement* pray the proper judgment, it seems to be sufficient, though judgment be prayed in an improper form in the *conclusion*, (y.) And the converse case, as to a right prayer in the *conclusion*, with an improper *commencement*, has been decided the same way, (z.) So, if judgment be simply prayed, without specifying *what* judgment, it is said to be sufficient; and it is laid down that the court will, in that case, *ex officio*, award the proper legal consequence, (a.) It seems, however, that these relaxations from the rule do not apply to pleas in *abatement*; the court requiring greater strictness in these pleas, with a view to discourage their use, (b.)

It will be observed that the *commencement* and *conclusion* of a plea are in such form as to indicate the view in which it is pleaded, and to mark its object and tendency, as being either to the jurisdiction, in suspension, in abatement, or in bar. It is therefore held that the class and character

(u.) *Supra*, p. 227.

(x.) *Nowlan v. Geddes*, 1 East, 634; *Wilson v. Kemp*, 2 M. & S., 549. *Le Bret v. Papillon*, 4 East, 502; *Com. Dig.*, Pleader, E. 27; *Weeks v. Peach*, 1 Salk., 179; *Powell v. Fullerton*, 2 Bos. & Pul., 420. But in some cases, a bad conclusion makes the plea a mere nullity, and operates as a *discontinuance*. (*Bisse v. Harcourt*, 3 Mod., 281; 1 Salk., 177; 1 Show., 155; *Carth.*, 137, S. C.; *Weeks v. Peach*, 1 Salk., 179.)

(y.) *Street v. Hopkinson*, Rep. Temp. Hard., 345.

(z.) *Talbot v. Hopewood*, Fort., 335.

(a.) 1 *Chitty*, 445, 539, 1st edit.; *Le Bret v. Papillon*, 4 East, 502; 1 *Saund.*, 97, n. 1.

(b.) *The King v. Shakespeare*, 10 East, 83; *Attwood v. Davis*, 1 Barn. & Ald., 172. See Appendix, note 71.

of a plea depend upon these its formula parts, which is ordinarily expressed by the maxim, *conclusio facit placitum*, (c.) Accordingly, if it commence and conclude as in bar, but contain matter sufficient only to abate the writ, it is a bad plea in bar, and no plea in abatement, (d.) And, on the other hand, it has been held that if a plea commence and conclude, as in abatement, and show matter in bar, it is a plea in abatement and not in bar, (e.)

As the *commencement* and *conclusion* have this effect of defining the character of the *plea*, so they have the same tendency in the *replication* and *subsequent pleadings*. For example, they serve to show whether the pleading be intended as in confession and avoidance or estoppel, and whether intended to be pleaded to the whole or to part. From these considerations, it is apparent that they are forms which, on the whole, materially tend to clearness and precision in pleading; and they have, for that reason, been considered under this section.

In connection with the rule last mentioned, and in a view to the same objects of clearness and precision, is established the following rule:

RULE IX.

A PLEADING WHICH IS BAD IN PART IS BAD ALTOGETHER, (f.)

The meaning of this rule is that, if in any material part of a pleading, or in reference to any of the material things which it undertakes to answer, or to either of the parties answering, the pleading be bad, though in other respects it be free from objection, the whole of it is open to demur-

(c) *Street v. Hopkinson*, Rep. Temp. Hardw., 346; *Medina v. Stoughton*, 1 Ld. Ray., 593; *Talbot v. Hopewood*, Fort., 335.

(d) *Nowlan v. Geddes*, 1 East, 934; *Wallis v. Savil*, 1 Lutw., 41; 2 Saund., 209 d., n. 1, per Littleton, J.; 36 Hen. VI, 18; *Medina v. Stoughton*, 1 Ld. Ray., 593.

(e) *Medina v. Stoughton*, 1 Ld. Ray., 593; *Godson v. Good*, 6 Taunt., 587. See Appendix, note 72.

(f) Com. Dig., Pleader, E. 36, F. 25; 1 Saund., 28, n. 2; *Webb v. Martin*, 1 Lev., 48; *Rowe v. Tutte*, Willes, 14; *Trueman v. Hurst*, 1 T. R., 40; *Webber v. Tivill*, 2 Saund., 127; *Duffield v. Scott*, 3 T. R., 374; *Hedges v. Chapman*, 2 Bing., 523; *Earl of St. Germain v. Willan*, 2 Barn. & Cres., 216.

rer; so that, if the objection be good, the whole pleading in question is overruled, and judgment given accordingly. Thus, if in a declaration of assumpsit two different promises be alleged in two different counts, and the defendant plead in bar to both counts conjointly the statute of limitations, viz, that he did not promise within six years, and the plea be an insufficient answer as to one of the counts, but a good bar to the other, *the whole plea* is bad, and neither promise is sufficiently answered, (g.) So, where to an action of trespass for false imprisonment against two defendants, they pleaded that one of them, A., having ground to believe that his horse had been stolen by the plaintiff, gave him in charge to the other defendant, a constable, whereupon the constable and A., in his aid and by his command, laid hands on the plaintiff, &c., the plea was adjudged to be bad as to both defendants, because it showed no reasonable ground of suspicion: for A. could not justify the arrest without showing such ground; and though the case might be different as to the constable, whose duty was to act on the charge, and not to deliberate, yet as he had not pleaded separately, but had joined in A.'s justification, the plea was bad as to him also, (h.)

This rule seems to result from that which requires each pleading to have its proper formal commencement and conclusion. For by those forms (it will be observed) the matter which any pleading contains is offered as an entire answer to the whole of that which last preceded. Thus, in the first example above given, the defendant would allege, in the commencement of his plea, that the plaintiff "ought not to have or maintain his *action*" for the reason therein assigned; and, therefore, he would pray judgment, &c., as to the whole *action* in the conclusion. If, therefore, the answer be insufficient as to one count, it cannot avail as to the other; because, if taken as a plea to the latter only, the *commencement* and *conclusion* would be wrong. It is to be observed that there is but one plea, and conse-

(g.) *Webb v. Martin*, 1 Lev., 48.

(h.) *Hedges v. Chapman*, 2 Bing., 523.

quently but one commencement and conclusion; but if the defendants should plead the statute in bar to the first count separately, and then plead it to the second count with a new commencement and conclusion, thus making two pleas instead of one, the invalidity of one of these pleas could not vitiate the other.

As the *declaration* contains no commencement or conclusion of the kind to which the last rule relates, so, on the other hand, the *declaration* does not fall within the rule now in question. Therefore, if a declaration be good in part, though bad as to another part relating to a distinct demand divisible from the rest, and the defendant demur to the whole, instead of confining his demurrer to the faulty part only, the court will give judgment for the plaintiff, (i.) It is also to be observed that the rule applies only to material allegations; for where the objectionable matter is mere surplusage, and unnecessarily introduced, (the answer being complete without it,) its introduction does not vitiate the rest of the pleading, (k.)

SECTION VI.

ON RULES WHICH TEND TO PREVENT PROLIXITY AND DELAY IN PLEADING.

RULE I.

THERE MUST BE NO DEPARTURE IN PLEADING, (l.)

A departure takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading, and resorts to another, (m.)

(i.) 1 Saund., 286, n. 9; Bac. Ab., Pleas, &c., B. 6; *Cutforthay v. Taylor*, Raym., 395; *Judin v. Samuel*, 1 New Rep., 43; *Benbridge v. Day*, 1 Salk., 218; *Powdick v. Lyon*, 11 East, 565; *Amory v. Brodrick*, 5 Barn. & Ald., 712.

(k.) *Duffield v. Scott*, 3 T. R., 377.

(l.) Co. Litt., 304; *Richards v. Hodges*, 2 Saund., 84; *Dudlow v. Watchorn*, 16 East, 39; *Tolputt v. Wells*, 1 M. & S., 395; *Fisher v. Pimbley*, 11 East, 198; *Winstone v. Linn*, 1 Barn. & Cres., 460. And see the numerous authorities collected in Com. Dig. Pleader, F. 7, F. 11; Bac. Ab., Pleas, &c., L.; Vin. Ab., tit. Departure; 1 Arch., 247, 253. See Appendix, note 73

(m.) Co. Litt., 304 a.; 2 Saund., 84, n. 1.

A departure obviously can never take place till the *replication*.

Of departure in the *replication* the following is an example. In *assumpsit* the plaintiffs, as executors, declared on several promises alleged to have been *made to the testator* in his lifetime. The defendant pleaded that she did not promise within six years before the obtaining of the original writ of the plaintiffs. The plaintiffs replied that, within six years before the obtaining of the original writ, the letters testamentary were granted to them, whereby the action accrued *to them, the said plaintiffs*, within six years. The court held this to be a departure; as in the declaration they had laid promises to the *testator*, but in the *replication* alleged the right of action to accrue to *themselves as executors*, (n.) They ought to have laid promises to themselves, as executors, in the declaration, if they meant to put their action on this ground.

But a departure does not occur so frequently in the *replication* as in the *rejoinder*.

In debt on a bond conditioned to perform an award, so that the same were delivered to the defendant by a certain time, the defendant pleaded that the arbitrators *did not make any award*. The plaintiff replied that the arbitrators did make an award to such an effect, and that the same was tendered by the proper time. The defendant rejoined *that the award was not so tendered*. On demurrer, it was objected that the *rejoinder* was a departure from the plea in bar; "for, in the plea in bar, the defendant says that the arbitrators made no award; and now, in his *rejoinder*, he has implicitly confessed that the arbitrators have made an award, but says that it was not tendered according to the condition; which is a plain departure: for it is one thing not to make an award and another thing not to tender it when made. And although both these things are necessary by the condition of the bond to bind the defendant to perform the award, yet the defendant ought only to rely

(n.) *Hickman v. Walker*, Willes, 27.

upon one or the other by itself," &c. "But if the truth had been that although the award was made, yet it was not tendered according to the condition, the defendant should have pleaded so at first in his plea," &c. And the court gave judgment accordingly, (o.) So, in debt on a bond conditioned to keep the plaintiffs harmless and indemnified from all suits, &c., of one Thomas Cook, the defendants pleaded *that they had kept the plaintiffs harmless*, (p.) &c. The plaintiffs replied that Cook sued them, and so the defendant had not kept them harmless, &c. The defendants rejoined *that they had not any notice of the damnification*. And the court held, first, that the matter of the rejoinder was bad, as the plaintiffs were not bound to give notice; and, secondly, that the rejoinder was a departure from the plea in bar; "for, in the bar, the defendants pleaded that they have saved harmless the plaintiffs, and, in the rejoinder, confess that they have not saved harmless, but they had not notice of the damnification; which is a plain departure," (q.) So, in debt on a bond conditioned to perform the covenants in an indenture of lease, one of which was that the lessee, at every felling of wood, would make a fence, the defendant pleaded *that he had not felled any wood*, &c. The plaintiff replied that he felled two acres of wood, but made no fence. The defendant rejoined *that he did make a fence*. This was adjudged a departure, (r.)

These, it will be observed, are cases in which the party deserts the ground, in point of *fact*, that he had first taken. But it is also a departure if he puts the same facts on a new ground in point of *law*; as if he relies on the effect of the common law in his declaration, and on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder. Thus, where the

(o.) *Roberts v. Mariett*, 2 Saund., 138.

(p.) This plea was bad, for not showing *how* they had kept harmless, (1 Saund., 117, n. 1, *supra*, p. 322; but the court held the fault cured by pleading over. *Vide supra*, p. 162.

(q.) *Cutler v. Southern*, 1 Saund., 116.

(r.) *Dyer*, 253 b.

plaintiff declared in covenant on an indenture of apprenticeship, by which the defendant was to serve him for seven years, and assigned, as breach of covenant, that the defendant departed within the seven years, and the defendant pleaded infancy, to which the plaintiff replied that, by the custom of London, infants may bind themselves apprentices, this was considered as a departure, (s.) Again, in trespass, the defendant made title to the premises, pleading a *demise for fifty years* made by the college of R. The plaintiff replied that there was another prior lease of the same premises, which had been assigned to the defendant, and which was unexpired at the time of making the said lease for fifty years; and alleged a proviso in the act of 31 Henry VIII, c. 13, avoiding all leases by the colleges to which that act relates made under such circumstances as the lease last mentioned. The defendant, in his rejoinder, pleaded another proviso in the statute, which allowed such leases to be good *for twenty-one years*, if made to the same person, &c.; and that, by virtue thereof, the demise stated in his plea was available for twenty-one years at least. The judges held the rejoinder to be a departure from the plea; "for, in the bar, he pleads a lease of fifty years, and, in the rejoinder, he concludes upon a lease for twenty-one years," &c. And they observed that "the defendant might have shown the statute and the whole matter at first," (t.)

To show more distinctly the nature of a departure, it may be useful, on the other hand, to give some examples of cases that have been held *not* to fall within that objection.

In debt on a bond conditioned to perform covenants, one of which was that the defendant should account for all sums of money that he should receive, the defendant pleaded performance. The plaintiff replied that 2*l.* came to his hands for which he had not accounted. The defendant rejoined that he accounted *modo sequente, viz, that*

(s.) *Mote v. Wallis*, 1 Lev., 81.

(t.) *Fulmerston v. Steward*, Flowd., 102; *Dyer*, 102 b., S. C.

certain malefactors broke into his counting-house and stole it, wherewith he acquainted the plaintiff. And it was argued on demurrer "that the rejoinder is a departure; for fulfilling a covenant to account cannot be intended but by actual accounting; whereas the rejoinder does not show an account, but an excuse for not accounting." But the court held that showing he was robbed is giving an account, and therefore there was no departure, (u.) So, in debt on a bond conditioned to indemnify the plaintiff from all tonnage of certain coals due to *W. B.*, the defendant pleaded *non damnificatus*; to which the plaintiff replied that for 5*l.* of tonnage of coals due to *W. B.* his barge was distrained; and the defendant rejoined that *no tonnage was due* to *W. B.* for the coals. To this the plaintiff demurred, "supposing the rejoinder to be a departure from the plea; for the defendant having pleaded generally that the plaintiff was not damnified, and the plaintiff having assigned a breach, the matter of the rejoinder is only by way of excuse, confessing and avoiding the breach; which ought to have been done at first, and not after a general plea of indemnity. On the other side, it was insisted that it was not necessary for the defendant to set out all his case at first, and it suffices that his bar is supported and strengthened by his rejoinder. And of this opinion was the court," (x.) Again, in an action of trespass on the case, for illegally taking toll, the plaintiff, in his declaration, set forth a charter of 26 Henry VI, discharging him from toll. The defendant pleaded a statute resuming the liberties granted by Henry VI. The plaintiff replied that by the statute 4 Henry VII such liberties were revived. And this was held to be no departure, (y.) Again, in an action of debt on a bond conditioned for the performance of an award, the defendant pleaded that the arbitrators *did not make any award*: the plaintiff replied that they duly made

(u.) Vere v. Smith, 2 Lev., 5; 1 Vent., 121, S. C.

(x.) Owen v. Reynolds, Fort., 341; cited Bac. Ab., Pleas, &c., p. 452, 5th edit.

(y.) Wood v. Hawkshead, Yelv., 13.

their award, setting part of it forth; and the defendant, in his rejoinder, set forth the whole award verbatim; by which it appeared that the award was bad in law, being made as to matters not within the submission. To this rejoinder the plaintiff demurred, on the ground that it was a departure from the plea; for by the plea it had been alleged that there was no award, which meant no award in fact; but by the rejoinder it appeared that there had been an award in fact. The court, however, held that there was no departure; that the plea of no award meant no legal and valid award, according to the submission; and that consequently the rejoinder, in setting the award forth, and showing that it was not conformable to the submission, maintained the plea, (z.) So, in all cases where the variance between the former and the latter pleading is *on a point not material*, there is no departure. Thus, in *assumpsit*, if the declaration, in a case where the time is not material, (a,) state a promise to have been made on a given day *ten years ago*, and the defendant plead that he did not promise within six years, the plaintiff may reply that the defendant *did promise within six years* without a departure, (b,) because the time laid in the declaration was immaterial.

The rule against departure is evidently necessary to prevent the retardation of the issue. For while the parties are respectively confined to the grounds they have first taken in their declaration and plea, the process of pleading will, as formerly demonstrated, exhaust, after a few alternations of statement, the whole facts involved in the cause, and thereby develop the question in dispute, (c.) But if a new ground be taken in any part of the series, a new state of

(z.) *Fisher v. Pimbley*, 11 East, 188; and see *Dudlow v. Watchorn*, 16 East, 29. N. B. The first of these cases seems, in effect, to have overruled some former decisions. See *Morgan v. Man*, 1 Sid., 180; *Raym.*, 94, S. C.; *Harding v. Holmes*, 1 Wils., 122; *Praed v. Duchess of Cumberland*, 4 T. R., 585; 2 H. Bl., 280.

(a.) *Vide supra*, p. 278.

(b.) *Lee v. Rogers*, 1 Lev., 110; *Cole v. Hawkins*, 10 Mod., 348, S. P.

(c.) *Supra*, pp. 93, 94.

facts is introduced, and the result is consequently postponed. Besides, if one departure were allowed, the parties might, on the same principle, shift their ground as often as they pleased; and an almost indefinite length of altercation might, in some cases, be the consequence, (*d.*)

RULE II.

WHERE A PLEA AMOUNTS TO THE GENERAL ISSUE IT SHOULD BE SO PLEADED, (*e.*)

It has been explained, in a former part of the work, that in most actions there is an appropriate form of plea, called the *general issue*, fixed by ancient usage as the proper method of traversing the declaration, when the pleader means to deny the whole or the principal part of its allegations, (*f.*) The meaning of the present rule is, that if, instead of traversing the declaration in this form, the party pleads in a more special way matter which is constructively and in effect the same as the general issue, such plea will be bad, and the general issue ought to be substituted.

Thus, to a declaration in trespass for entering the plaintiff's garden, the defendant pleaded *that the plaintiff had no such garden*. This was ruled to be "no plea, for it amounts to nothing more than *not guilty*; for if he had no such garden, then the defendant is not guilty." So the defendant withdrew his plea, and said *not guilty*, (*g.*) So, in trespass for depasturing the plaintiff's herbage, *non depascit herbas* is no plea: it should be, *not guilty*, (*h.*) So, in debt for the price of a horse sold, *that the defendant did not buy* is no plea, for it amounts to *nil debet*, (*i.*) Again, in trespass for enter-

(*d.*) *Vide* 2 Saund., 84 a, n. 1.

(*e.*) Co. Litt., 303 b; Doct. & Stud., 271, 272; Com. Dig., Pleader, E. 14; Bac. Ab., Pleas, &c., p. 370-376, 5th edit.; 10 Hen. VI, 16; 22 Hen. VI, 37; Holler v. Bush, Salk., 394; Birch v. Wilson, 2 Mod., 277; Lynnet v. Wood Cro. Car., 157; Warner v. Wainsford, Hob., 127; Anon., 12 Mod., 537; Saunders's Case, *ibid.*, 513; Hallet v. Byrt, 5 Mod., 252.

(*f.*) *Supra*, p. 168.

(*g.*) 10 Hen. VI, 16.

(*h.*) Doct. Pl., 42, cites 22 Hen. VI, 37.

(*i.*) Vin. Ab., Certainty in Pleadings, E. 15, cites Bro. Traverse, &c., pl. 375. 22 Fdw. IV, 29

ing the plaintiff's house, and keeping possession thereof for a certain time, the defendant pleaded that *J. S.* was seized in fee thereof, and, being so seized, gave license to the defendant to enter into and possess the house till he should give him notice to leave it; that thereupon the defendant entered and kept the house for the time mentioned in the declaration, and had not any notice to leave it all the time. The plaintiff demurred specially, on the ground that this plea amounted to the general issue, *not guilty*; and the court gave judgment, on that ground, for the plaintiff, (*k.*) So, in an action of trover for divers loads of corn, the defendant in his plea entitled himself to them as tithes severed. The plaintiff demurred specially, on the ground that the plea "amounted but to *not guilty*;" and the court gave judgment for the plaintiff, (*l.*) So, in trespass for breaking and entering the plaintiff's close, if the defendant plead a demise to him by the plaintiff, by virtue whereof he, the defendant, entered and was possessed, this is bad, as amounting to the general issue, *not guilty*, (*m.*) So, in debt on a bond, the defendant by his plea confessed the bond, but said that it was executed to another person, and not to the plaintiff; this was bad, as amounting to *non est factum*, (*n.*)

These examples show that a special plea, thus improperly substituted for the general issue, may be sometimes in a *negative*, sometimes in an *affirmative* form. When in the *negative*, its *argumentativeness* (*o*) will often serve as an additional test of its faulty quality. Thus, the plea in the first example, "that the plaintiff had no such garden," is evidently but an argumentative allegation that the defendant did not commit, because he *could* not have committed, the trespass. This, however, does not universally hold; for, in the second and third examples, the allegations that the

(*k.*) Saunders's Case, 12 Mod., 513.

(*l.*) Lynnet v. Wood, Cro. Car., 157.

(*m.*) Jaques's Case, Sty., 355.

(*n.*) Gifford v. Perkins, 1 Sid., 450; 1 Vent., 77, S. C.

(*o.*) See the rule against argumentativeness, *supra*, p. 337.

defendant "did not depasture," and "did not buy," seem to be in as direct a form of denial as that of *not guilty*. If the plea be in the *affirmative*, the following considerations will always tend to detect the improper construction. If a good plea, it must (as formerly shown) be taken either as a traverse, or as in confession and avoidance, (*p.*) Now, taken as a traverse, such a plea is clearly open to the objection of *argumentativeness*; for two affirmatives make an argumentative issue, (*q.*) Thus, in the fourth example, the allegations show that the house in question was the house of *J. S.*; and they therefore deny argumentatively that it was the house of the plaintiff, as stated in the declaration. On the other hand, if a plea of this kind be intended by way of confession and avoidance, it is bad *for want of color*, (*r.*) for it admits no apparent right in the plaintiff. Thus, in the same example, if it be true that *J. S.* was seized in fee, and gave license to the defendant to enter, who entered accordingly, this excludes all title of possession in the plaintiff; and without such a title he has no color to maintain an action of trespass, (*s.*) So, in the example where the defendant pleads the plaintiff's own demise, the same observation applies; for if the plaintiff demised to the defendant, who entered accordingly, the plaintiff would then cease to have any title of possession; and he consequently has no color to support an action of trespass.

The fault of *wanting color* being in this manner connected with that of *amounting to the general issue*, it is accordingly held that a plea will be saved from the latter fault where *express color* is given, (*t.*) Thus, in the example of *express color* given in a former part of this work, (*u.*) the plea is cured, by the fictitious color of title there given to the

(*p.*) *Vide supra*, pp. 156, 157.

(*q.*) *Vide supra*, p. 338.

(*r.*) *Vide supra*, pp. 205, 206.

(*s.*) See *Holler v. Bush*, *Salk.*, 394.

(*t.*) *Anon.*, 12 *Mod.*, 537; *Saunders's Case*, *ibid.*, 513; *Lynnet v. Wood*, *Cro. Car.*, 157; *Birch v. Wilson*, 2 *Mod.*, 274.

(*u.*) *Supra*, pp. 210-213.

plaintiff, of the objection to which it would otherwise be subject, that it amounts to *not guilty*. So, where sufficient *implied* color is given, a plea will never be open to this kind of objection. And it is further to be observed that, where sufficient implied color is given, the plea will be equally clear of this objection, even though it consist of matter which *might, by a relaxation of practice, be given in evidence under the general issue*. The relaxation here referred to is that formerly noticed, by which defendants are allowed, in certain actions, to prove, under this issue, matters in the nature of confession and avoidance; as, for example, in *assumpsit*, a release or payment, (x.) In such cases the plaintiff, (as formerly stated,) (y,) though allowed, is not *obliged* to plead *non assumpsit*, but may, if he pleases, plead specially the payment or release; and if he does, such plea is not open to the objection that it amounts to the general issue, (z.)

It is said that the court is not bound to allow this objection, but that it is in its discretion to allow a special plea, amounting to the general issue, if it involve such matter of law as might be unfit for the decision of a jury, (a.) It is also said that as the court has such discretion, the proper method of taking advantage of this fault is not by *demurrer*, but by motion to the court to set aside the plea and enter the general issue instead of it, (b.) It appears from the books, however, that the objection has frequently been allowed on demurrer.

As a plea amounting to the general issue is usually open also to the objection of being *argumentative*, or that of *wanting color*, we sometimes find the rule in question discussed as if it were founded entirely in a view to those

(x.) *Supra*, p. 175.

(y.) *Supra*, p. 177.

(z.) *Holler v. Bush*, Salk., 394; *Hussey v. Jacob*, Carth., 356; *Carr v. Hinchliff*, 4 Barn. & Cres., 547.

(a.) *Bac. Ab., Pleas, &c.*, p. 374, 5th edit.; *Birch v. Wilson*, 2 Mod., 274; *Carr v. Hinchliff*, 4 Barn. & Cres., 547.

(b.) *Warner v. Wainsford*, Eob., 127; *Ward & Blunt's Case*, 1 Leon., 178.

objections. This, however, does not seem to be a sufficiently wide foundation for the rule; for there are instances of pleas which are faulty, as amounting to the general issue, which yet do not (as already observed) seem fairly open to the objection of argumentativeness, (c.) and which, on the other hand, being of the negative kind or by way of traverse, require no color. Besides, there is express authority for holding that the true object of this rule is to avoid prolixity, and that it is therefore properly classed under the present section. For it is laid down that "the reason of pressing a general issue is not for insufficiency of the plea, but not to make long records when there is no cause," (d.)

RULE III.

SURPLUSAGE IS TO BE AVOIDED, (e.)

Surplusage is here taken in its large sense, as including unnecessary matter of whatever description, (f.) To combine with the requisite certainty and precision the greatest possible brevity is now justly considered as the perfection of pleading. This principle, however, has not been kept uniformly in view at every era of the science. For although it appears to have prevailed at the earliest periods, it seems to have been nearly forgotten during a subsequent interval of our legal history, (g;) and it is to the wisdom of modern judges that it owes its revival and restoration.

1. The rule as to avoiding surplusage may be considered, first, as prescribing the omission of matter wholly foreign. An example of the violation of the rule in this sense occurs when a plaintiff, suing a defendant upon one of the covenants in a long deed, sets out, in his decla-

(c.) *Supra*, p. 361.

(d.) *Warner v. Wainsford*, Hob., 127; see also Com. Dig., Pleader, E. 13.

(e.) *Bristow v. Wright*, Doug., 667; 1 Saund., 233, n. 2; *Yates v. Carlisle* 1 Black. Rep., 270.

(f.) In its more strict and confined meaning, it imports matter wholly foreign and irrelevant.

(g.) See the remarks of Sir M. Hale, *Hist. of Com. Law*, ch. vii, viii.

iation, not only the covenant on which he sues, but all the other covenants, though relating to matters wholly irrelevant to the cause, (*h.*)

2. The rule also prescribes the omission of matter which, though not wholly foreign, *does not require to be stated*. Any matters will fall within this description which, under the various rules enumerated in a former section as tending to limit or qualify the degree of certainty, (*i.*) it is unnecessary to allege; for example, matter of mere evidence, matter of law, or other things which the court officially notices, matter coming more properly from the other side, matter necessarily implied, &c.

3. The rule prescribes, generally, the cultivation of brevity, or avoidance of unnecessary prolixity, in the manner of statement. A terse style of allegation, involving a strict retrenchment of unnecessary words, is the aim of the best practitioners in pleading, and is considered as indicative of a good school.

Surplusage, however, is not a subject for demurrer; the maxim being that utile, per inutile, non vitiatur, (*k.*) But when any flagrant fault of this kind occurs and is brought to the notice of the court, it is visited with the censure of the judges, (*l.*) They have also, in such cases, on motion, referred the pleadings to the master, that he might strike out such matter as is redundant and capable of being omitted without injury to the material averments; and, in a clear case, will themselves direct such matter to be struck out. And the party offending will sometimes have to pay the costs of the application, (*m.*)

(*h.*) *Dundass v. Lord Weymouth*, Cowp., 665; *Price v. Fletcher*, *ibid.*, 727; *Phillips v. Fielding*, 2 H. Bl., 131.

(*i.*) *Vide supra*, pp. 310-332.

(*k.*) Co. Litt., 303 b.

(*l.*) *Yates v. Carlisle*, 1 Black., 270; *Price v. Fletcher*, Cowp., 727.

(*m.*) *Price v. Fletcher*, Cowp., 727; *Bristow v. Wright*, Doug., 667; 1 Tidd, 667, 8th edit.; *Nichol v. Wilton*, 1 Chitty Rep., 449, 450; *Carmack v. Gun-dry*, 3 Barn. & Ald., 272; *Brindley v. Dennett*, 2 Bing., 184.

This is not the only danger arising from surplusage.

Though traverse cannot be taken (as elsewhere shown) on an immaterial allegation, (n,) yet it often happens that when material matter is alleged, with an unnecessary detail of circumstances, the essential and non-essential parts of the statement are, in their nature, so connected as to be incapable of separation; and the opposite party is therefore entitled to include, under his traverse, the whole matter alleged, (o.) The consequence evidently is that the party who has pleaded with such unnecessary particularity has to sustain an increased burden of proof, and incurs greater danger of failure at the trial.

Most of the principal rules of pleading have now been classed in reference to certain common objects which each class or set of rules is conceived to contemplate, and have been explained and illustrated in their connection with these objects and with each other. But there still remain certain rules, also of a principal or primary character, which have been found not to be reducible within this principle of arrangement, being, in respect of their objects, of a miscellaneous and unconnected kind. These will form the subject of the following section

SECTION VII.

OF CERTAIN MISCELLANEOUS RULES.

These rules relate either to the *declaration*, the *plea*, or *pleadings in general*, and shall be considered in the order thus indicated.

RULE I.

THE DECLARATION SHOULD COMMENCE WITH A RECITAL OF THE ORIGINAL WRIT, (p.)

The commencement of the declaration, in *personal actions*, generally consists of a *short recital of the original writ*.

(n.) *Supra*, p. 236.

(o.) *Vide supra*, p. 240.

(p.) *Com. Dig.*, Pleader, C. 12.

Accordingly, where the writ directs the sheriff to *summon* the defendant, as in debt and covenant, (*q*.) the declaration begins, "*C. D. was summoned to answer A. B. of a plea,*" &c., (*r*.) On the other hand, where by the writ the defendant is required to be *put by gages and safe pledges*, as in trespass and trespass on the case, (*s*.) the commencement is, "*C. D. was attached to answer A. B. of a plea,*" &c., (*t*.) The declaration then proceeds further to recite the writ, by showing the nature of the particular requisition or exigency of that instrument; as, for example, (in debt,) "of a plea that he render to the said *A. B.* the sum of — pounds," &c. For further example, the reader may be referred to the different specimens of declaration given in the first chapter. From these it will appear that in debt, covenant, detinue, and trespass, nearly the whole original writ is recited; but not in trespass on the case. The course was formerly the same in the latter action also; but as this led to an inconvenient prolixity, it was by rule of court (*u*) provided, that in that and some other actions it shall be sufficient to mention generally the nature of the action; thus: "a plea of trespass upon the case," &c.; and such summary form has accordingly been since used.

In *real* and *mixed* actions, the writ is, in general, not so formally recited. Thus, in the writ of right the count begins, "*A. B. demands against C. D.,*" &c.; and the case is the same in formedon and dower, (*x*.) In general, however, it will be observed that this commencement comprises a repetition of the tenor of the writ; and in some actions, as in *quare impedit*, (*y*.) the writ is as formally recited as in actions personal.

(*q*.) *Supra*, pp. 46, 47.

(*r*.) *Vide supra* pp. 67, 68.

(*s*.) *Vide supra* pp. 48, 50.

(*t*.) *Vide supra*, pp. 70, 72.

(*u*.) 1 Tidd., 435, 8th edit.; 1 Saund., 318, n. 3.

(*x*.) See the forms of these courts in the first chapter, *supra*, pp. 65, 66

(*y*.) *Supra*, p. 66.

The recital of the writ is a form which the declaration has borrowed from the style in which it was entered on record; for the declaration itself, when actually pronounced in court, began, in general, with the words, *Ceo vous monstre, &c.*, (z.)

Though the writ, as recited at the commencement of the declaration, appear to be erroneous, yet that is no ground for demurrer to the declaration; for the court will not judge of any defect in the original writ without examination of the instrument itself, (a.)

The rule under consideration of course does not apply where the proceeding is by *bill*; but in that case also the declaration has its proper formal commencement.

The declaration by bill commences with the following formula: "*A. B.* complains of *C. D.*," &c.; and in the king's bench proceeds, in general, to allege that the defendant is "in the custody of the marshal of the marshal-sea of our lord the now king, before the king himself," (b;) viz, that he is a prisoner of the court; but, in case of an action against an attorney or officer of the court, it alleges the defendant to be such attorney or officer, without stating him to be in custody, &c. In the common pleas, the capacity of the defendant, as attorney or officer, is in a similar manner alleged; and in the exchequer, the declaration commences by describing the plaintiff as "a debtor to our sovereign lord the king." Of the meaning of these different forms, some explanation may be collected from the first chapter of this work, (c;) but it will be found more copiously in treatises which profess to consider at large the origin of the respective jurisdictions of the superior courts, (d.)

(z.) See Appendix, note 80.

(a.) Com. Dig., Pleader, C. 12; 1 Saund., 318, n. 3; *Helliot v. Selby*, Salk., 701.

(b.) Com. Dig., Pleader, C. 8; *vide supra*, p. 80.

(c.) *Vide supra*, pp. 74-82.

(d.) And see the forms of commencement by original, and by bill, in the different courts, given at large, 2 Chitty, 1-4, 1st edit.; 1 Arch., 72.

RULE II.

THE DECLARATION MUST BE CONFORMABLE TO THE ORIGINAL WRIT, (e.)

This is a rule of high antiquity, being laid down by Bracton, (f.) who wrote in the reign of Henry III, a period at which the system of pleading was in a very rude and imperfect state. It may be exemplified as follows: In detinue, where the writ stated the value of the goods which were the subject of action to be 20*l.*, and the declaration alleged 40*l.*, the variance was, in an old case, considered as a ground for reversing the judgment upon writ of error, (g.) And in trespass, where the writ charged the defendant with breaking the *close* of the plaintiff, and the declaration with breaking his *closes*, the decision was the same, (h.)

The rule is to be taken, however, subject to this qualification: that the declaration in general may, and does, so far vary from the writ, that it states the cause of action more *specially*, (i.) This the reader may see exemplified in the specimens of writs and declarations given in the first chapter, though it is more observable with respect to the writs of debt and covenant, &c., which are in a general form, than the writs of a special kind, such as trespass and trespass on the case.

Though it has been thought desirable to notice this rule, it is, at the same time, to be observed that it has lost much of its practical importance, as it can rarely now be enforced. For, if the declaration varied from the original, the only modes of objecting to the variance (unless the fault happened to appear by the recital in the commencement of the declaration) were by plea in abatement or by writ of

(e.) Com. Dig., Pleader, C. 13; Bac. Ab., Pleas, &c., B. 4; Co. Litt., 303 a.; Bract., 431 a., 435 b.

(f.) Bract., *ubi supra*.

(g.) *Young v. Watson*, Cro. Eliz., 308.

(h.) *Edward v. Watkin*, *ibid.*, 185.

(i.) Com. Dig. Abatement, G. 8, Pleader, C. 15, Co. Litt., 303 b.

error, (*k.*) But by a change of practice, explained in the first chapter, a plea in abatement, in respect of such variance, can now no longer be pleaded, (*l.*) and, by the statutes of jeofails and amendments, the objection cannot now be taken by way of writ of error after verdict; nor, if the variance be in a matter of *form* only, can it be taken after judgment by confession, *nil dicit*, or *non sum informatus*, (*m.*) However, the effect of the rule is still felt in pleading; for its long and ancient observance had fixed the frame and language of the declaration in conformity with the original writ in each form of action; and, by a rule which has already been considered, to depart from the known and established tenor of pleadings is a fault, (*n.*) consequently a declaration must still be framed in conformity with the language of the original writ appropriate to the form of action, as much as when a variance from the writ actually sued out might have become the subject of a plea in abatement.

In proceedings by *bill*, the rule in question is, of course, inapplicable; yet, even in these, the declaration pursues the same forms of expression as if founded on an original writ in the same form of action. Thus, the declaration in debt by bill is worded exactly in the same manner as the declaration in debt by original, (*o.*) the formal commencement only excepted; and the case is the same in all other actions.

RULE III.

THE DECLARATION SHOULD, IN CONCLUSION, LAY DAMAGES, AND ALLEGE PRODUCTION OF SUIT.

First, the declaration must lay *damages*.

In *personal* and *mixed* actions (*p.*) the declaration must

(*k.*) 1 Saund., 318, n. 3.

(*l.*) *Supra*, p. 88.

(*m.*) 5 Geo. I, c. 13; 21 Jac. I, c. 13; 4 Ann., c. 16; See 2 Tidd, 958, 959, 8th edit.; 1 Saund., 318, n. 3.

(*n.*) *Vide supra*, p. 342.

(*o.*) *Vide supra*, pp. 67, 80.

(*p.*) But *penal* actions are an exception.

allege, in conclusion, that the injury is to the *damage* of the plaintiff, and must specify the amount of that damage, (*q.*) In *personal* actions, there is the distinction formerly explained between actions that *sound in damages* and those that do not, (*r.*) but in either of these cases it is equally the practice to lay damages. There is, however, this difference: that in the former case damages are the main object of the suit, and are, therefore, always laid high enough to cover the whole demand; but in the latter the liquidated debt or the chattel demanded being the main object, damages are claimed in respect of the *detention* only of such debt or chattel, and are, therefore, usually laid at a small sum.

The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration, (*s.*)

In *real* actions, no damages are to be laid; because, in these, the demand is specifically of the land withheld, and damages are in no degree the object of suit.

Secondly, the declaration should also conclude with the *production of suit*.

This applies to actions of all classes—real, personal, and mixed.

In ancient times the plaintiff was required to establish the truth of his declaration, in the first instance, and before it was called into question upon the pleading, by the simultaneous production of his *secta*, that is, a number of persons prepared to confirm his allegations, (*t.*) The practice of thus producing a *secta* gave rise to the very ancient formula, almost invariably used at the conclusion of a dec-

(*q.*) Com. Dig., Pleader, C. 84; Robert Pilford's Case, 10 Rep., 116 b., 117 a. b.

(*r.*) *Vide supra*, p. 133.

(*s.*) Com. Dig., Pleader, C. 84; Vin. Ab., Damages, R.; Robert Pilford's Case, 10 Rep., 117 a. b.

(*t.*) See Bract., 214 b. Et inde statim producat (i. e., after the declaration in an action of prohibition) sectam sufficientem, duos ad minus, vel tres, vel plures, si possit. (*Ibid.*, 410 a.) "Producit sectam, was proffering to the court the testimony of the witnesses or followers." (Gilb. C. P., 48.) See Appendix, note 75.

laration as entered on record: et inde producit sectam, (u;) and though the actual production has for many centuries fallen into disuse, the formula still remains, (x.) Accordingly, except the count on a writ of right and in dower, all declarations constantly conclude thus: "And therefore he brings his suit," &c. The count on a writ of right did not, in ancient times, conclude with the ordinary production of suit; but with the following formula, peculiar to itself: "et quod tale sit jus suum offert disrationare per corpus talis liberi hominis," &c., (y;) and it concludes at the present day with an abbreviated translation of the same phrase: "And that such is his right, he offers," &c. The count in dower is an exception to the rule in question, and concludes without any production of suit; a peculiarity which appears always to have belonged to that action, (z.)

We may take occasion to notice, in this place, that subjoined to the declaration, in proceedings by *bill*, there is an addition of the names of two persons, now fictitious ones, as *pledges for the prosecution of the suit*, (a.) By the old law, it was necessary that, before the sheriff executed the original writ, the plaintiff should give him security that he would pursue his claim, (b.) This regulation seems to have been extended to proceedings by *bill* also; but, in these proceedings, the security would appear to have been given, not to the sheriff, but to the court itself, and the time for giving it was apparently that of filing the *bill*.

(u.) See the entries in the *Placitorum Abbreviatio*, passim, temp., Ric. I, Ed. II.

(x.) As early as 7 Ed. II it had become a mere form; for it is said in a case reported of that year, cest court (i. e., the common pleas) ne soeffre mye la sute estre *examine*. (7 Ed. II, 242.)

(y.) Bract., 372, b. Glanville gives it thus: Et hoc promptus sum probare per hunc liberum meum hominem, &c. (Glan. Lib., 2, c. 3.)

(z.) Booth, and Co. Ent., tit. Dower.

(a.) *Vide* the example, p. 80.

(b.) *Hussey v. More*, Cro. Jac., 414; 3 Bulst., 279, S. C.; Sel. Introd., xlviij. This practice is still indicated by the form of the original writs, which always contain the clause of *site fecerit securum*. See the forms in the first chapter.

Hence the practice in question of entering *pledges* at the foot of declarations by bill. These *pledges*, however, are now, in all cases, a mere matter of form; no such security being actually given in proceedings either by bill or original, (c.)

RULE IV.

PLEAS MUST BE PLEADED IN DUE ORDER, (d.)

The order of pleading, as established at the present day, is as follows :

Pleas.

1. To the jurisdiction of the court.
2. To the disability of the person: { 1. Of plaintiff.
2. Of defendant.
3. To the count or declaration.
4. To the writ: { 1. To the form of the writ: { 1. For matter apparent on the face of it.
2. For matter dehors the writ.
2. To the action of the writ.
5. To the action itself in bar thereof, (e.)

In this order the defendant may plead all these kinds of pleas successively. Thus, he may first plead to the jurisdiction, and, upon demurrer and judgment of respondeat ouster thereon, (f.) may resort to a plea to the disability of the person; and so to the end of the series.

But he cannot plead more than one plea of the same kind or degree. Thus, he cannot offer two successive pleas to the jurisdiction, or two to the disability of the person, (g.)

So he cannot vary the order; for by a plea of any of

(c.) See Appendix, note 76.

(d.) Co. Litt., 303 a.; Longueville v. Thistleworth, Ld. Ray., 970.

(e.) Com. Dig., Abatement, C.; 1 Chitty, 425. See Appendix note 77.

(f.) As to this judgment, *vide supra*, p. 133.

(g.) Com. Dig., Abatement, I. 3; Bac. Ab., Abatement, O.

these kinds he is taken to waive or renounce all pleas of a kind prior in the series.

And, if issue *in fact* be taken upon any plea, though of the dilatory class only, the judgment on such issue (as else where explained) either terminates or (in case of a plea of suspension) suspends the action, (*h.*) so that he is not at liberty, in that case, to resort to any other kind of plea.

RULE V.

PLEAS MUST BE PLEADED WITH DEFENSE, (*i.*)

Defense here signifies a certain form of words by which the plea is introduced.

This form varies in some degree according to the nature of the action.

In the *writ of right*, where the demandant claims on *his own* seizin, it is thus: "And the said *C. D.*, by *E. F.*, his attorney, comes and defends the right of the said *A. B.*, and his seizin, when, &c., and all, &c., and whatsoever, &c., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and right, &c., and says;" and then the matter of the plea is stated, (*k.*) In a writ of right, when the demandant claims on the seizin of *his ancestor*, it is thus: "And the said *C. D.*, by *E. F.*, his attorney, comes and defends the right of the said *A. B.*, and the seizin of the said *G. B.*, (the ancestor,) when, &c., and all, &c., and whatsoever, &c., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and right, &c., and says," (*l.*)

In *formedon* the defense is: "And the said *C. D.*, by *E. F.*, his attorney, comes and defends his right, when, &c., and says," (*m.*)

(*h.*) *Vide supra*, pp. 133, 134.

(*i.*) *Co. Litt.*, 127 b.; *Tampian v. Newsam*, *Yelv.*, 210; *Hampson v. Bill*, 3 *Lev.*, 240.

(*k.*) 3 *Bl. Com.*, Appendix, No. I, sec. 5.

(*l.*) *Booth*, 94; *Co. Ent.*, 181 b.; 3 *Chitty*, 652, 1st edit.

(*m.*) *Booth*, 148. *Defendit jus suum*, &c., is the Latin phrase; but this is ungrammatically put, as *Blackstone* conjectures, for *ejus*, and refers to the right of the demandant. (See 3 *Bl. Com.*, 297.)

The action of *dower* is an exception to the rule, and in this suit defense is not made, (n.)

In *quare impedit* the defense is: "And the said C. D., by E. F., his attorney, comes and defends the wrong and injury, when, &c., and says."

In *trespass*: "And the said C. D., by E. F., his attorney, comes and defends the force and injury, when, &c., and says."

In *other personal actions*: "And the said C. D., by E. F., his attorney, comes and defends the wrong and injury, when, &c., and says," (o.)

The word "comes" expresses the *appearance* of the defendant in court. It is taken from the style of the entry of the proceedings on the record, and formed no part of the *viva voce* pleading. It is accordingly not considered as in strictness constituting a part of the plea, (p.)

The word "defends," as used in these formulæ, has not its popular sense. It imports *denial*, being derived from the law Latin *defendere*, or the law French *defendre*, (both of which signify to *deny*;) (q;) and the effect of the expression is that the defendant denies the right of the plaintiff, or the force or wrong charged, (r.) This denial, however, is mere matter of form; for the defense is used, not merely when the plea is by way of denial or traverse, but when by confession and avoidance also; and, even when the plea does deny, other words are employed for that purpose, as we have seen, besides those of the formal *defense*.

The &c.'s supply the place of words which were formerly inserted *at length*. In a personal action, for example, the form, if fully given, would be as follows: "And the said C. D., by E. F., his attorney, comes and defends the force" (or "wrong") and "injury, when and where it shall be-

(n.) Rast. Ent., 228.

(o.) See examples of defense in the different pleas in the first chapter

(p.) 1 Chitty 411, 1st edit.; *Stephens v. Arthur*, Salk., 544.

(q.) See Appendix, note 78.

(r.) See Appendix, note 79.

hoove him, and the damages, and whatsoever else he ought to defend, and says," (s.)

At a time when this formula was more considered than it now is, particular effects were assigned to these its different clauses. It was said that, by defending "when and where it shall behoove him," the defendant impliedly acknowledged the jurisdiction of the court; and, by defending the "damages, and whatsoever else he ought to defend," he in effect admitted the competency of the plaintiff to sue; that by the former words, therefore, he was excluded from proceeding to plead to the jurisdiction, and by the latter from pleading to the disability of the plaintiff. Hence arose a distinction between "full defense" and "half defense," the former being that in which all the clauses were inserted; the latter being abridged thus: "And the said *C. D.*, by *E. F.*, his attorney, comes and defends the force" (or "wrong") "and injury, and says." Half defense was used where the defendant intended to plead to the jurisdiction or in disability, and full defense in other cases. All this doctrine, however, is now, in effect, superseded by the uniform practice of making defense with an *f.c.*, as in the forms first above given; it having been decided that such method will operate either as full defense or half defense, as the nature of the plea may require, (t.)

Defense is used in almost all actions. It has been seen, however, that *dower* is an exception; and the case is the same with an *assize*; the form of commencing the plea in these actions being merely "comes and says," and not "comes and defends," (u.)

Defense is used, too, in almost every description of pleas in those actions in which it obtains, (x.)

(s.) Bac. Ab., Pleas, &c., D.

(t) Co. Litt., 127 b.; *Alexander v. Mawman*, Willes, 40; *Wilkes v. Williams*, 8 T. R., 633; 2 Saund., 209 c., n. 1; 1 Chitty, 413, 414, 1st edit.

(u.) Booth, 118. In *sci: e facias* also no defense is made. (Bac. Ab., Pleas &c., D.)

(x) See the few exceptions noticed 1 Chitty, 413, 1st edit.

This formula can, perhaps, be considered in no other light than as one of those verbal subtleties, by which the science of pleading was, in many instances, anciently disgraced. It is at least difficult to discover in what solid view much consideration could be attached to the use of these technical words, (*y.*) Yet they have been formerly held essential, (*z.*) are still constantly used; and cannot, in general, with safety be omitted, (*a.*)

RULE VI.

PLEAS IN ABATEMENT MUST GIVE THE PLAINTIFF A BETTER WRIT OR BILL, (*b.*)

The meaning of this rule is, that in pleading a mistake of form in abatement of the writ or bill, the plea must, at the same time, *correct* the mistake, so as to enable the plaintiff to avoid the same objection in framing his new writ or bill, (*c.*) Thus, if a misnomer in the Christian name of the defendant be pleaded in abatement, the defendant must, in such plea, show what his true Christian name is, and even what is his true surname, (*d.*) and this though the true surname be already stated in the declaration, lest the plaintiff should a second time be defeated by error in the name. For these pleas, as tending to delay justice, are not favorably considered in law, and the rule in question was adopted in a view to check the repetition of them.

This condition of requiring the defendant to give a better writ is often a criterion to distinguish whether a given matter should be pleaded in *abatement* or in *bar*, (*e.*) The latter kind of plea, as impugning the right of action altogether, can of course give no better writ; for its effect is to deny that, under any form of writ, the plaintiff could

(*y.*) See Appendix, note 80.

(*z.*) Co. Litt., 127 b.; *Hampson v. Bill*, 3 Lev., 240.

(*a.*) 1 Chitty, 412, 1st edit.; 1 Arch., 162.

(*b.*) Com. Dig., Abatement I, 1; *Evans v. Stevens*, 4 T. R., 227; *Mainwaring v. Newman*, 2 Bos. & Pul., 120; *Haworth v. Spraggs*, 8 T. R., 5, 15.

(*c.*) See Appendix, note 81.

(*d.*) *Haworth v. Spraggs*, 8 T. R., 515.

(*e.*) 1 Saund., 284 n. 4 *Evans v. Stevens*, 4 T. R., 227.

recover in such action. If, therefore, a better writ can be given, this shows that the plea ought not to be in bar, but in abatement.

It may also be laid down as a rule that—

RULE VII.

DILATORY PLEAS MUST BE PLEADED AT A PRELIMINARY STAGE OF THE SUIT.

For dilatory pleas are in general not allowable after *full defense*, (*f*;) nor after a *general imparlance*, (*g*;) nor after *oyer* (*h*) or a *view*, (*i*;) nor after *voucher*, (*k*;) nor after a *plea in bar*, (*l*.) And, besides these, there are other proceedings also which have the effect of excluding a subsequent dilatory plea; but, being of a less ordinary and general kind, it is not necessary here to notice them more distinctly, (*m*.)

RULE VIII.

ALL AFFIRMATIVE PLEADINGS WHICH DO NOT CONCLUDE TO THE COUNTRY MUST CONCLUDE WITH A VERIFICATION, (*n*.)

Where an issue is tendered to be tried by jury, it has been shown that the pleading concludes *to the country*, (*o*.) In all other cases pleadings, if in the affirmative form, must conclude with a formula of another kind, called a *verification* or an *averment*. The verification is of two kinds, *common* and *special*. The common verification is that which applies to ordinary cases, as in the following form: "And this the said *A. B.*" (or "*C. D.*") "is ready to verify," (*p*.) The special verifications are used only where the matter

(*f*.) Com. Dig., Abatement, I, 16.

(*g*.) *Ibid.*, I, 20.

(*h*.) *Ibid.*, I, 22.

(*i*.) *Ibid.*, I, 25.

(*k*.) *Ibid.*, I, 28.

(*l*.) *Ibid.*, I, 23.

(*m*.) See the instances, Com. Dig., Abatement, I, 26, &c. See Appendix, note 82.

(*n*.) Com. Dig., Pleader, E, 32, E, 33; Co. Litt., 303 a.; Finch, Law, 359.

(*o*.) *Vide supra*, p. 223.

(*p*.) See the various examples of pleadings given in the course of this work.

pleaded is intended to be tried by record, or by some other method than a jury. They are in the following forms: "And this the said *A. B.*" (or "*C. D.*") "is ready to verify by the said record," or, "And this the said *A. B.*" (or "*C. D.*") "is ready to verify, when, where, and in such manner as the court here shall order, direct, or appoint," (*q.*)

The origin of this rule is as follows:

It was a doctrine of the ancient law, little, if at all, noticed by modern writers, that every pleading affirmative in its nature must be supported by an offer of some *mode of proof*, (*r.*) and the reference to a jury (who, as formerly explained, were in the nature of witnesses to the fact in issue) (*s.*) was considered as an offer of *proof* within the meaning of that doctrine, (*t.*) When the proof proposed was that by jury, the offer was made in the *viva voce* pleading, by the words *prest d'averrer*, or *prest, &c.*, (*u.*) which in the record was translated, *Et hoc paratus est verificare*, (*x.*) On the other hand, where other modes of proof were intended, the record ran, *Et hoc paratus est verificare per recordum*, or *Et hoc paratus est verificare quocunque modo curia consideraverit*, (*y.*) But while these were the forms in general observed, there was the following exception, that on the *attainment of an issue* to be tried by jury, the record marked that result by a change of phrase, and substituted for the verification the conclusion, *ad patriam*, to the *country*, (*z.*) The written pleadings (which, it will be remembered, are framed in the ancient style of the record) (*a.*) still retain the same formulæ in these different cases, and with the same distinctions as to their use.

(*q.*) *Vide supra*, p. 229.

(*r.*) See Appendix, note 83.

(*s.*) *Vide supra*, p. 153.

(*t.*) See Appendix, note 84.

(*u.*) See Appendix, note 85.

(*x.*) See 10 E. III, 23; *ibid.*, 25, and the Year Books, *passim*.

(*y.*) In the pleading this was expressed thus: *Prest d'averrer si devonius*, 40 E. III, 20.

(*z.*) See 10 E. III, 25, 26, &c.

(*a.*) *Vide supra*, p. 63.

They preserve the conclusion to the country, to mark the attainment of an issue triable by jury, but in other cases conclude with a translation of the old Latin phrase, *Et hoc paratus, &c.*; and hence the rule, that an affirmative pleading that does not conclude to the country must conclude with a verification, (*b.*)

As the ancient rule requiring an offer of proof extended only to *affirmative* pleadings, (those of a *negative* kind being in general incapable of proof,) so the rule now in question now applies to the former only, no verification being in general *necessary* in a negative pleading, (*c.*;) but it is nevertheless the practice to conclude with a verification all negative as well as affirmative pleadings that do not conclude to the country.

RULE IX.

IN ALL PLEADINGS WHERE A DEED IS ALLEGED, UNDER WHICH THE PARTY CLAIMS OR JUSTIFIES, PROPERT OF SUCH DEED MUST BE MADE, (*d.*)

Where any party pleads a deed, and claims or justifies under it, the mention of the instrument is accompanied with a formula to this effect: "One part of which said indenture," (or other deed,) "sealed with the seal of the said —, the said — now brings here into court, the date whereof is the day and year aforesaid," (*e.*)

This formula is called *making profert* of the deed. Its present practical import is, that the party has the instrument ready for the purpose of giving oyer, (*f.*;) and at the time when the pleading was *viva voce*, it implied an *actual*

(*b.*) "Every plea or bar, replication, &c., must be offered to be proved true, by saying in the plea, *Et hoc paratus est verificare*, which we call an averment." (Finch, Law, 359.) This gives confirmation, it will be observed, to the account of the origin of this rule contained in the text.

(*c.*) Co. Litt., 303 a.; *Millner v. Crowdall*, 1 Show., 338.

(*d.*) Com. Dig., Pleader, O. 1; *Leyfield's Case*, 10 Rep., 92 a.

(*e.*) See the example, *supra*, p. 68.

(*f.*) As to oyer, see p. 100.

production of the instrument in *open court* for the same purpose.

The rule, in general, applies to *deeds* only. No profert, therefore, is necessary of any written agreement or other instrument not under seal, (*g.*) nor of any instrument which, though under seal, does not fall within the technical definition of a *deed*; as, for example, a sealed will or award, (*h.*) This, however, is subject to exception in the case of letters testamentary and letters of administration; executors and administrators being bound, when plaintiffs, (*i.*) to support their declaration by making profert of these instruments.

The rule applies only to cases where there is occasion to *mention the deed in pleading*. When the course of allegation is not such as to lead to any mention of the deed, a profert is not necessary, even though in fact it may be the foundation of the case or title pleaded.

The rule extends only to cases where the party *claims* under the deed, or *justifies* under it; and therefore, when the deed is mentioned only as inducement or introduction to some other matter, on which the claim or justification is founded, or alleged not to show right or title in the party pleading, but for some collateral purpose, no profert is necessary, (*k.*)

The rule is confined, too, to cases where the party relies on the *direct and intrinsic operation of the deed*, (*l.*) Thus, in pleading a conveyance under the statute of uses, it is not necessary to make profert of the lease and release, because it is the *statute* that gives effect to the conveyance, and the deeds do not intrinsically establish the title.

(*g.*) Com. Dig., Pleader, O. 3; *Aylesbury v. Harvey*, 3 Lev., 205.

(*h.*) Com. Dig., Pleader, O. 3; 2 Saund., 62 b., n. 5.

(*i.*) But semb. that they are not bound to make profert where they have occasion to plead the letters testamentary, &c., as *defendants*. (See *Marsh v. Newman*, Popham, 163-4, cites 36 Hen. VI, 36.)

(*k.*) *Bellamy's Case*, 6 Rep., 38 a.; *Holland v. Shelley*, Hob., 303; *Banfill v. Leigh*, 8 T. R., 571; Com. Dig., Pleader, O. 8, O. 16; 1 Saund., 9 a., n. 1.

(*l.*) *Banfill v. Leigh*, 8 T. R., 573; *Read v. Brookman*, 3 T. R., 156.

Another exception to the rule obtains where the deed is *lost or destroyed* through time or accident, or is *in the possession of the opposite party*, (*m.*) These circumstances dispense with the necessity of a profert, and the formula is then as follows: "Which said writing obligatory" (or other deed) "having been lost by lapse of time," (or "destroyed by accidental fire," or "being in the possession of the said —,") "the said — cannot produce the same to the court here," (*n.*)

The reason assigned for the rule requiring profert is, that the court may be enabled by inspection to judge of the sufficiency of the deed, (*o.*) The author, however, presumes to question whether the practice of making profert *originated* in any view of this kind. It would be recollected that, by an ancient rule, all affirmative pleadings were formerly required to be supported by an offer of some mode of proof, (*p.*) As the pleader, therefore, of that time concluded in some cases by offering to prove by jury or by the record, so, in others, he maintained his pleading by producing a *deed* as proof of the case alleged. In so doing he only complied with the rule that required an offer of proof. Afterwards, the trial by jury becoming more universally prevalent, it was often applied (as at the present day) to determine questions arising as to the genuineness or validity of the deed itself so produced; and from this time a deed seems to have been no longer considered as a method of proof, distinct and independent of that by jury. Consequently it became the course to introduce, as well in pleadings where the party relied on a deed as in other cases, the common *verification* or offer to prove by *jury*; and the true object of the profert was in this manner not only superseded, but forgotten, though in practice it still continued to be made, (*q.*)

(*m.*) *Read v. Brookman*, 3 T. R., 156; *Carver v. Pinkney*, 3 Lev., 82.

(*n.*) 2 Chitty, 153, 1st edit.

(*o.*) *Leyfield's Case*, 10 Rep., 92 b.; *Co. Litt.*, 35 b.

(*p.*) *Vide supra*, p. 379.

(*q.*) See Appendix, note 86.

RULE X.

ALL PLEADINGS MUST BE PROPERLY ENTITLED OF THE COURT AND TERM, (r.)

With respect to the title of the *court*, it consists, in general, of a superscription of the name of the court, thus: "In the king's bench," "In the common pleas," or "In the exchequer," (s.) But in a declaration by bill in the king's bench it consists of a superscription of the name of the prothonotary, (t.)

With respect to the title of the *term*, it is either *general*, thus: "Trinity term, in the fourth year of the reign of King George the Fourth," (u;) or *special*, thus: "Monday next, after fifteen days of the Holy Trinity, in the fourth year of the reign of King George the Fourth."

Such title refers to the time when the party is supposed to deliver his oral allegation in open court; and as it was only in *term* time that the court anciently sat to hear the pleading, it is therefore always of a *term* that the pleadings are entitled, though they are often in fact filed or delivered in vacation time. The term of which any pleading is entitled is usually that in which it is actually filed or delivered, (x;) or, where this takes place in vacation time, the title is of the term last preceding.

The most frequent practice is to entitle *generally*, (according to the first form above given.) But it is to be observed that a pleading so entitled is by construction of law presumed, unless proof be given to the contrary, to have been

(r.) 1 Chitty, 261, 527, 528, 1st. edit.; 1 Arch., 72, 162; Topping v. Fuge, 1 Marsh., 341.

(s.) 1 Chitty, 262, 527, 1st. edit.; Com. Dig., Pleader, C. 7. See the examples, *supra*, pp. 65, 67, &c.

(t.) See the example, *supra*, p. 80.

(u.) See the examples, *supra*, p. 65, &c.

(x.) But *dilatory pleas*, though pleaded in a term subsequent to that of which the declaration is entitled, (as is sometimes the case,) must yet always be entitled of the same term with the declaration, unless pleaded with a special or general special imparlance. See this further explained, 1 Chitty, 422, 447, 1st edit.

pleaded on the *first day* of the term. And the effect of this is, that if a *general* title be used, it will sometimes occasion an apparent objection. Thus, in the case of a declaration so entitled, it may appear in evidence on the trial that the cause of action arose in the course and after the first day of the term of which the declaration is entitled, or this may appear on the face of the declaration itself; and, in either case, this objection would arise, that the plaintiff would appear to have declared before his cause of action occurred; whereas the cause of action ought of course always to exist at the time the action is commenced, (*y.*) The means of avoiding this difficulty is to entitle *specially* (according to the second form above given) of the *particular day* in the term when the pleading was actually filed or delivered.

RULE XI.

ALL PLEADINGS OUGHT TO BE TRUE, (*z.*)

While this rule is recognized, it is at the same time to be observed, that in general there is no means of *enforcing* it as a rule of pleading, because in general there is no way of proving the falsehood of an allegation till issue has been taken and trial had upon it.

It may also be observed, that notwithstanding this rule, a practice has prevailed of what is called *sham pleading*; that is, pleading, for the mere purpose of delay, a matter which the pleader knows to be false. There are certain pleas of this kind which, in consequence of their having been long and frequently used in practice, have obtained toleration from the courts, and, though discouraged, are tacitly allowed; as, for example, the common plea of *judgment recovered*, viz, that judgment has been already recovered by the plaintiff for the same cause of action. But in

(*y.*) But where this objection arises on the trial, it may be answered by giving evidence that the declaration was actually filed on a subsequent day in the term. (*Granger v. George*, 5 Barn. & Cres., 149.)

(*z.*) *Bac. Ab., Pleas, &c., G. 4; Slade v. Drake, Hob., 295; Smith v. Yeomans, 1 Saund., 316.*

other cases a sham plea, when ascertained to be so, is not allowed. It is true that, as already observed, it cannot in general, and in the regular course, be proved that a plea is false till the trial; but where a plea is not in the usual and tolerated form of a sham plea, and the matter pleaded is at the same time very improbable, and presumably intended as a plea of that description, the court will, *on motion*, supported by affidavit of its falsehood, allow judgment to be signed by the plaintiff as for want of plea, and make the defendant or his attorney pay the costs, (a.) And the court has in all cases power to punish for sham pleading, and has often strongly censured the practice.

Lastly, there is an exception to the rule in question, in the case of certain *fictions* established in pleading for the convenience of justice. Thus, the declaration in ejectment always state a fictitious demise made by the real claimant to a fictitious plaintiff; and the declaration in trover uniformly alleges, though almost always contrary to the fact, that the defendant *found* the goods in respect of which the action is brought.

(a.) *Thomas v. Vandermoelen*, 2 Barn. & Ald., 197; *Bartley v. Godslake*, *ibid.*, 199; *Shadwell v. Berthoud*, 5 Barn. & Ald., 750, 751; *Richley v. Proone*, 1 Barn. & Cres., 286; *Merington v. Becket*, 2 Barn. & Cres., 81; *Bell v. Alexander*, 6 M. & S. 133; *Young v. Gadderer*, 1 Bing., 380.

CONCLUSION.

To the view that has been taken in this work of the principles of the system of pleading, it may be useful to subjoin a few remarks on the merits of that system, considered in reference to its effects in the administration of justice.

When compared with other styles of proceeding, it has been shown (a) to possess this characteristic peculiarity, that it *produces an issue*; that is, it obliges the parties so to plead as to develop, by the effect of their own allegations, some particular question, as the subject for decision in the cause. With respect to the *degree* of particularity with which such question or issue is developed, we have seen, in the first place, that it is always distinctly defined, as consisting either of *fact* or *law*, because, in the former case, it arises on a traverse; in the latter, it presents itself in the very different shape of a demurrer. But, independently of this distinction, it will be remembered that the issue produced is required to be *certain* or specific, (b.) It is true that some issues are framed with much less certainty than others. Thus the general issue, in assumpsit and other actions of trespass on the case, presents a question abundantly more general than that on the execution of a release by duress, which occurred, by way of example, in a former part of this work, (c;) and, with respect to the whole class of general issues, it will be observed that they raise questions much less circumstantial than those which occur after special pleas. Still, however, it is the universal property of all issues to define the question for decision in a shape more or less specific. Even the general issue in

(a.) *Supra*, p. 148.

(b.) *Vide supra*, pp. 152-155.

(c.) *Vide supra*, p. 95.

assumpsit, which is one of the most indefinite in its nature, raises this question, viz, whether the defendant be liable to the demand circumstantially stated in the declaration, and thus presents to the mind a distinct and practical, though general, idea of the matter to be tried.

That prior to the institution of any proceeding for the purpose of decision, the question to be decided should be by some means publicly adjusted, as consisting either of fact or law, and this, too, with some certainty or specification of circumstances, is evidently required by the nature of the English common-law system of jurisprudence. For, by the general principles of that system, questions of law are determinable exclusively by the judges, while questions of fact (some few instances excepted) can be decided only by a jury, and in those excepted cases are referred to other appropriate modes of trial. Unless, therefore, some public adjustment of the kind above described took place between the parties, they would be unable, after the pleading had terminated, to pursue further their litigation. For they might disagree upon the very form of the proceeding by which the decision was to be obtained; or, if they both took the same view of the general nature of the question, so that they both referred their controversy to the same method of determination, for example, trial by jury, they might yet differ as to the shape of the question to be referred.

A public adjustment of the point for decision, of the specific kind above described, being for this reason necessary, there are two ways in which it might conceivably be effected: either by a retrospective selection from the pleading, or by the mere operation of the pleading itself. The law of England, in producing an issue, pursues the latter method. For, as has been shown, the alternate allegations are so managed that, by the natural result of that contention, the undisputed and immaterial matter is constantly thrown off, until the parties arrive at demurrer or traverse, upon which a tender of issue takes place, on the one hand, and an acceptance of it on the other, and the question in-

volved in the demurrer or traverse is thus mutually referred to decision.

The production of an issue, when thus defined and explained, appears to be attended with considerable advantage in the administration of justice, for the better comprehension of which it will be useful to advert to those styles of juridical proceeding in which no issue is produced.

In almost every plan of judicature with which we are acquainted, except that of the common law of England, the course of proceeding is to make no public adjustment whatever of the precise question for decision. For, as all matters, whether of law or fact, are decided by the judge, and by him alone, upon proofs adduced on either side by the parties, the necessity upon which that practice has been shown to be founded in the English common-law system does not arise. Consequently the mutual allegations are allowed to be made *at large*, as it may be called; that is, with no view to the exposition of the particular question in the cause, by the effect of the pleading itself. The litigants, indeed, before they proceed to proof, must explore the particular subject in controversy, in order to ascertain whether any proof be required, and to guide them to the points to which their proof is to be directed. And, upon the hearing of the cause, the judge must of course also ascertain for his own information the precise point to be decided, and consider in what manner it is met by the evidence. But, in these proceedings, neither the court nor the parties have any public exposition of the point in controversy to guide them, and they judge of it, as a matter of private discretion, upon retrospective examination of the pleadings, (*d.*)

(*d.*) The practice of the courts of *equity* in this country forms no exception to this general statement. For though the common replication offers a formal contradiction to the answer, a contradiction which imitates in some measure the form of an issue in the common law, and borrows its name, yet, in substantive effect, the two results are quite different; for the contradiction to which the name of an issue is thus given in the equity pleading is of the most general and indefinite kind, and develops no particular question as the subject for decision in the cause.

This, as already stated, is the almost universal method; but there is another which also requires notice, viz, that which at present prevails in the Scottish judicature. Since the trial by jury in civil causes has been engrafted upon the juridical system of Scotland, it has of course been found necessary to adjust and settle publicly between the parties the particular question or questions on which the decision of the jury is to be taken. But, instead of eliciting such question (called by analogy to the law of England the issue) by the mere effect and operation of the pleading itself, according to the practice of the English courts, the course taken has been to adjust or settle the issue *retrospectively* from the allegations by an act of court, and these allegations have consequently continued to be made *at large*, according to the definition of that term already given, (e.)

Now, the English common law method, as compared with either of those that have been just described, possesses this advantage, that the undisputed or immaterial matter, which every controversy more or less involves, is cleared away by the effect of the pleading itself; and therefore, when the allegations are finished, the essential matter for decision necessarily appears. But under the rival plans of proceeding by which the statements are allowed to be made at large, it becomes necessary, when the pleading is over, to analyze the whole mass of allegation, and to effect for the first time the separation of the undisputed and immaterial matter, in order to arrive at the essential question. This operation will be attended with more or less difficulty, according to the degree of vagueness or prolixity in which the pleaders

(e.) It is to be understood, however, that the issues are not extracted from the pleadings in the full latitude of allegations sometimes allowed to them by the Scottish law, but from allegations of a more succinct and specific character, called *condescendences* and *answers*, which the parties are directed to give in as the materials from which the court are to adjust the issue. Yet even these *condescendences* and *answers* are pleadings *at large*, in the sense in which the author uses that term, for they do not develop the point in controversy by their intrinsic operation.

have been allowed to indulge; but where the allegations have not been conducted upon the principle of coming to issue, or in other words, have been made at large, it follows from that very quality that their closeness and precision can never have been such as to preclude the exercise of any discretion in extracting from them the true question in controversy; for this would amount to the production of an issue. Therefore it will always be in some measure doubtful, or a point for consideration, to what extent and in what exact sense the allegations on one side are disputed on the other, and also to what extent the law relied upon by one of the parties is controverted by his adversary. And this difficulty, while thus inherent in the mode of proceeding, will be often aggravated, and present itself in a more serious form, from the *natural tendency* of judicial statements, when made at large, to the faults of vagueness and prolixity. For where the pleaders state their cases, in order to present the materials from which the mind of the judge is afterwards to inform itself of the point in controversy, they will of course be led to indulge in such amplification on either side as may put the case of the particular party in the fullest and most advantageous light, and to propound the facts in such form as may be thought most impressive or convenient, though at the expense of clearness or precision. On the other hand, it is evident that, upon the English common law method, the pleaders, having no object but to produce the issue, are without the least inducement either to an uncertain or a too copious manner of statement; and, on the contrary, have a mutual interest to effect the result at which they aim in the shortest and most direct manner.

The difficulty that must thus be always, in some measure, found under the method of pleading at large, in ascertaining the precise extent of the mutual admissions of fact or law, is attended with this obvious inconvenience: that a party may be led to proceed to proof or trial upon matters not disputed, or not considered as material to be disputed, on the other side, or to omit the proof or trial of matters which are meant to be disputed, and which are, in fact,

essential to the final determination of the cause.* The judge may consequently find, upon examination of the whole process, and hearing the further allegations and arguments of the parties, that the investigation of fact has either been redundant, and therefore attended with useless expense and delay, or defective, so as not to present him with the materials on which he can properly adjudicate. On the other hand, these evils are unknown to the English system of judicature, except in a very partial degree; and to that degree they arise, as will be afterwards explained, in consequence of the latitude of some of the general issues; in other words, from a partial abandonment of its own peculiar principle.

On the whole, then, it may be fairly concluded that the system of pleading is not only distinguished from other methods of judicial allegation, by its production of an issue, but is in this respect *advantageously* distinguished from them, and derives from this singularity of proceeding considerable protection from inconveniences to which they are severally subject.

It also appears to deserve high praise, in respect of such of its rules as are classed in this work, by their tendency to prevent *obscurity* or *confusion*, *prolixity* or *delay*, (*f.*) Here, indeed, the objects pursued are not peculiar to the English system; for the avoidance of such faults is of course in some measure the aim of every enlightened plan of judicature. But in general there is either a want of regulation to enforce the object, or the regulation is found to be ineffectual. On the contrary, the system of pleading has various rules, specifically designed to promote precision and brevity in the method of allegation; rules exclusively its own, and extremely strict and efficacious in their character. Accordingly, it has ever been proverbially famous for the former of these qualities; and in modern times, and under the influence of enlightened judges, the principle of avoiding the introduction of unnecessary mat-

(*f.*) *Supra*, pp. 332-354.

ter (*g*) has been so rigorously applied, and the cases of unnecessary allegation have been so well defined and understood, (*h*), as very considerably to remove its no less ancient and notorious *reproach* of amplification and prolixity.

While the system of pleading is thus in general distinguished for the excellence of its structure, it cannot be denied that there are points on which its merit is questionable.

1. There is something not satisfactory in its tendency to decide the cause upon points of mere form.

It will be observed that in general, whenever a demurrer occurs in respect of insufficiency in the manner of statement, and not for insufficiency in substance, or where an issue, either in fact or law, is joined upon a plea in abatement, the issue joined in such cases involves a question of form only. And as the issue, whatever be its nature, is in general decisive of the fate of the cause, (*i*), it follows, that where issue is so joined the action must commonly be decided upon a point of form, and not upon the merits of the case; a result that seems inconsistent with sound justice. Thus, if the plaintiff, in an action of trespass, should happen to omit in his declaration to state the day or time at which the trespass was committed, and the defendant should demur specially for this omission, and the issue joined on this demurrer should be decided (as it would be) in favor of the defendant, by the regular consequence judgment would be also given for the defendant, and the plaintiff's claim would be defeated by the omission of a few words in his declaration. Yet we have seen that the time, if alleged, need not have been proved as laid, (*k*), and its omission, therefore, is a fault of the most strictly

(*g*.) *Vide supra*, p. 364.

(*h*.) This is by the effect of the rules tending to limit or restrain the degree of certainty in allegation. *Vide supra*, pp. 309-332.

(*i*.) *Vide supra*, p. 133.

(*k*.) *Vide supra*, p. 278.

formal kind. Again, if the defendant should plead in abatement that he is sued by a wrong Christian name, and the plaintiff should choose to take issue in fact upon the plea, and go to trial, the verdict, if given for the plaintiff, entitles him to judgment *quod recuperet*, and he consequently recovers his demand, (l.) On the other hand, if given for the defendant, it is followed by judgment of *breve* (or *billa*) *casseter* (m;) and thus the action in one case, and in the other both the action and the demand itself, are disposed of upon a mere question relating to the Christian name of the defendant.

But if any objection attach on this ground to the system of pleading, its weight at least is much diminished by the liberality with which *amendments* are allowed in the modern practice. Thus, in the case of demurrer above supposed, if the plaintiff should imprudently join in demurrer, (instead of applying, as he ought, for leave to amend,) the court would nevertheless, after joinder in demurrer, and even after the demurrer had come on to be argued, allow him to amend; and the only inconvenience that he would suffer would be the payment of costs. The second case, indeed, viz, that in which an issue in fact is joined upon a plea in abatement, is such as would not allow of amendment, unless applied for before the cause had come on for trial. But even in this instance it is not probable that any hardship or injustice would arise by the final determination of the cause upon the point of form, for if the unsuccessful party had had any substantial case upon the merits, he would presumably have applied to amend, without hazarding the trial.

2. Again, some doubt may reasonably be felt with respect to the advantage of that part of the system which relates to the *singleness* of the issue; provided only that

(l.) *Vide supra*, p. 133. 2 Wils., 367. The case is otherwise, however, if the plaintiff succeeds on an issue in *law* on a plea in abatement, for there the judgment is *respondcat ouster* only. *Ibid.*

(m.) *Vide supra*, p. 134.

a party be restrained from raising issues inconsistent with each other, or such as he knows to be without foundation in fact, it may be questioned whether any sufficient considerations of utility or convenience can be urged at the present day in favor of the object of *singleness*. At all events, some presumption must arise against the value of this object in modern pleading, when we recollect that the long-permitted use of several counts, in respect of the same cause of action, and the provision of the statute of Anne allowing the use of several pleas, have declared it as the sense both of the bench and the legislature, that if the original principle deserved to be retained, it required at least material mitigation. However, it is clear that the principle of singleness, is so far, at least, a right and valuable one, as it may tend to prevent the parties from offering *inconsistent* allegations, or *such as they may know to be false*. For, though the interests of justice seem to require, in many cases, the allowance of several counts or pleas in respect of the same demand, they are, on the other hand, directly opposed to the allowance of repugnant ones; and where one of the matters alleged must evidently be false, the party should, of course, be obliged to make his election between them; and so, in allowing a party to make different allegations, he ought, if possible, to be excluded from such as (whether inconsistent or not with what has been previously pleaded) he must know to be without foundation in fact. Yet these, which are perhaps the only beneficial results that can flow from the principle of singleness, the present state of the law against duplicity, unfortunately, fails to produce. For, first, a plaintiff is at liberty to adopt as many counts as he pleases, however apparent it may be that the cases which they respectively state cannot all be true. So a defendant is allowed, under the provision of the statute of Anne, to plead, with scarcely any exception, matters directly inconsistent with each other; for example, he may plead, in trespass for assault and battery, not guilty, (namely, that he did not commit the trespasses;) and also son assault demesne, (viz, that he commit-

ted them in self-defense, (*n.*) or in debt on bond non est factum, (*viz.*, that he did not execute the deed,) and also that he executed it under duress of imprisonment, (*o.*) Again, a party is not restrained by the present system from adding to his true case another, that, though inconsistent with it, he knows to be false. And accordingly a defendant, at the same time that he pleads a special plea founded on his real matter of defense, almost always resorts also to the general issue, or some other plea, by way of traverse, in order to put the plaintiff to the proof of his declaration, without having, in truth, the least reason to deny the allegations which it contains. The statute of Anne, indeed, provides a check against this, by a provision of which the general effect is as follows: that where the defendant has pleaded several pleas, and the issue upon any one of them is found for the plaintiff, the court may give the plaintiff the costs of every such issue, unless the judge of nisi prius shall certify that the defendant had probable cause to plead the matter found against him. But the construction and effect given to this provision in practice seem to have rendered it inadequate to the object which it contemplates, (*p.*)

3. Another feature of doubtful character in the system of pleading is, the wide effect which belongs, in certain actions, to the general issue. In debt on simple contract, in assumpsit, and trespass on the case in general, the general issue embraces almost every ground of defense to which the defendant, at the trial, may choose to resort; the questions offered by these issues being, in effect, nearly these: whether the defendant be indebted to the plaintiff, as alleged in the declaration, or whether he be liable to the plaintiff's demand, as set forth in the declaration, (*q.*) Now, these questions are so general and vague, as to pro-

(*n.*) 1 Arch., 226.

(*o.*) *Ibid.*; and see other instances open in some measure to the same objection of inconsistency, *supra*, p. 265.

(*p.*) See 11 East, 263; 2 Burr., 753.

(*q.*) *Vide supra*, pp. 172, 176, 177.

duce but in a limited and inferior degree the advantages which attend the production of a more strict and special issue. For, first, they do not fully effect the separation of matter of fact from matter of law. To understand this, it must be considered that, though the parties cannot go to trial on a *mere* question of law, (a traverse of matter of law not being allowable,) (*r.*) yet it is in the nature of many issues in fact to involve some subordinate legal question, the decision of which is essential to the decision of the issue. And the wider and more general the form of the issue, the more likely it is to comprise these subordinate questions of law. For example: In an action of debt on simple contract, or assumpsit, if the defendant rely on a release executed by the plaintiff, he may give this in evidence under the general issue, (*nil debet*, or *non assumpsit*,) because it tends to show that he is not indebted, or is not liable, as alleged; and if the plaintiff's answer to the release be that it was obtained by duress, this will of course be also offered in evidence under the same issue. Upon this point of duress two questions may be supposed to arise: first, whether the execution of the deed under duress would defeat the effect of the deed; secondly, whether the deed were, in fact, executed under duress. Before the jury can find a verdict either for the plaintiff or defendant, both these questions must be disposed of. But the first is a question of mere law, and their decision upon it must be guided by the direction of the judge. Here, then, is a question of law involved under the issue in fact. Now, if, on the other hand, a form of action be supposed, in which the pleading is more special, and the general issue less comprehensible, for example, the action of covenant, this very same question will be distinctly developed as a point of law upon the pleading by way of demurrer. For the defendant cannot, under *non est factum*, (which is the general issue in that action,) set up the release, but must plead it specially, and the plaintiff must consequently plead the

(†) *Vide supra*, p. 201.

duress in reply; and then, if the defendant disputes the legal consequence of the duress, his course is to demur to the replication. Of such demurrer, occurring in the very case here imagined, the reader has already seen an example in the course of this work, (s,) and to this he may be again referred for further illustration.

It thus appears, then, that it is the effect of the wider general issues to render less complete than it otherwise would be the separation of fact from law. And the inconvenience of this is felt in the great frequency with which difficult legal questions arise for the opinion of the judge at nisi prius, the numerous motions for new trials consequently made in the court in banc, to obtain a revision of such opinions, and the delay and expense necessarily attendant on a proceeding of this kind, when compared with the regular method of demurrer.

Again, it is an inconvenience arising from general issues of this description that they tend to conceal from each party the case meant to be made by his adversary at the trial. Thus, in the instance above supposed, the plaintiff would have no notice, from the nature of the issue, *nil debet* or *non assumpsit*, that the defendant meant to set up a release, nor would the defendant, on the other hand, have any intimation that it was to be met by the allegation of duress. And thus is defeated, in some measure, another of the advantages otherwise attendant on the production of an issue, *viz*, that of apprizing the parties of the precise nature of the question to be tried, and enabling them to shape their proofs without danger of redundancy on the one hand or deficiency on the other.

4. Another objection to the system of pleading, and one more formidable, perhaps, than any that has been above suggested, is to be found in the excessive subtlety and needless precision by which some parts of it are characterized. The existence of these faults cannot fairly be denied, nor

(s.) *Vide supra*, p. 98.

that they bring upon suitors the frequent necessity of expensive amendments, and sometimes occasion an absolute failure of justice upon points of mere form. Yet is their inconvenience less severely felt in practice at the present day than a mere theoretical acquaintance with the subject would lead the student to suppose. Many of the intricacies and mysteries of pleading—those, for example, which relate to *color* and *special traverses*, long discouraged by the courts—are rapidly falling into disuse, and, on the whole, have but little effect in the actual operation of the system; and, with respect to the science in general, it may be remarked that its increasing cultivation has made the course of practice more uniformly correct than in former times, and the occasion for formal objection considerably less frequent.

Such are the principal observations which a long practical acquaintance with pleading has suggested to the author on the merits of that celebrated system of allegation. Founded as they are on experience, he does not hesitate to offer them to the public, though the limits which he has prescribed to himself in this part of the work have obliged him to condense them into a form more summary than befits the interest, the importance, and the difficulty of the subject.

APPENDIX.

NOTE 1. (See p. 37.)

Plé in French, in English *plea*, were anciently used to signify *suit* or *action*. While used in this sense they gave rise respectively to the words *pléder*, and to *plead*, of which the primary meaning was, accordingly, to *litigate*, but which, in the later English law, have been taken in the more limited sense of *making allegation in a case*. Hence the name of that science of *pleading*, to which this work relates.

This variable word, to *plead*, has indeed still another and more popular use, importing the forensic *argument* in a cause; but it is not so employed by the profession.

Whether *plé* and *pléder* were *derived* from the parallel Latin terms *placitum* and *placitare* is somewhat doubtful, (a.) If so, it must have been through the gradation of the more ancient French word *plaids*, which, according to Houard, (b.) at first signified the assemblies of the kings and great men of the realm, and was afterwards applied to ordinary courts of justice. With respect to *placitum* itself, it is most probably of Roman origin, for it is clear that both the rescripts of the emperors and the judicial decisions in the Roman empire had that name, (c.) It has, however, been considered by some writers as derived from *plats*, (a German word for *campus*,) *quod in campo tenerentur placita*, (d.) Either of these, though a less amusing, is, perhaps, a more

(a.) Spelman considers the word *plea* as of Saxon origin, (see Spelm. Gloss. ;) but the almost universal derivation of our juridical terms from the language of the Normans would seem to render this exception an improbable one.

(b.) Anciennes Loix des Francois, &c., sec. 10.

(c.) See Brisson, de verborum signif.

(d.) Ducange, Gloss., verbo Placitum.

satisfactory conjecture than that which derives *placitum* from *placendo*; quia bene placitare super omnia placet, (e.)

NOTE 2. (See p. 43.)

This part of our juridical system, viz, the use of *brevia* or *writs*, as essential formulæ for the institution of a suit, is not only connected with the whole scheme of actions, but will presently appear to have an important relation to pleading in particular. It is also remarkable, as being, in modern times at least, unknown to the practice of the courts of other countries, and a peculiarity of the national law. These circumstances naturally excite some curiosity to investigate its origin; yet the subject is involved in considerable obscurity.

Though we know that some of the *brevia* are at least as ancient as the time of Henry II, being found in the work of Glanville, who wrote in that king's reign, the student will in vain search the books of the science for any distinct and satisfactory account of their original invention. It is said, on high authority, that the more common and ordinary writs were "de communi consilio totiûs regni concessa et approbata," (f;) and also that some writs existed "long before the Conquest," (g;) while another learned writer asserts that the more ancient of them were brought from Normandy, (h;) and these vague and somewhat inconsistent statements seem to constitute the whole substance of the information to be derived from professional sources on this subject. If we turn, for further elucidation, to the antiquarians, we shall find little beyond vague conjecture, and even in this a great discordance, both as to the origin of the instrument and the derivation of its name. While one

(e.) Co. Litt., 17 a.

(f.) Bract., 413 b.

(g.) Co., Pref. to 10 Rep. This proposition of Lord Coke's seems to have been satisfactorily refuted by Hickee. See the *Dissertatio Epistolaris* in his *Thesaurus*.

(h.) Gilb. Hist. of C. P., 2, 5.

learned writer refers the origin of the term *breve* to a new application among the Normans of a word derived from their Scandinavian ancestors, signifying a letter or epistle, (i.) others speak of it as borrowed from the imperial and pontifical constitutions, and as ultimately derived from the word *brevis*, (k.) Again, the language of these instruments is supposed, on great authority, (l.) to have owed much to the Roman forms; though, on the other hand, an illustrious antiquarian declares that it has the most remote English extraction, and has hardly a word derived from the Cæsarean law, (m.)

Whatever may be the authority for the opinion that *brevia*, for the institution of suits, were in existence in this country before the Conquest, it is at least certain that there is no mention of them in the laws of the Anglo-Saxons now extant, (n); but that they were in use, both in substance and in name, in the ancient laws of *Normandy*, is a fact well known to all who have looked into the *Grand Coustumier*. On this, however, as on the many other features common to the laws of England and Normandy, the doubt has been to which of the two nations the original invention is to be ascribed; for it seems to be clear that, if the English at first received the institutions of their conquerors, they, in turn, began to impart their own improvements; and the *Grand Coustumier* is confessedly of date long posterior to the treatise of *Glanville*, (o.) The remark of a learned foreigner not only tends to decide this question, but at the same time throws more light on the ulterior origin of the *brevia* than can be obtained from any writer of our own country. It is well known that the use of forensic formulæ obtained among the semi-barbarous tribes who governed Europe

(i.) *Hickes, Thes. Diss. Epist., in notis, p. 3.*

(k.) *Spelm. Gloss., tit. Breve; Cragii, Jus. Feud., lib. ii., D. 17, 23, 25; Seldon's notes on Hengham.*

(l.) *Barrington on the Ancient Statutes, 88, 90.*

(m.) *Seld. Diss., ad Fletam, c. 9, sec. 1.*

(n.) *Hickes, Thes. Diss. Epist., p. 3.*

(o.) See *Hale's Hist. of Com. Law, ch. vi.*

during the middle ages, at least among the French and Lombards; nations both distinguished among their neighbors by the superior refinement of their jurisprudence, (p.) The author in question, who speaks of the *brevia* of Glanville as *Brefs Anglo-Normands*, from their equal adoption in both countries, points out their similarity to certain forms preserved by Marculphus, and which, under the different names of *præceptiones* and *indiculi*, were used among the Franks during the two first races of the monarchy, (q.) The resemblance, in their general conception, will be found strong enough to lead, with great probability, to the inference that the English *brevia* were derived, through Normandy, from a Francic source; an inference confirmed by the fact, elsewhere stated by the same author, that at this early period the judicial usages of Normandy were, in the main, the same with those of France at large, (r.) The reader may judge of the degree of similarity between the *brevia* of Glanville and the *præceptiones* of the Franks, by comparing the following formulary, from Marculphus, with the first of the English specimens given in the text, viz, the *writ of right*, (p. 44.) “Ille rex, vir inluster, illo comiti. Fidelis Deo propitio, noster ille, ad præsentiam nostram veniens, clementiæ regni nostri suggestit eo quod pagensis vester ille, eidem, terram suam in loco nuncupante illo, per fortiam tulisset, et post se retineat injuste, et nullam justitiam ex hoc, apud ipsum, consequi possit. Propterea ordinationum presentem ad vos direximus, per quam omnino jubemus, ut ipso illo taliter constringatis, qualiter, si ita agitur, hanc causam contra jam dicto illo, legibus studeat emendare. Certé si noluerit, et ante vos recte, non finitur, memorato illo, tultis fide jussoribus, Kalendas illas, ad nostram eum omnimodis dirigere faciatis præsentiam,” (s.)

(p.) J. G. Heinecc., Elem. Germ., lib. iii, tit. ii, sec. lxxxii, lxxxiii.

(q.) Houard, Anc. Loix des Franc., &c., vol. ii, pp. 9-16.

(r.) Houard, Dict. Analytique, &c., verbo Droit.

(s.) Marculphi Formularum, lib. i, 23. The reader who wishes to compare with this the Anglo-Norman formula, in the original Latin, will find it in Glanville, lib. i, c. 6. And it may be remarked that it has a decided advan-

The following will be found to have a close affinity with the Anglo-Norman writ of *trespass for an assault*, which see, (*supra*, p. 48.)

“Ille rex, vir inluster, illi. Fidelis noster ille ad præsentiam nostram veniens, nobis suggestit quod vos eum, nulla manente causa, in via *adsalissetis* et graviter livorassetis, et rauba sua in solidos tantos, eidem tulissetis, vel post vos retineatis indebitè, et nullam justitiam ex hoc, apud vos, consequere possit. Propterea, præsentem indiculum ad vos direximus, per quem omnino jubemus ut si taliter agitur, de præsentem hoc contra jam dicto illo, legibus studeatis emendare. Certè si nolueritis, et aliquid contra hoc habueritis quod opponere, non aliter fiat nisi vosmet ipsi per hunc indiculum commoniti, Kalendas illas proximas, ad nostram veniatis præsentiam, eidem ob hoc, integrum et legale dare responsum,” (*t.*)

The opinion that the English *brevia* are of French extraction is not peculiar to Houard. It is held, as has been already observed, by L. C. B. Gilbert; and a writer on the feudal law, the learned Craig, observes of them: *Usum in Gallia, antiquissimum puto; in Normannia, adhuc in usu sunt. Gulielmus Conquæstor cum armis, etiam leges Normannicas, Angliæ intulit; inde factum, ut omnes fere causæ in Anglia, adhuc per Brevia deducantur, (u.)*

To attempt to trace them further may appear superfluous; yet it may be observed that one of the earliest refinements in forensic science was that of classifying the various subjects of litigation, and allotting to each class an appropriate *formula* of complaint or claim; a method devised in a view, probably, to the more certain definition of the nature of those injuries for which the law afforded redress, and perhaps, also, to save the trouble of inventing new modes of expression for each particular case of wrong, as it might arise. Whatever the object, it is certain that such

tags over the French model in point of Latinity and precision of phrase; the latter being, indeed, in such a barbarous dialect as to be scarcely intelligible.

(*t.*) Marc. Form., lib. i, 29.

(*u.*) Crag Jus. Fe:d., lib. ii, D. 17, 23, 25.

was the practice of ancient Rome, and *that* from a period almost as early as the introduction of the laws of the twelve tables, (*x*;) and so severely were these formulæ observed, that any deviation from them was fatal to the cause, (*y*.) This strictness evidently tended to injustice; and we accordingly find that it was banished from the Roman law by Constantine, who abolished the judicial formulæ, (*z*.) Yet form was not altogether extirpated. Certain general distributions of the subjects of litigation were recognized under the title of *actions*, (*a*;) and considerable attention continued to be paid to the frame and wording of the complaint, (*b*.) When, therefore, we find the rude judicature of the nations who were in possession of Europe at the fall of the Roman empire, exhibiting at a very remote period the same contrivance of fixed judicial formulæ, we are naturally led to refer it to an imitation either of the ancient or more modern system of their predecessors. Yet, whether it were the result of such adoption or the fruit of original invention, it is certainly not easy, nor perhaps very important, to decide.

NOTE 3. (See p. 53.)

Ejection, however, has been latterly often ranked as a *mixed* action, (*c*;) because the plaintiff has judgment for specific recovery of the term itself, as well as nominal damages for the ejection. With deference, however, it is conceived that the class of an action depends not on the form of judgment, but on the form of writ and declaration; and that the question is not whether specific recovery be *adjudged*, but whether it be *claimed* in the form of the proceeding. (See the definition of real and mixed actions,

(*x*.) Dig., lib. i, tit. 2; Cic. pro. Rosc. Com., c. 8, &c.

(*y*.) Quinctil., lib. vii, c. 3; Brisson de Formul., lib. v, xl.

(*z*.) Brisson, *ibid.*, lib. v, xl, liii; Voet. ad Pandect., lib. ii, tit. xiii, sec. 9

(*a*.) Inst., lib. 4, tit. 6; Car. Sigon. de Judiciis.

(*b*.) *Vide* Inst. and Voet., *ubi supra*.

(*c*.) *Vide* 3 Bl. Com., 199.

supra, p. 39.) Now, it is clear that, in the form of writ and declaration, an ejectment is no more than a species of the action of trespass; and as such it has been most anciently considered. Ejectione firmæ n'est que un action de trespass en son nature, &c. (Fitz. Abr., tit. Eject., firm. 2, cited 3 Bl. Com., 200.)

NOTE 4. (See p. 58.)

The mode of making the objection of the want of an original writ is by writ of error on the judgment; but no writ of error will lie in respect of such objection if the judgment was obtained upon a *verdict*.

It is to be observed, that when this objection occurs in the common pleas, (where the præcipe and capias are framed as in trespass,) an original writ, prepared according to such præcipe and capias, will not suffice, unless the action brought be really trespass; but an original, *adapted to the action*, must be obtained, which (as there is no præcipe to warrant it) can only be done by petition to the master of the rolls, (*d.*)

NOTE 5. (See p. 58.)

That the appearance was actual in the time of Henry II seems sufficiently proved by the following passages in Glanville: Utroque litigantium, *apparente in curia, petens ipse loquelam suam et clameum ostendat, in hunc modum Peto versus istum H., &c. Auditâ vero loquelâ et clameo petentis, in electione ipsius tenentis erit, se versus petentem defendere per duellum, &c., (e.)* Utroque *præsente in curia, is qui petit, jus suum in hæc verba versus adversarium suum proponat, Peto, &c. Auditâ autem clameo, &c., (f.)* The forms of expression which occur in Bracton, in the time of Henry III, everywhere lead to the same conclu-

(*d.*) 1 Sel. Pract., 69; *ibid.*, Introd., xliv, per Powell J.; *Brown v. Babington*, Lord Ray., 833.

(*e.*) Glar., lib. 2, c. 3.

(*f.*) *Ibid.* lib. 4, c. 6.

sion. For example, *comparentibus* tam petente quam tenente, petens actionem qua agere velit, et intentionem suam, proponere debet *coram justitiariis*, &c. Et *audito* brevi de recto, *dicat* sic *petens* vel ejus *advocatus* in præsentiam justitiariorum pro tribunali residentium. Hoc ostendit vobis A., &c., (g.)

It was said that it was the statute of Westminster 2 (13 Edward I, c. 10) which first gave the general liberty to all persons of suing and defending by *attorney*; and that, before that statute, a special warrant from the crown for that purpose was required, (h.) It seems, however, that this is only to be understood of *appearance* by attorney, and not to the conduct of the suit by attorney, *after appearance once made*. For it is clear that, long prior to the 13 Edward I, and even in the time of Glanville, a party might, upon appearance first made by himself in person, appoint a *responsalis* (whose office, though in some respects different, was, in substance, the same with that of an attorney) to represent him during the subsequent progress of the cause; "ad lucrandum vel perdendum pro eo," (i.) And it is not said by Glanville that this required a warrant from the crown, (k.)

NOTE 6. (See p. 59.)

For proof that in the time of Henry II and Henry III the pleading was *oral*, it will be sufficient to refer to the passages cited from Glanville and Bracton in the last note, and to observe, that not the least allusion is made in either author to the use of written pleadings, the introduction of which is generally supposed not to have taken place till the reign of Edward III, (l.)

(g.) Bract., 372 b.; and see 10 Ed. III, 19, pl. 21.

(h.) 1 Tidd, 54, 8th edit.; Gilb., C. P., 32, 33; 2 Reeves, 169.

(i.) Glan., lib. 11, c. 1.

(k.) See Beecher's Case, 8 Rep., 58 b., acc.

(l.) 3 Reeves, 95.

NOTE 7. (See p. 59.)

As to the practice of oral pleading among the *Lombards*, see Muratori, in a note to his edition of the *Leges Langobardicæ*, (*m.*) where he says that the pleadings among that nation appear to have been non scripto, judici tradita, sed petitione verbali pronunciata coram iudicibus. As to the *German tribes in general*, (comprising the *Franks*,) see the *Elementa Juris Germanici* (*n.*) of Heineccius, who says, formulas non scriptas offerebant, sed viva voce præcinebant.

NOTE 8. (See p. 59.)

The use of professional *pleaders* or *advocates* may be traced among some of the continental nations to a period extremely remote. The Lombards had the following law: Si forsitan aliquis per simplicitatem suam, causam agere nescit, veniat ad placitum, et si rex aut iudex præviderit quod veritas sit, tunc debeat dare ei hominem qui causam ipsius agat, (*o.*)

In the Francic Formulæ apud Lindenberg, contained in the Capitularies by Baluzius, there is a record of a cause between a bishop and a private individual, where the bishop pleads by his *advocate*, and the other in his own person.

In the Assizes de Jerusalem, one of the most curious and important relics of the jurisprudence of the middle age, and fully recognized as an authentic compilation from the laws of France, made towards the close of the eleventh century, (*p.*) we have a full account of the office, duties, and proper qualifications of a *pleader*. Doit chascun de ceausqui veont pleideer en la haute court, demander *conseill* au seignor, avant que il comance a pleideer. Il doit demander, au seig-

(*m.*) Murat Script. Rer. Ital., vol. i.

(*n.*) Lib. iii, tit. iv, sec. clvi.

(*o.*) *Leges Langobard*, apud Lindenbrog., 650.

(*p.*) Ouvrage précieux, says Mabley, (in his Observations sur l'Histoire de France, vol. ii, p. 346,) et très propre a nous donner des lumières sur l'époque de l'origine de nos différentes coutumes.

nor, a conseil, le meilleur pleideoir de la court a son escient, se il est pleideoir ou se il ne l'est; pour se que se il ne est pleideoir, que son conseil li sache sa raison garder et sa querele des reïgnier de ce dont il est requeroir, et deffendre de ce dont il est deffendoir, et se il est pleideoir, pour ce que il ait plus de conseil, qu'il n'est nul si sage pleideoir, qui ne puisse bien souvent estre averti el plaît de ce que bon li est, par un autre pleideoir o lui; que deus pleideoirs savent plus que un, &c., ch. ix. Qui a conseil et se veaut clamer d'ome ou de feme qui est present en la court, il doit faire dire par son conseil, au seignor, si que celui de qui il se clame ou veaut clamer, l'oye, Sire tel se clame a vous de tel chose, et en veaut avoir droit par vous et par la court; et le nome, et die de quoi il se clame, et as plus briefves paroles que il pora, face son clame, &c., ch. xxvii. Il convient a celui que est bon pleideoir et soutill, que il soit sage de son naturel, et que il ait esprit sein, et soutill engin, et que il ne soit doutif, ne esbay, ne hontous, ne hatif, ne non chaillant elplaît, ne que il ait s'entente ne sa penceé aillors tant com il pleidoie, et que il se garde dese trop corroucer ne agrier ne ehmouvoir en pleidoiant, ch. xxiv. As a translation of this barbarous dialect may save the reader some trouble, the following very literal one is offered: "Every person about to plead in the supreme court ought, before he begins, to pray the lord to appoint him counsel. He ought to pray, for his counsel, the best pleader in the court; and this, whether he is himself a pleader or not; because, in the latter case, he will need counsel to defend his right and establish his claim or defense; and even in the former he will do well to have counsel, since there is no pleader so wise that he may not be often advised on his pleading by another pleader, as two pleaders know more than one, &c. He who has counsel, and wishes to make claim on some man or woman present in court, ought to say by his counsel to the lord, so that the other party may hear: Sir, such an one makes before you such a claim, and hopes to obtain justice in that behalf from you and the court; and then he should say what he claims, and in the shortest way possible, &c. A good pleader ought

to have good sense, a sound understanding, and a subtle genius; he should be free from the faults of indecision, timidity, false shame, haste, and nonchalance; while he pleads, he should keep his attention from wandering to any other subject, and should also take care to avoid undue heat and asperity." Some of these admonitions seem to deserve the attention of the nineteenth no less than the eleventh century.

The use of advocates was not confined to the Franks and Lombards. It obtained, at the same period, among the continental nations in general. Heineccius speaks of them as generally allowed throughout the German tribes, though under permission to be previously obtained from the judge, which, as he incidentally observes, explains the modern practice of not allowing all persons indiscriminately to plead causes, but confining the privilege to a certain number appointed by authority, (*q.*) With respect to the Franks in particular, he says, in foro litigantibus eo magis opus erat jurisperitorum auxilio, quo pluribus formularum ac sollemnitatatum tricis, implicata erat eorum jurisprudentia; et quo facilius in his verbis labi possunt homines plebei, et aliis distracti negotiis, (*r.*) He makes a similar remark as to the Lombards: Quum enim et hoc gens paullo plus tribueret juri subtiliori et formulario, homines plebei et harum rerum imperiti vix poterant advocatorum jurisperitorum opera carere, (*s.*)

Hachenberg also lays it down as a general feature in the judicial system of the Germans of the middle ages: Adherent in judicio *advocati*,—quos Clamatores et Ferendarios prisæ leges vocant,—qui causas litigantium nuda simplici-que oratione, sine ullo verborum circuitu, tractare jubebantur, (*t.*)

In England, though the particular degree and denomination of *barrister* is supposed by Blackstone (1 Bl. Com., 23)

(*q.*) Elem Jur. Germ., lib. iii, tit. ii, sec. xcix.

(*r.*) *Ibid.*, sec. lxxxii.

(*s.*) *Ibid.*, sec. lxxxiii.

(*t.*) Hach. Germ. Media, p. 97.

not to be more ancient than 20 Edward I, yet it appears that there were persons learned in the law and skilful in pleading causes at least as early as the reign of William Rufus, (u;) and Bracton makes express mention of *counsel*, *pleaders*, and *advocates* in the reign of Henry III, (x.) And not only were such professional persons employed, but (as stated in the text) the rule seems to have been already established excluding all but regular advocates from pleading in causes in which they were not personally concerned. This point appears to be sufficiently proved even by the following extract from the *Placitorum Abbreviatio*, a compilation published a few years since from our earliest judicial records: *Abell. de Sancto Martino venit et narravit pro Episcopo. Et non fuit Advocatus. Ideo in Misericordia. Custodiatur*, (y.) And additional evidence of the same proposition is supplied by the following curious passage in the *Vitæ viginti trium Sancti Albani Abbatum*, by the historian Matthew Paris, written about the same period with the preceding extract. After complaining of certain oppressions which the abbey had sustained from a person protected and encouraged by John Mansel, the historian proceeds: *Nec quicquam juris vel ultionis assistente memorato Johanne Regis lateribus et conciliis, potuimus obtinere. Quinimo, metus et persuasio ipsius Johannis, omnium Justiciariorum et placitantium advocatorum (quos Banci narratores, vulgariter appellamus) ora penitus obturavit. Ita ut multo totiens oportuit Dominum Willielmum tunc cellarium (virum scilicet circumspectum et facundum) suum sermonem et querelam in persoua propria coram Justiciariis, imo etiam coram Rege et Barnagio proponere. Et protestati sunt Justiciarii, secretius in aure dicti Domini Willielmi instillantes, quod duo tunc temporis in regno dominabantur, scilicet Comes Richardus et Johannes Mansel, contra quos non audebant sententiare*, (z.)

(u.) 1 Reeves, 228.

(x.) Bract., 412 a., 372 b.

(y.) Plac. Ab., 137; Kanc., rot. 22, temp. 38 Hen. III.

(z.) Matt. Par. Hist., p. 1077.

NOTE 9. (See p. 59.)

All the authorities prove that questions of law have at all times been the exclusive province of the judges. Thus, in the *Placitorum Abbreviatio* there is an entry, in the sixth year of Richard I, that *sub iudicibus* lis et contentio fuit, utrum carta prædicta debet teneri versus puerum qui infra ætatum, (a.)

And again in the fourth year of King John the jury upon an inquisition declare, non pertinet ad eos de jure discernere, (b.)

NOTE 10. (See p. 60.)

This phrase, of *issue*, occurs at the very commencement of the Year-Books, viz, 1 Edward II; but the author has not traced it to an earlier period. In some instances the expression *isser d'empler* occurs, which may be translated, *to get out of* or *finish the pleading*, and clearly marks the meaning and derivation of the term *issue*.

In the reign of Edward IV we find the Latin term thus regularly defined: *Exitus idem est quod finis, sive determinatio placiti*, (Year-Book, 21 Ed. IV, 35.)

It is observable that the parallel word *fin* appears to have been used in the same sense in *Normandy*. (See *Commentary de Terrien*, lib. ix, c. xxvii.)

The terms *issue en ley* and *issue en fet* occur as early as the third year of Edward II. (See the Year-Book, 3 Ed. II, 59.)

NOTE 11. (See p. 61.)

Lord Coke defines a record as a "memorial or remembrance in rolls of parchment of the proceedings or acts of a court of justice," &c., and observes that "the rolls

(a.) *Plac. Ab.*, 5 Warr., temp. 6 Rich. I.

(b.) *Plac. Ab.*, 40 Linc., temp. 4 Johan.

being the records or memorials of the judges of the courts of record, import in them such incontrollable credit and verity, as they admit no averment, plea, or proof to the contrary," (Co. Litt., 260 a.) The origin of the practice of *recording* (another peculiarity of the English law) appears to have eluded our legal antiquarians as much as that of the *Brevia*, but it is no doubt referable to the same source. The term *record* is itself, in its immediate derivation, French, and the law of records is copiously discussed under that name in the *Grand Coustumier*, the most ancient depository of the Norman customs. The manner in which it is there treated might alone be sufficient to show that France was its native soil, and that it had not been adopted from the English courts; not only because no allusion is there made to any recent introduction of the practice, but because the practice appears in the Norman courts in a shape obviously more consonant with the original meaning and derivation of the term than that which it bears in England. For it appears that in the Norman law *recorder* anciently signified to *recite* or *testify on recollection*, as occasion might require, what had previously passed in court, and that this was the duty of the judges and other principal persons who presided at the *Placitum*, thence called *recordeurs*. On the other hand, we find faint vestiges only of this the proper and ancient meaning existing in England. Of these vestiges one example occurs in our phrase of *recorder*, as applied to a borough judge, which is plainly a derivative or secondary application of the Norman word *recordeur*; and another that may be mentioned is the principle anciently recognized, *that the record is properly not in the parchment, but in the breast of the judge*. Thus we find it said in the *Year-Book*, 7 Henry VI, p. 29: *Le record est tout temps en les cœurs de justices, et le roll n'est forsque remembrance pur le melior suerty*. But what decisively removes all doubt as to the national character of this judicial practice, is that, while no trace of it is to be discovered among the Anglo-Saxons, (for their loose historical notices, now extant, of some few important contro-

versies, are evidently of a quite different kind,) (c.) it existed in the law of France at large at least as early as at the Norman conquest, and in a shape exactly similar to that which it bore in Normandy. It is one of the directions given to litigants in the Assizes de Jerusalem, (compiled as early as 1099, and presumably referring to a state of law some time established,) that they should collect as many of their own friends as possible in court, and request them to be attentive to what is said, with a view of enabling themselves to retain and *record* it properly at the time of judgment on trial. Qui veaut tost son plait atteindre, il doit faire estre en la court, tant de ses amis com il pora, et prier les, que il soient ententis as paroles qui seront dites as plais, et bien entendre et retenir, si que il sachent bien le *recorder*, as esgars et as connoissances, se mestir li est, (d.) It is also recommended that if there should be an adjournment of the proceedings, and a further day appointed for the hearing of the parties, both the plaintiff and defendant should take care to *put down in writing* the nature of the claim that has been made, the day and place of the adjournment, and the names of those who were present at the first hearing; and the plaintiff is advised to rehearse this writing before the adjournment day to such of those persons as he considered most friendly to himself, in order to refresh their memories and enable them to testify (*recorder*) at the adjourned meeting, if it should be necessary, both the day and place of the adjournment, and the words in which the claim or other allegations were first made; it being assigned as a reason for this particularity that a variance from the claim first made would entitle the defendant to a new enlargement of the time for answering, (e.) It is easy to con-

(c.) See the Apographum Saxonicum, published by Hickes, (Thes. Diss. Epist., p. 2.) and the observations on that instrument by Hallam, (vol. ii, p. 141.) See also the plea in the county court, between Gundulf and Pichot, (Hickes, Thes. Diss. Epist., 33.) and the plea of Pinenden, in the county court, in the reign of William I, mentioned by Lord Coke, (preface to 9 Rep.,) the narratives of which are all in the same style.

(d.) Assises de Jerusalem, xliv.

(e.) *Ibid*, xlix.

ceive, though not to trace, the progress by which the occasional memorandum thus drawn up by the Francic pleader, to confirm the recollection of his judges, took the shape of an official contemporaneous minute of the proceedings, and no longer merely subordinate to a record or judicial report, became itself invested with that name and character. Whether this change had fully taken place at the date of Glanville's treatise, (in the reign of Henry II,) that work does not enable us accurately to decide. He speaks, indeed, frequently of records, and lays down the maxim that the curia regis, and no other court, was properly and generally a court of record, (*f*;) but it is not clear whether the written memorial, though already designated as the record, and officially prepared, was made contemporaneously with the proceedings themselves, or considered as intrinsic evidence of them, or in any other light than as an aid to the memory of judicial reporters. However, we find that at least very shortly *after* this period the practice of recording, in the present sense of the term, was in full operation. The series of records now extant begins with the reign of Richard I, (*g*.) Curious extracts from some of the earliest of them have been printed, and are to be seen in the *Placitorum Abbreviatio*.

The following passage in an able publication confirms the account that the author has above given of the origin and true meaning of *recording*. In reference to the laws of the Scandinavians, it is observed: "No record or register authenticated the judgment of the court, which was preserved only by the recollection and knowledge of the judges who pronounced the decree, or of the assembled people who ratified the sentence. This usage of oral pleadings, and of proving legal proceedings by oral testimony, might be thought to be inconsistent with the assumption of the antiquity of written laws in Scandinavia, did we not know

(*f*.) *Sciendum quod nulla curia recordum habet generaliter præter curiam domini regis.* (Glan., lib. 8, c. 9.)

(*g*.) See the Report of the Commissioners on Public Records, and 1 *Beeves*, 218.

that the same practice was adopted by other systems of jurisprudence which are more familiar to us, such as the Customal of Normandy and the assizes of the kingdom of Jerusalem. In Normandy, a judgment pronounced by the king, sitting as duke of Normandy, was *recorded* by his testimony, added to that of one witness; or the royal judge might substitute three other witnesses in his stead; seven witnesses were required for the *record* of the exchequer of the assize. In these proofs it is clear that the compilers of the Customal did not contemplate the production of any written document as evidence of past decrees or proceedings. The recorders swore as to what they had heard and what had been said," &c. (*Edinburg Review for August, 1820.*)

NOTE 12. (See p. 62.)

It is to be observed, on the subject of suing, appearance, or defending by attorney, that there are certain persons, viz, *infants, married women*, (when sued without their husbands,) and *idiots*, who are incapable of appointing an attorney to appear for them in court. The appearance and pleadings of such persons must consequently not purport to be by attorney, nor be so entered on record, whether an attorney be in fact employed or not. As for the mode in which the appearance and pleadings of such persons should be entered. (See 1 Tidd, 87, 88, 94, 8th edit.; 1 Arch. Pract., 22.)

NOTE 13. (See p. 62.)

There can be no pleading till appearance is effected. And in a *personal* action, there can till then be no *judgment* given nor other act done in court beyond the issuing of the process. But in a *real* action, if the tenant hold out against the process and fail to appear, judgment will pass against him, and the demandant will recover the land. (See Booth, 12, 19, 24, &c.; Com. Dig., Pleader, Y; 2 Saund. 43, n. 1.

NOTE 14. (See p. 64.)

Besides these changes in the practical method of conducting the pleadings, it may be proper to notice the alterations that have taken place in the *tongue* or *language* used.

It has been the general opinion (*h*) that among the badges of servitude imposed by the Conqueror was the introduction of the French language, by his command, into the courts of justice; but an ingenious and learned writer (*i*) has controverted this notion with great plausibility, and even doubts whether that language were used in the courts till a much later period. That the French was not introduced *by command*, his arguments render extremely probable; but, on the other hand, when the history of the Conquest is recollected, there are many obvious reasons for supposing that the *curia regis*, or superior court of justice, (which was itself of Norman introduction,) (*k*), would follow, in its pleadings, the language of the conquerors; and the considerations adduced by this author are not sufficient to outweigh the probability of that supposition.

It is, however, clear beyond dispute, that whatever was the most ancient language of the *pleading*, the *record* was, from the earliest period to which that kind of document can be traced, in the *Latin* language. For this it is sufficient to refer to the still extant series of records from whence the *Placitorum Abbreviatio* is extracted; though Blackstone seems to have fallen into an error on this subject, and to have supposed that the enrollment in Latin began with the statute 36 Edward III, c. 15, and in pursuance of its provisions, (*l*.)

It is clear, too, that the *pleading* was in *French*, if not from the Conquest, at latest from the time of John or Edward I, (*m*;) and so remained till, by the stat. 36 Edward

(*h*.) 2 Reeves, 449; 4 Bl. Com., 413.

(*i*.) See Law Tracts, by Mr. Luders.

(*k*.) 1 Reeves, 46.

(*l*.) See 3 Bl. Com., 318, 319.

(*m*.) Luders, *ubi supra*.

III, st. 1, c. 15, it was enacted that henceforth the pleading should be no longer in French but in English, and should continue to be enrolled or recorded in Latin. Afterwards, on the introduction of paper pleadings, they followed, in the *language* as well as in other respects, the style of the record, and were therefore drawn up in Latin. This continued to be the practice till a period so late as 4 George II, c. 26, when it was provided *that both the pleadings and the record should thenceforward be framed in English*; and it is in this language that they have since been drawn; the ancient terms of art and forms of expression, which had been so long known exclusively in a French and Latin dress, being now literally translated into English, but with that exception remaining undisturbed.

NOTE 15. (See p. 64.)

The practice of framing the allegations in the cause according to technical rule and method, or, in other words, the science of pleading, was no doubt derived from the same system of jurisprudence with the writ itself, viz, from that of Normandy. (*Vide supra*, note 2.) It is certain, at least, that the use of stated forms of pleading is not to be traced among the Anglo-Saxons; and the general account given by the learned Hickes of *their* manner of litigation is as follows: *Quisque causam suam sine sollemnioribus juris formulis, vel ipse agebat, vel causidicum et patronum sibi adscivit; quem amicitia, quem propinquitas quem charitas, aut benevolentia, vel denique quem sors ipsa, nonnunquam, obtulerit, (n.)* And the specimen he gives of the proceedings in a country court, in the time of Canute, (*o.*) strongly corroborates the opinion that they were strangers to any regular or artificial forms of statement. On the other hand, it appears that such forms *were* known among that great family of continental tribes, of which the Franks stood foremost in forensic refinement. *Actor breviter*

(n.) Hickes, *Thes. Diss. Epist.*, p. 8.

(o.) *Ibid.*, p. 3.

proponebat actionem, simili fere formula qua olim Romani uti solebant. Quemadmodum enim hi non prolixis libellis actiones intentabant, sed formulis utebantur, quas vel jure-consulti vel prætores prodiderant; *e. g.*, aio hunc fundum qui in Campania est, meum esse ex jure Quiritium— aio Titium mihi centum ex mutuo dare oportere, &c., ita simili brevitate magnopere delectatos esse animadvertimus majores nostros. Tales sane sunt formulæ agendi in lege Alam, &c., (*p.*)

NOTE 16. (See p. 81.)

An anonymous author in Hargrave's Law Tracts observes on this subject: "I do not blame them" (the K. B.) "for the latitat, or the exchequer for the quo minus; but I must say, the first invention of these tricks was neither honest nor justifiable. However, they are established," &c.

He afterwards observes that these usurpations grew by slow degrees, and crept silently into practice. "Who can show the time when this writ" (the quo minus) "first issued upon a mere surmise, or who can tell that man's name who was first arrested by a latitat, &c.? If these fictions had, in their beginnings, been opposed and withstood, I cannot think it possible that the judges would have countenanced so gross a falsehood," (*q.*) Lord Holt says that "North, C. J., of the common pleas, made a complaint of latitats in Parliament, and the matter suffered great agitation in Parliament; but at last the latitats were approved, as they are also by 27 Elizabeth, c. 8, which gives a writ of error in the exchequer chamber, but excepts errors to be assigned for want of jurisdiction in the K. B." (Per Lord Holt, *Brown v. Babbington*, Lord Ray., 882.)

NOTE 17. (See p. 82.)

A *demurrer* cometh from the Latin word "*demorari*, to abide; and therefore he which demurreth in law is said

(*p.*) Heinecc. Elem. Jur. Germ., lib. iii, tit. iv, sec. clvi.

(*q.*) Harg. Law Tracts, p. 422.

he that abideth in law: moratur or demorature in lege," (r.)

We find from the Year-Books that the pleaders sometimes put themselves upon the judgment of the court, upon a matter of law, in the following form of words: "Nous demurroins en vos discretions si nous etions met a respond," &c., (s.) Sometimes in the following: "Sur ceo demurromus en jugement," &c., (t.) These expressions clearly indicate the manner of the derivation.

NOTE 18. (See p. 83.)

This, it will be observed, is a narrower sense of the term to *plead* than it otherwise bears; for, in its more general meaning, as elsewhere stated, (u,) it imports making *any allegation in the cause*, and, so taken, would include the case of a *demurrer* or a *declaration*.

NOTE 19. (See p. 83.)

Exceptionum quædam sunt dilatoriæ, quædam peremptoriæ et hæc est prima et brevis divisio, (x.) This division was borrowed from the canon or civil law. Thus, it is said by the canonists, est summa exceptionum divisio, quad aut sunt dilatoriæ, aut peremptoriæ, (y.) And it is laid down in the Digest, exceptiones aut perpetuæ et peremptoriæ sunt aut temporales et dilatoriæ, (z.)

NOTE 20. (See p. 83.)

"Pleas are variously distinguished. The more general division of them is that of being dilatory or peremptory. Of these are, first, pleas in *abatement*; secondly, such as

(r.) Co. Litt., 71 b.

(s.) 1 Ed. II, 8.

(t.) 10 Ed. III, 23.

(u.) *Vide supra*, note 1.

(x.) Bract., 399 b.

(y.) Corvin., Jus. Canon., lib. 3, tit. 32.

(z.) Dig., lib. 44, tit. i, sec. 3.

suspend the action; or, thirdly, such as *bar* the action forever, (a.)

“The plea is either to the *jurisdiction* of the court, or *suspending* the action, as in the case of *parol demurrer*, or in *abatement*, or in *bar* of the action,” (b.)

The pleas to the *jurisdiction* are frequently mentioned as pleas in *abatement*, but inaccurately; for in their *form* they are not pleaded as grounds for *abating the writ*, but for *refusing to answer in the court* in which the action is brought. It is true that, in their *effect*, they abate the writ, for they defeat the action; but the case is the same with pleas in *bar*, which are yet essentially distinguished from pleas in *abatement*. “A plea to the *jurisdiction* is not properly a plea in *abatement*, though in its consequence it be so; and therefore is to have its proper conclusion, as *respondere non debet*, or *si curia cognoscere velit*, and not *quod billa cassetur*,” (c.)

All dilatory pleas, including those in *suspension*, as well as pleas to the *jurisdiction*, are sometimes inaccurately classed as pleas in *abatement*.

NOTE 21. (See p. 84.)

Parol demurrer may be founded on the nonage of *either* party in some *real* actions. In *personal* actions, it extends to the case of the *defendant* only, and that in very few instances. (See as to *parol demurrer*, Bac. Ab., tit. *Infancy and Age*, L.)

Another plea which operates in suspension of the suit is that of *aid prayer*; as to which see Com. Dig., Aide, B. 5, B. 6; Booth, 60; Lightfoot v. Lenet, Cro. Jac., 421; Onslow v. Smith, 2 Bos. & Pul., 384.

Excommunication of the plaintiff is another plea in suspension. (See 1 Chitty, 450, 1st edit.; Reg. Plac., 179, 180.)

(a.) Bac. Ab., Pleas, &c., A.

(b.) 1 Chitty, 243, 1st edit.; see also Bac. Ab., *ubi supra*; Bract., 399 b.

(c.) Bac. Ab., Pleas, &c., E. 2. See Bowyer v. Book, 5 Mod., 146; Carth., 143; 1 Salk., 297, S. C.

NOTE 22. (See p. 85.)

A plea in abatement is called by Bracton *exceptio ad breve prosternendum*, (*d*;) and is described about the same time in French as *exception pur brefe abatre*, (*e*;) whence the words *abate* and *abatement*.

Cassare was another word applied, as well as *prosternere*, to express the abatement of the writ, (*f*;) and from *cassare* is derived to *quash*; as to *abate*, from *abattre*.

NOTE 23. (See p. 86.)

Originally the pleas to the *person* were not considered as pleas in abatement of the writ; for they are classed by Bracton and others as distinct from the *exceptiones ad breve prosternendum*; and, indeed, at this day they are pleaded (as observed in the text) not as reasons for *abating the writ*, but for *not answering*, (*g*;) and it seems, therefore, that they are improperly classed as pleas in abatement. In more modern times, however, they have been uniformly so ranked and considered, (*h*;) and they have the same effect, and are subject to the same rules, with pleas in abatement properly so called.

NOTE 24. (See p. 89.)

We may here take occasion to notice two rules, not properly of *pleading*, but of *practice*, by which the use of dilatory pleas is considerably restrained.

First, they must be verified by affidavit; or, at least, some probable matter must be shown to the court to induce it to believe that the fact of the plea is true. This is by

(*d*.) Brac., 431 b.

(*e*.) Britton, 48.

(*f*.) See Hengham's Summa.

(*g*.) Co. Litt., 128 a.; Com. Dig., Abatement, I. 12; and see the example, p. 86.

(*h*.) See Doct. Pl., I.

4 Anne, c. 16, s. 11. Secondly, they must be pleaded within four days, inclusive after delivery or notice of declaration, unless the declaration be delivered or filed after term, or so late in the term that the defendant is not bound to plead to it in that term; in both which cases the defendant may plead within the first four days, inclusive, of the next term. This is by different rules of court, (*i.*)

NOTE 25. (See p. 89.)

A plea in bar is called by Bracton, after the civilians, *exceptio peremptoria*. In the French of Britton it is described as an *exception, pur barrer le pleintyfe de sa demaunde*, (*k.*) It is observable that the terms *barrer* and *barre* were in common use in the law language of France in the year 1270, (*l.*) which is about the same period when they first made their appearance in the English pleading.

NOTE 26. (See p. 89.)

Traverse is the most proper and ancient term, (*m.*) In the modern language of pleading, however, *deny* is often substituted for it; and *pleas in denial* is a term often used, instead of *pleas by way of traverse*. The reason is, that *traverse* is a word that also occurs in a more limited sense, being often applied to a *particular form of denial*, of which there will be occasion, in the course of this work, to speak; and the word *deny*, as preventing confusion, is, therefore, usually adopted as the more convenient expression for the general idea. In this treatise, however, denial in general is called by its proper appellation of *traverse*; and the particular kind of denial above mentioned is denominated by the appropriate phrase, viz, a *special* or *formal traverse*.

(*i.*) 1 Tidd, 691, 8th edit. : 2 Arch. Pract., 1, 2.

(*k.*) Britton, 92.

(*l.*) Ducange Gloss., verbo *Barræ*.

(*m.*) See 1 Chitty, 576, 1st edit., and the authorities there cited; Bac. Ab., Pleas, &c., H.; Finch Law, 396, 397.

Any confusion is thus sufficiently avoided, and the regular and ancient terms of art are preserved.

NOTE 27. (See p. 93.)

As a party who makes a statement of fact is said to *plead*, by way of distinction from *demurring*, so such statement or allegation is in strictness called a *plea*; and, when opposed to the declaration, is denominated a *plea* to the *jurisdiction*, in *suspension*, in *abatement*, or in *bar*; at subsequent stages a plea by way of *reply*, by way of *rejoinder*, &c., according to the stage at which it occurs. But as the name of *plea* is, in practice, generally understood to refer to that particular answer in fact which the defendant opposes to the declaration, and to that only, the word *pleading* will, to avoid ambiguity, be substituted in this work to express a statement of fact in general, as opposed to a demurrer.

NOTE 28. (See p. 94.)

The civilians and canonists described their pleadings in a similar manner, viz, as *intentio*, *exceptio*, *replicatio*, &c. (Dig., lib. 44, tit. 1, sec. 2; Corv. Jus. Canon., lib. 3, tit. 32.)

NOTE 29. (See p. 96.)

Nothing has been here attempted but a *practical* explanation of the manner of coming to issue. If considered in a view to its *abstract principle*, it will be found to consist in an application of that analytical process by which the mind, even in the private consideration of any controversy, arrives at the development of the question in dispute. For this purpose it is always necessary to distribute the mass of matter into detached contending propositions, and to set them consecutively in array against each other, till, by this logical conflict, the state of the question is ultimately ascertained. This ranks, in the present day, among those ordinary logical operations which it is easier to practice

than to define, and which it would be superfluous to attempt to reduce to scientific rule. It was, however, as applied to the purpose of forensic disputation, a very favorite topic with the ancient writers on dialectics and rhetoric: and there was no subject connected with these sciences on which they bestowed more elaborate attention. *Status excogitandi*, (says Sigonius,) atque eo probationes omnes conferendi, artificium, in libris oratoriis, multis verbis est demonstratum; neque enim in aliis præceptis, antiqui rhetores, tam Græci, quam Latini, plus studii aut operæ consumpserunt, (n.) The *question in controversy* is described among these writers by the different terms *κρινόμενον*, *summa quæstio*, *res de qua agitur*, *quæstio ex qua causa nascitur*, *judicatio*, and others of similar import, all expressive of the same general idea, though slightly distinguished from each other in their particular application, (o.) When this question was developed, there was said to be a *status* or *constitutio causæ*.

Of these *status* there were many classes, according to the different kinds of questions which might arise, involving not only the distinction recognized in our pleading between questions of *fact* and of *law*, (*status conjecturales et legales*,) but additional distributions into *status finitivæ*, *translativæ*, and many others, corresponding with the various logical divisions under which the different subjects of civil dispute may be considered. As a specimen of this obsolete but curious learning, and, at the same time, as the best illustration of what is the natural progress of the mind in effecting that development of which we have spoken, the following passage of Quintilian deserves attention. In that part of his work which relates to the *dispositio*, or the art of oratorical division and arrangement, after noticing the importance of a prudent selection of the point of argument, and a discreet statement of the general

(n.) Car. Sigonius de Judiciis. See also Quintil., lib. 3, c. 6; Cic. in Topico, c. 25; Ger. Vossius, Instit., Orat.

(o.) Quintil. et Cic., *ubi supra*.

question, and observing that the choice should be determined by the nature of the case which the orator was to support, he proceeds: "I will explain my own method in this particular, which I attained partly by precept and partly by the natural deductions of reason, and of which I never attempted to make a mystery. In all forensic controversies I took care, in the first place, to inform myself of all the different matters involved in the cause. I say in forensic controversies, for as to the disputes of the schools the operation is unnecessary, as they consist merely in the discussion of a few questions distinctly discriminated at the outset as the subjects for declamation, and denominated *separata* by the Greeks, by Cicero *proposita*. After thus placing, then, the whole matter of the controversy distinctly in my view, it was my habit to *analyze* it, as well on the part of my adversary as on my own. And, first, I applied myself to that which, though easily described, requires a peculiarly attentive performance; I mean, I ascertained what case it was the object of either party to make, and by what allegations such cases might be respectively supported. With this view, I began by considering what might be alleged by the plaintiff. This statement would necessarily either be admitted or denied on the part of the defendant. If admitted, no question could, at that stage, arise. I therefore proceeded to consider what would be the defendant's answer; and to this I applied the same dilemma of admission or denial by the plaintiff. Accordingly, sometimes the matter of the answer would be admitted, but at all events there would, at some period of the process, arise a contradiction between the parties; and it is then that the question in the cause is first ascertained. For example: *You killed such a man. Admitted. We proceed: The defendant must now assign some reason for this act. It was lawful to kill him, as surprised in adultery with my wife.* There is no doubt of the law; we must therefore seek in some other point the subject of contention. *The parties surprised were not committing adultery. They were.* This, then, is the question, and it is a question of fact," (conjectura, *i. e.*, status

conjecturalis.) "In some cases, however, there might be a further admission. *They were in adultery, but you had no right to kill him, for you were an exile and infamous person.* And here arises a question of law. On the other hand, if to the first allegation, *you killed*, it had been answered, *I did not kill*, the question had been ascertained at the outset. By this kind of process is the matter in dispute or main question in the cause to be investigated," (p.)

This oratorical analysis of Quintilian exhibits exactly the principle of the English pleading; and when it is considered that the logic and rhetoric of antiquity were the favorite studies of the age in which that science was principally cultivated, and that the judges and pleaders were doubtless men of general learning, according to the fashion of their times, it is, perhaps, not improbable that the method of developing the point in controversy was improved from these ancient sources. On the other hand, however, it seems not to have been wholly derived from them; for the same method will appear in one of the following notes (q) to have been substantially in the possession of the barbarous Franks and Lombards, with whom it was presumably a native invention. "Whatever merit," says Gibbon, "may be discovered in the laws of the Lombards, they are the genuine fruit of the reason of the barbarians, who never admitted the bishops of Italy to a seat in their legislative councils," (r.)

NOTE 30. (See p. 114.)

Trial has been long used to express the investigation and decision of *fact* only, but would appear to have originally signified *decision* in general. For by Bracton, in the reign of Henry III, the word *triare* seems to be taken in that larger sense: Nunc dicendum ubi *triandæ* sunt actiones civiles, &c., (s.) And Britton applies the French word *trier* in

(p.) Quintil., lib. vii, c. i.

(q.) *Vide post*, note 40.

(r.) *Decline and Fall*, &c., vol. viii, p. 157.

(s.) *Bract.*, 105 a.

the same way. Thus, in speaking of the assize of darreign presentment, he says: *Se il aveigne que ils se consentent en un clerke, sans faire trier le droit, &c., (t.)* As for the *origin* of the word *trial*, it appears by these quotations that it is, like almost every term of the English law, of French extraction, being derived from *trier*, (*u.*) Indeed, on this subject we shall find the observation of the learned Craig perpetually verified: *Omnia vocabula, quæ vocabula artis dicuntur, quibusque hodie in foro Angli utuntur, Gallica sunt; nihilque cum Saxonica lingua habent affine, (x.)*

NOTE 31. (See p. 116.)

Originally an action was triable only in the court where it was brought. But it was provided by Magna Charta, in ease of the subject, that *assizes of novel disseizin and mortancestor* (which were the most common remedies of that day) should thenceforward, instead of being tried at Westminster, in the superior court, be taken in their proper counties; and for this purpose justices were to be sent into every county once a year, to take these assizes there, (*y.*) These local trials, being found convenient, were soon applied not only to assizes but to other actions; for by the statute of *nisi prius* (13 Ed. I, c. 30) it is provided, as the general course of proceeding, that writs of *venire* for summoning juries to the superior courts shall be in the following form: *Præcipimus tibi quod venire facias coram justitiariis nostris apud Westm. in octabis Scti. Michaelis, nisi talis et talis, tali die et loco ad partes illas venerint, duodecim, &c.* Thus the trial was to be had at Westminster only in the event of its not previously taking place in the county, before the justices appointed to take the assizes. This clause of *nisi* or *nisi prius* is not now retained in the *venire*, but it occurs

(*t.*) Britton, 92.

(*u.*) It is said by one writer, however, to be derived from the Saxon. (See Ducange, Gloss., verbo *Triare*.)

(*x.*) Craig, *Jus. Feud.*, lib. 1, d. 7.

(*y.*) 1 Reeves, 246.

in a subsequent part of the proceedings. (See the Entry of Judgment, p. 139.) And it is this provision of the statute of *nisi prius*, enforced by a subsequent statute of 14 Edward III, c. 16, which authorizes, at the present day, a trial before the justices of assize in lieu of the superior court, and gives it the name of a trial *at nisi prius*, (z.)

NOTE 32. (See p. 126.)

The ancient law, indeed, provided one means of appeal from the verdict of a jury in certain cases, viz, by writ of *attaint*, upon which there was a kind of new trial by twenty-four new jurors, (a.) But this proceeding is now obsolete, and, indeed, is applicable only to a case where the jury knowingly and willfully give a false verdict.

NOTE 33. (See p. 126.)

The statutes of jeofails are so called from *j'ay faille*, an expression used by the pleader of former days when he perceived a slip in his proceeding, (b.) The statutes of jeofails and amendments are 14 Ed. III, c. 6.; 9 Hen. V, c. 4.; 4 Hen. VI, c. 3.; 8 Hen. VI, c. 12, 15.; 32 Hen. VIII, c. 30.; 18 Eliz., c. 14.; 21 Jac. I, c. 13.; 16 and 17 Car. II, c. 8.; 4 and 5 Ann., c. 16.; 9 Ann., c. 20.; 5 Geo. I, c. 13, (c.)

NOTE 34. (See p. 129.)

Without entering into the well-contested field of controversy on the question whether the method of *trial by jury* was of Anglo-Saxon or of Norman origin, it may be sufficient to sum up the result of the dispute thus: There is, on the one hand, some evidence of the occasional existence of an *inquisitio patriæ*, or inquisition by a jurata of twelve, in Eng-

(z.) For further information on this subject, see 3 Bl. Com., 58.; 1 Reeves, 345, 382.; 2 Reeves, 170.

(a.) See 3 Bl. Com., 402.; 1 Reeves, 370.; 2 Reeves, 117, 434.; 4 Reeves, 363.

(b.) 3 Bl. Com., 407. *Termes de ley*.

(c.) 3 Bl. Com., 477.; 2 Tidd, 954, 8th edit.

land before the Conquest, though with what frequency it may have occurred it is very difficult to determine. On the other hand, it clearly existed as an ordinary mode of decision among the Scandinavian ancestry of the Norman invaders, (*d.*) The same species of inquisition also existed among the Normans themselves, (*e.*) and was in force in Normandy at least as late as the year 1654; for, in the *Commentaires de Terrien*, published in that year, it is said, *Enquete est recognoissant de verité de la chose de quoy est, par le serment de douze chevaliers, ou de douze autres preudes hommes (probos homines) creables, et qui ne soyent pas soupçonneux, (f.)* And the same author observes, *Par la coustume du pays, un faict ne chet point en enquete, en tel cas (i. e., matiere heredital) s'il n' est ou peut estre notoire au voisiné, (g.)*

Whatever may have been the ultimate origin of this method of decision, it is at all events clear that it was occasionally in use in this country at least as early as the reign of Henry II; for it is expressly mentioned by Glanville, under the name of *jurata patriæ sive visineti, (h.)* But it is equally clear, on the same authority, that it was not then in *ordinary* use. Prior to a certain law of Henry II, not now extant, it seems that this mode of decision had belonged only to a *few specific cases*, the enumeration of all or most of which may be found in Glanville. But in the

(*d.*) Hæc Nembdæ ratio etiam hodie, non in Dania tantum, sed etiam in Anglia superstes est, ex eo procul dubio jure quod Dani et Normanni olim in Angliam invexerunt. (Stiernhook de Jure Sue. et Goth., lib. i, c. 4.) Apud veteres Danos, Suecos et Norwegos multa de hoc instituto, quod Namd vel Næmd nunc Nembd vocant, leguntur. Namd autem, i. e., nominatio, vocatur apud eos duodecim viralis juratorum numerus, &c. (Hickee, Thes. Diss. Epist., 39.) The latter author at the same time combats the opinion that the method was known among the Anglo-Saxons, and attempts to show that the passages cited in support of that opinion have been misunderstood. In this, however, he opposes himself to Coke, Spelman, and Selden; and the authority of these great names is fortified by the coincident opinion of Mr. J. Blackstone.

(*e.*) *Vide* the Grand Coustumier, lxxxiv, &c.

(*f.*) *Comment. de Terrien*, liv. ix, ch. xxxiii.

(*g.*) *Ibid.*, lib. ix, ch. xxvii.

(*h.*) *Glan.*, lib. ix, c. 11; lib. vii, c. 16; lib. 7, c. 4.

reign of that monarch the law above mentioned passed, authorizing the application of the *jurata patriæ*, or inquisition of twelve men, to certain questions of *seizin*, which appear before that time to have been decided by *wager of battel* only. This ordinance, like other laws of that day, (i,) was called *assiza*, or *an assize*, and, when an inquisition by a *jurata patriæ* took place by virtue of its provisions, such inquisition was called a *recognition of assize*. The *recognition of assize* became so popular, that suitors were led to adopt the same method *by mutual consent*, or by advice of the court, (k,) even for the decision of questions for which the ordinance of Henry II did not provide, and which they would otherwise have been obliged to settle by *wager of battel*. The proceeding, when thus instituted by consent of the parties or advice of the court, was called *jurata ex consensu*, to distinguish it from the regular *recognition of assize* appointed by law. This *jurata ex consensu*, which is the modern *trial by jury*, continually increased in favor from the time of Glanville, and at the date of Bracton's work had become the most ordinary method of deciding fact, (l.)

NOTE 35. (See p. 130.)

The question of *mere right* was from the earliest period decided by *wager of battel*, and at one time could be decided in no other manner. Afterwards, in the reign of Henry II, the assize or law of that monarch, referred to in the last note, gave the tenant in a writ of right the alternative of having this question tried either by *wager of battel* or a recognition by jurors, to be selected by four knights, (m,) while it appointed for questions of *seizin* (as

(i.) See Co. Litt., 159 b.

(k.) Tunc ex consensu ipsarum partium, tunc etiam de consilio curiæ. (Glan., lib. xiii, c. 2.) And see Plac. Ab., 146; Berk., 147, Suht, &c.

(l.) The same account of the establishment of trial by jury is given by Mr. Reeves, vol. i, 177, 334, and is perhaps stated in no other work with sufficient precision. A careful perusal of Glanville and Bracton will leave no doubt as to its correctness.

(m.) Glan., lib. ii, c. 7, 11; 1 Reeves, 125, 127.

already mentioned) a recognition of a more ordinary kind; and as the latter obtained the name of a recognition of assize, so the former was called, by way of distinction from it, the *grand assize*, (*magna assisa*.) The question of mere right from this time continued to be exclusively determinable by *battel* or the *grand assize*; and, either from its solemnity or the difficulty that attended it in point of proof, (*n.*) was never allowed to be tried by a common jury.

NOTE 36. (See p. 132.)

The possibility of being exposed to this disadvantageous method of decision—the *wager of law*—has long led plaintiffs to avoid the forms of action in which it is allowed. Accordingly, *debt on simple contract* and *detinue* are much less frequently used than in ancient times, and have been nearly supplanted by *assumpsit* and *trover*, which are forms of remedy respectively applicable to the same cases, but not admitting that mode of trial.

The *wager of law* (*vadiatio legis*) which, under different names and in different forms, prevailed over all Europe in the middle ages, was fully established not only among the Normans, but the Anglo-Saxons. The *name*, however, is clearly of Norman derivation; for in the old law of Normandy, *lex* signified a mode of proof or trial, and *vadiare* was to give pledge to produce such proof or to meet such trial. Thus, the *Coustumier* speaks of the *lex apparens*, the *lex probabilis*, the *lex simplex*, (otherwise called *deraisnia*), as so many modes of deciding causes, (*o.*) Now it appears, by the account given of the *lex simplex*, that it was equiva-

(*n.*) See Bract., 318 b.

(*o.*) For example, it is said, *Sciendum est quod omnis querela de mobili possessione, cum res in causa deducta, decem solidorum usualis monetæ precium non excedat, per legem simplicem habet terminari. Si vero dictum excedit precium, per legem deduciter apparentem.* (*Grand Coust.*, lxxxvii.) And again: *Est quædam lex quæ probabilis sive monstralis in laicali curia nuncupatur.* *Ibid.*, cxxv. See also Ducange Gloss., verbo *Lex*., where it appears that the *wager of battel* was sometimes called *lex duelli*.

lent to our wager of law, (*p*;) and that the party who adopted this proceeding was said *vadaire legem simplicem*, or, more shortly, *vadiare legem*, (*q*;) whence undoubtedly the term *vidiatio legis*, or *wager of law*, as used in the English courts. Though this deduction of the name be clear and indisputable, Lord Coke (whose derivations do not always satisfy the antiquarian) gives the following origin of the phrase, in which he is followed by Blackstone: "It is called *wager of law*, because of ancient time he put in surety to make his law at such a day; and it is called *making of his law*, because the *law* doth give such a special benefit to the defendant to bar the plaintiff for ever in that case," (*r*.)

NOTE 87. (See p. 182.)

Such of the different modes of trial now in use as are of extraordinary and limited application are the relics of a very ancient system of deciding fact, established before the full introduction of *trial by jury*, (*s*.) Though it would be foreign to the present purpose to attempt to explain fully the meaning and policy of this curious system, yet there is one general observation which throws so much light on that subject that it may, without impropriety, be here introduced. The observation relates to the defective state, during those barbarous ages, when the foundations of this system were laid, of the proper and rational sources of judicial proof.

In times when the arts of reading and writing were comparatively rare, and when parchment had not yet been superseded by the invention of paper, written documents were of course by no means so frequently in use as the

(*p*.) Grand Coustum., lxxxiv, cxxvi.

(*q*.) *Ibid.*, cxxvi.

(*r*.) Co. Litt., 294 b., 295 a.; and see 3 Bl. Com., 341.

(*s*.) Considerable insight into this ancient system of trial may be obtained by an attentive perusal of the work of Glanville, the earliest and best authority. It is a subject, however, that has never yet been thoroughly elucidated.

occasions of life would require, even after making due allowance for the comparative paucity, at that period, of commercial transactions. This circumstance at once increased the necessity for resorting to living witnesses, and, at the same time, by rendering perjury less open to conviction, must have tended to diminish the security of that mode of proof. Whatever the cause, the fact is certain, that perjury was at this era a crime of peculiarly frequent occurrence, and consequently oral testimony a species of evidence of the lightest and most doubtful kind. It seems evident, too, that in a scanty population there must have been considerably less publicity than in the present day in almost every kind of occurrence; and that while witnesses were, on the one hand, less to be depended upon, so, on the other, they were less easily to be found. In this state of things it is not surprising that attempts should be made to strengthen this, the ordinary mode of judicial investigation, by such corroborative tests as the opinions and manners of the times might approve, or to supply the want of it by other kinds of probation. Thus, the oath of the defendant himself, in opposition to the claim of his adversary, would, under such circumstances, naturally have but little weight. At the same time, he might be unprovided with writing or witness. He was, therefore, by way of suppletory expedient, required to support his own oath by *wager of law*, that is, by the adduction of many other persons, as his compurgators, who, though unacquainted with the transaction itself, knew the character of the party, and had sufficient confidence in it to swear that they believed his assertion true. Thus, too, when this proof by *wager of law* was, from the importance of the question, or for other reasons, deemed inapplicable, and that by witnesses alone considered insufficient, resort was often had to *judicial combat*, as the best means that offered itself for deciding between opposite assertions, (*t.*)

(*t.*) In the time of Glanville the *wager of battel* was applied not only to the question of mere right, but to a great variety of other cases, and was

With respect to the great prevalence of perjury at this period, the latest and one of the most able and accurate delineators of the middle ages thus notices that feature in the morals of the day:

“One crime, as more universal and characteristic than others, may be particularly noticed. All writers agree in the prevalence of judicial perjury. It seems to have almost invariably escaped human punishment; and the barriers of superstition were in this, as in every other instance, too feeble to prevent the commission of crimes. Many of the proofs by ordeal were applied to witnesses as well as those whom they accused; and undoubtedly trial by combat was preserved in a considerable degree, on account of the difficulty experienced in securing a just cause against the perjury of witnesses. Robert, king of France, perceiving how men foreswore themselves upon the relics of saints, and less shocked apparently at the crime than at the sacrilege, caused an empty reliquary of crystal to be used, that those who touched might incur less guilt in fact, though not in intention. Such an anecdote characterizes both the man and the times,” (*u.*)

NOTE 38. (See p. 147.)

The only material authorities on the subjects of pleading, of date prior to the reign of Edward I, are the treatise of Glanville, in the time of Henry II; that of Bracton, in the latter end of the reign of Henry III; and the *Placitorum Abbreviato*, which contains extracts from the records from Richard I to Edward II inclusive, (*x.*) From these authorities it would appear that the manner of pleading was extremely imperfect, and many of the most import-

one of the most general and ordinary modes of deciding fact. Thus, he says, *Probari solet res debita ex empto, vel ex commodato, generali probandi modo in curia, scilicet per scriptum vel per duellum.* (*Glan.*, lib. 10, c. 17.)

(*u.*) Hallam's *View of the State of Europe During the Middle Ages*, vol. ii, p. 456, 1st edit.

(*x.*) As to the *Mirror*, it is not to be relied upon as authority in respect to any period prior to Ed. I. (See *Reeves' Hist.*, vol. ii, 359.)

ant rules of the science either unknown or but partially observed in practice so late as the end of the reign of Henry III. On the other hand, the very earliest reports in the *Year-Books* (which begin with the reign of Edward II) exhibit proofs that the pleading was by that time in a comparatively perfect state. It is therefore that the author has been led to consider the reign of Edward I as the era at which the manner of allegation may be said to have been first methodically formed and cultivated as a science.

It would be easy to produce numerous proofs that the pleading was very imperfectly regulated till the end of the reign of Henry III, but the following will suffice:

Glanville gives scarcely any rule that can strictly be considered as a rule of pleading, though he is copious on subjects which would have led him to notice such rules had they existed, (*y.*)

In the time of John we find instances of pleas which *neither traverse nor confess*. Thus, in answer to a fine, it is pleaded *quod si finis ille factus fuit per deceptionem et fraudum, factus fuit, &c.*, (*z.*) Again, where a defendant had pleaded a deed made by the father of the plaintiff, the plaintiff replies, *quod cartam quam profert sub nomine patris sui, nec dedit, nec concedit, &c.*, *sed qualiter carta illa facta fuit vel a quo, semper postquam facta fuit, presentavit pater ejus personam, &c.*, (*a.*)

In the same reign numerous examples of the fault of *duplicity* (*i. e.*, pleading several allegations in answer to the same matter) are to be found. Thus, in assize of mort-ancestor, the tenant pleads that the demandant was seized himself post obitum of the ancestor, and by fine, of which he produces the chirograph, quit-claimed, &c., the land. The demandant replies, *quod ipse nunquam fuit seisisus de terra quam petit, nec unquam eam tenuit. Et inde ponit se super asisam, &c. Et cum habuerit seisinam, talem, &c.*,

(*y.*) Glan., lib. 12, c. 14.

(*z.*) Plac. Ab., 38; Bedd., rot. 4.

(*a.*) Plac. Ab., 92 Kent rot. 15; and see 48 Linc., rot. 7, 39; North, rot. 6, &c.

bene ostendet quod *concordiam illam non fecit, nec facere potuit* Et petit sibi allocari quod chirographum illud, non est factum in forma aliorum chirographorum, &c., and so argues against its genuineness, (b.)

In the same reign the fault of *argumentativeness* appears to have been common. Of this the following entry may serve as an example: *Dicit quod Ranulphos non potuit dare illam terram in maritagio, quia obiit inde scisitus. Et inde ponit se super juratam,* (c.)

All these are clear violations of rules of pleading subsequently established and still in force, and appear to have encountered no objection from the opposite party.

In the reign of Henry III much attention certainly appears to have been paid to the manner of pleading; and Bracton not only makes constant reference to that subject, but has a division of his work expressly allotted to it, under the head *De Exceptionibus*. Yet, on careful perusal of that work, the most convincing proofs may be found that the regular and methodized plan of allegation, which we find soon afterwards established, and which has since received the name of the *system of pleading*, was in his time not fully formed. For besides that the very title, *De Exceptionibus*, is borrowed from the Pandects, and is rather applicable to the nature of the Roman than the English pleading, and that he often uses appellations peculiar to the civil law, (d,) it will be found that scarcely any of the more important and fundamental rules of the present system are noticed by the author. Even the word "issue" does not occur, and instead of it is used the civil-law term *litis-contestatio*, (e;) a phrase by no means exactly parallel, though expressive of the same general idea. The rule against duplicity, indeed, is given, but in such a form as to raise a doubt whether its

(b.) Plac. Ab., 88; Sussex, rot. 22; and see 48 Linc., rot. 7; 50 Buck. rot. 2; 59 Linc., rot. 5, &c.

(c.) *Ibid.*, 79; Warr., rot. 2.

(d.) For example, *exceptio iudicis non sui—exceptio falsi procuratoris*, (Bract., 400 a.)

(e.) Bract., 373 a., 172 a., 435 b.

true extent and object were understood by the writer. Si plures peremptoriæ (exceptiones) actionum concurrant, unam debet tenens proponere et probare, &c., quia si tenens cum duas peremptorias proponeret vel plures exceptiones, in probatione unius deficeret, posset recursum habere ad alias, et probare, *sicut posset se pluribus baculis defendere*; quod esse non debet cum ei sufficere debeat tantum probatio unius, (f.) Again, it may be observed that neither the rule obliging the pleader to traverse or confess, nor that against argumentative pleading, appears to have been perfectly established in the time of this author. Thus he mentions it as one of the pleas to an appeal of rape: Quod anno et die quo hoc fieri defuit, fuit alibi extra regnum, vel in provincia, in tam remotis partibus, *quod verisimile esse non poterit*, quod hoc quod ei imponitur, fieri posset per ipsum, (g.) And again, among the pleas to an assize, the following is mentioned: Liberum tenementum *habere non potuit*, quia non tenuit tenementum illud, nisi ad terminum annorum, &c., (h.)

While there are these reasons for holding that in the reign of Henry III even the more fundamental principles of pleading were as yet imperfectly settled, a careful perusal of the Year-Books will prove that not only had these principles become well established in the time of Edward II, but that many of its more subtle and artificial rules were beginning in that reign to be observed. Thus, the doctrine and practice of pleadings in estoppel and of protestation will be found distinctly developed in 17 Edward II, 534; and the objection as to negatives pregnant occur in 7 Edward II, 213, and again, *ibid.* 226.

With respect to the subsequent history of the science, Mr. Reeves holds that it was in a state of progressive advance till the reigns of Henry VI and Edward IV, when it was "cultivated with so much industry and skill, that it was

(f.) Bract., 400 b. Something seems to be omitted in this passage, which renders its construction imperfect.

(g.) Bract., 143 a.

(h.) Co Litt., 128 a.

raised to a sudden perfection in the course of a few years,' (i.) Sir M. Hale, however, complains that at that period the judges and pleaders had already become "somewhat too curious, and that the science had degenerated from its primitive simplicity; which how these later times have improved the length of the pleadings, the many and unnecessary repetitions, the many miscarriages of causes upon small and trivial niceties in pleading, have too much witnessed." And both that author and Sir E. Coke commend the reign of Edward III as the period when pleading had attained its highest point of excellence, (k.) The excessive refinement and prolixity of which Sir M. Hale complains were abuses which continued to exist till long after his day, and, though in modern times much checked and discouraged, are not yet entirely extirpated.

NOTE 39. (See p. 148.)

The *issue* is thus defined by Lord Coke: "Issue, (exitus,) a single, certain, and material point, issuing out of the allegations or pleas of the plaintiff and defendant, consisting regularly upon an affirmative and negative, to be tried by twelve men," (l;) and thus by Heath, C. J.: "That point of matter depending in suit whereon the parties join and put their cause to the trial of the jury," (m.) These definitions, besides being too narrow, as extending only to questions of fact, and to such questions of fact as are referred to one particular mode of trial, viz, that by jury, seem to be also defective in clearness and precision. The definition of the issue by Mr. Justice Blackstone (followed by Sir M. Hale) is as follows: "When, in the course of pleading, they come to a point which is affirmed on one side and denied on the other, they are then said to be at issue," (n.)

(i.) 3 Reeves, 424.

(k.) Hale's Hist., 173, 176; 1 Inst., 304 b.

(l.) Bract., 268 a.

(m.) Heath's Maxims, ch. iv.

(n.) 3 Bl. Com., 313; Hale's Analysis, sect. 50.

Even this does not appear to be perfectly accurate, for it would include a point contradicted by *protestation*, (o.) The definition by Finch is more unexceptionable: "An issue is, when both the parties join upon somewhat that they refer unto a trial to make an end of the plea," (*i. e.*, suit,) (*p.*)

NOTE 40. (See p. 149.)

We find in the Assizes de Jerusalem (as to which, *vide supra*, p. ix) the following directions to the pleader on the subject of brevity and precision. *As plus briefves paroles que il pora, die sa parole; car les plus briefves paroles et entandaument dites, sont meaus entendues et retenues et recorderees et jugees, et quant mestier, que les autres, i. e.*, let the pleader make his claim in the shortest form of words possible, and let him speak as intelligibly as he can, for the shortest and most intelligible expressions are the best heard, and retained, and recorded, and adjudged upon, (*q.*)

The remark in the text may also be illustrated by the following curious specimens of the manner of pleading among the *Lombards*, as preserved in a compilation of undoubted authenticity:

"Petre, te appellat Martinus, quod tu malo ordine (*i. e.*, *injuste*) tenes terram in tali loco positam. Illa terra mea propria est, per successionem patris mei. Non debes ei succedere, quia habuit te ex sua ancilla, vere; sed fecit eam widerbora (*i. e.*, liberam) sicut est edictum, et tulit ad uxorem. Approbet ita, aut amittat," (*r.*)

"Petre, te appellat Martinus, quod terra quæ in tali loco est, sit sua; tu eam detines. Etiam, quia possedi per xxx annos. Vere possedisti, sed per chartam falsam quam dixisti patrem meum fecisse tibi. Non est verum. Ita.—Probato," (*s.*)

(o.) As to *Protestation*, *vide supra*, p. 217.

(p.) Finch Law, 396.

(q.) Assizes de Jerus., xxx.

(r.) Leges Langobard., ap. Muratori; Leges Liutpran, lib. vi, 53.

(s.) *Ibid.*, Leges Liutpran lib. vi, 62.

“Petre, te appellat Martinus, quod tu dedisti sibi vadia te dare sibi unum solidum, III Kalend. Augusti. Non dedi ipsa vadia. Tunc ipse qui appellat, probet. Si non potuerit, ipse qui appellatus est, juret quod in tali tenore vadia non dedit,” (*t.*)

The following specimen is of a somewhat later era, when Lombardy had fallen under the *Francic* dominion:

“Petre, te appellat Martinus, quod tu tenes malo ordine, terram in tali loco. Ipsa terra mea propria est, per chartam quam tu mihi fecisti; et ecce chartam. Ego feci ipsam chartam, sed per virtutem, (*i. e., vim.*) Non fecisti. Vis ei probare? Volo. Vadiate pugnam,” (*u.*)

These specimens of the pleading of a barbarous nation have drawn from a foreign writer of superior taste a warm eulogium: “Le formole dell’ intentar le liti,” says Denina, “erano sì semplici, e sì spiecie, e sì chiare, che non cedevano a quella sì giustamente lodata forma del procedere che regna tuttavia in alcuni tribunali dell’ età nostra,” (*x.*)

NOTE 41. (See p. 150.)

Omnia hæc (says Heineccius, speaking of the pleadings of the civilians and canonists, as opposed to those of ancient Germany) *non viva voce* proferebant, sed *scripta* offerebant iudici; ex eoque nata est ingens actorum forensium moles, quum sæpe integris voluminibus, causam suam tueantur litigantes, quam olim, paucissimis verbis, non minus dextre perorabant, (*y.*)

In France written pleadings were in use at least as early as 1364. By an ordinance of Charles V, of that date, (art. 3,) another of Charles VII, in 1446, (art. 24 and 37,) and

(*t.*) *Leges Langobard., Leges Raris, c. 1.*

(*u.*) *Ibid., Leges Ottonis II, c. 5.* The above extracts are taken from the *Leges Lagobardiæ*, with the *Formulæ Veteres* annexed, as published from ancient MSS. by Muratori, in his *Scrip. Rer. Italic*, vol. 1. These laws had been previously published by Lindenbrog, but without the formulæ.

(*x.*) *Rivoluzioni d’Italia di Denina*, vol. i, p. 316.

(*y.*) *J. G. Heinecc., Elem. Jur. Germ., lib. iii, tit. iv, sect. clviii.*

another of Charles VIII, in 1490, (art. 92,) advocates are required to draw up their writings in as concise a manner as possible. (Domat., vol. ii, book ii.)

NOTE 42. (See p. 151.)

In *Bracton* (as observed in a former note) the attainment of the issue is called *litis contestatio*, which is a word used by the civilians to express the same general idea. Thus he says, *usque ad litis contestationem, scilicet quousque fuerit præcise responsum intentioni petentis, et ita quod tenens se posuerit in magnam assisam, vel defenderit per duellum, (z.)* And in another place, *non tenetur aliquis hæres de facto, scilicet de disseysina antecessoris sui, quoad pœnam disseysinæ, licet teneatur ad restitutionem? et hoc nisi lis contestata fuerit cum suo antecessore, &c., (a.)*

It may be worth while to observe here that Blackstone's idea of the meaning of this term of the civil law is inaccurate. He considers it as "a general assertion that the plaintiff hath no ground of action," (b.) This, however, is not the sense in which it is properly or commonly used in the civil law, though it may occasionally have that meaning. It is clear that its usual signification is exactly that in which it is used by *Bracton*, viz, the development of the point in controversy; or, as it is now expressed, the coming to *issue*. "In common parlance, denying the truth of the defendant's exception, or, indeed, whenever parties come to direct affirmance on one side and denial on the other, is called a contestation of suit," (c.) *Litis contestatio non aliud est quam intentio actoris, et contradictio seu depulsio rei; adeo ut ex actione et opposita preemptoria exceptione, consurgat; et comprehendat illud in quo tota controversia consistat, (d.)* And *Fortescue* is express to

(z.) *Bract.*, 373 a.

(a.) *Ibid.*, 172 a.

(b.) 3 *Bl. Com.*, 296.

(c.) *Brown's Civil Law*

(d.) *Voet ad Pandect.*, lib. v, tit. 1, sec. 144.

the point, for, in treating of the method of proof in the civil law, he says: Si coram iudice contententes ad litem perveniant contestationem, super materia facti, quam legis Angliæ periti *exitum placiti* (the issue) appellant, *exitus hujusmodi veritas, per leges civiles, testium depositione, probari debet, (e.)*

NOTE 48. (See p. 153.)

That juries were originally composed of witnesses or persons cognizant of their own knowledge of the fact in question seems to be sufficiently proved by the following authorities:

In an assize of darreign presentment, in the reign of Richard I, the jurors find a special verdict in these terms:

Assisa dicunt quod numquam viderunt aliquam personam presentari ad ecclesiam de Duneston, sed semper tenuerunt personæ, persona in personam, ut de patre in filium, usque ad ultimam personam quæ ultimo obiit, (f.)

In an assize of novel disseizin, in the same reign, there is the following entry:

Assisa venit recognitura si Adam de Greinville et Willielmus de la Folie dissaisaverunt injustè et sine iudicio Willielmum de Weston de libero tenemento suo in Suto, post primam coronationem Domini Regis. Juratores dicunt quod non viderunt unquam alium saisitum de tenemento illo, nisi Willielmum de la Folie. Et quod nesciunt si Willielmus de la Folie dissaisisset eum inde vel non. Consideratum est quod alii juratores eligantur qui melius sciant rei veritatem. Dies datus est eis ad diem Mercurii, (g.)

In the reign of John there is the following entry:

Juratores dicunt quod ecclesia Sanctæ Helenæ de G. nunquam fuit capella pertinens ad ecclesiam Sancti Michaelis super Wir, quæ est de donatione Dom. Regis; sed

(e.) Fortescue de Laud, c. 20.

(f.) Plac. Ab. 3, Norfolk.

(g.) Plac. Ab., 11, Wiltshire.

semper temporibus suis judicaverunt illam esse matricem ecclesiam, (h.)

So, upon a question whether the plaintiff, claiming to be tenant by the courtesy, had issue by his wife, Bracton says:

Si dicant juratores quod bene viderunt eum seysitum et postea ejectum per teuentem, sed aliquo puero nihil sciunt, quia mater obiit in pariendo extra comitatum, in remotis, quia eorum veredictum insufficiens est, et quia ipsi ignorare possunt ea quæ fiunt in remotis, recurrendum erit ad comitatum et ad vicinetum ubi mater obiit; et ibi facta inquisitione de veritate, terminetur negotium, (i.)

And see 2 Reeves, 270, where the doctrine in support of which these authorities are cited is distinctly laid down.

It may also be observed, as affording confirmation of this doctrine, that the award of a venire facias still directs the jury to be summoned to recognize, &c., (*vide supra*, 113,) that is (properly) to declare upon their recollection. That the word was anciently used in that sense appears from many entries. For example, in the reign of John we find a jury declaring, *quod ipsi recognoverunt quod interfuerunt ubi Ricardus de W. coram ipsis et pluribus aliis &c., propria voluntate vendidit terram suam, &c., (k.)*

NOTE 44. (See p. 156.)

The author being the first who has attempted to develop the principles on which the system of pleading is founded, he is unable to cite any direct authority, either for the enumeration contained in the text of the objects which that system contemplates, or even for the account there given of the properties or qualities required in the issue.

Yet passages sufficient to justify both the one and the other may be easily collected from the books.

First, as to the properties of the issue.

Lord Coke defines the issue to be "a *single, certain, and*

(h.) Plac. Ab., 94 Lanc., rot. 3.

(i.) Bract., 216 a.

(k.) Plac. Ab., Dorset, rot. 20.

material point, issuing out of the allegations or pleas of the plaintiff and defendant," (l.) He considers these properties, therefore, to be of the very definition of the term, though perhaps they are more properly incidental to the issue than of its essential nature. So, it is laid down in Comyn's Digest, that "the issue must be upon a *material* point," (m.) and "must be upon a *single* and *certain* point," (n.) So it is said by Lord Coke that the law "prefers and favors certainty, as the mother of quiet and repose, to the intent that either the court shall adjudge thereupon, if the plaintiff demurs, or that a *certain* issue may be taken upon *one certain point*," &c., (o.) So in the Year-Books we find the court interrupting the pleader with this remark: "Vous dites chose que veot avoir *deux issues*; tenez vous *al une*, (p.)

With respect to the doctrine that the system of pleading contemplates the different objects enumerated in the text, and that these form the secret foundation of most of its principal rules, the author must refer, for his chief authority, to the intrinsic evidence arising from the consideration of the rules themselves, as subsequently explained in this work. In treating, however, of these different rules, he will be able occasionally to offer some citations from the books in a great measure confirmatory of the same view.

NOTE 45. (See p. 159.)

The general effect of these statutes relative to special demurrer is well expressed by Lord Hobart, who says, in reference to the 27 Eliz., c. 5: "The moderation of this statute is such, that it does not utterly reject *form*, for that were a dishonor to the law, and to make it in effect no art; but requires only that it be *discovered*, and not used as a secret

(l.) Co. Litt., 126 a.

(m.) Com. Dig., Pleader, R. 8.

(n.) Com. Dig., Pleader, R. 4.

(o.) Leyfield's Case, 10 Rep., 90 a.

(p.) 1 Edward II, 14.

snare to entrap. And that discovery must not be confused and obscure, but special; therefore, it is not sufficient to say that the demurrer is *for form*, but he must express what is the *point and speciality of form* that he requires." (q.)

NOTE 46. (See p. 168.)

It is true that in the *writ of right* the *mise on the mere right* (as to which see pp. 129, 130) is usually considered as the general issue, and in dower that name is often given to the plea of *ne unques seisie que dower*. But though these pleas resemble the general issues in their frequent use and extensive application, they appear not to fall within the strict definition of that term, as they deny neither the whole nor the principal part of the count. In fact, though they tender a kind of issue, they do not contain, in terms, *any* denial or traverse of the count, and are therefore anomalies or exceptions in the system of pleading. The reason is, perhaps, to be found in the great antiquity of these actions, (the writ of right and of dower,) which were in full use at least as early as the time of Glanville, a period considerably anterior to the complete establishment of the doctrine of issue and of the rules by which it is produced.

NOTE 47. (See p. 183.)

Where the plaintiff alleges a seizin in fee in his father, the lessor, from whom he claims by descent, the defendant has the option of traversing either that at the time of making the lease the father was seized in fee, or that the reversion in fee belonged to the father after making the lease, or that the reversion descended to the plaintiff; for all these allegations are contained in the declaration, and the denial of any of them is a sufficient answer, (r.)

(q.) *Heard v. Baskerville*, Hob., 232.

(r.) *Brudnell v. Roberts*, 2 Wils., 143.

NOTE 48. (See p. 189.)

Mr. Reeves, in his able history of the English law, has treated of the origin of special traverses, but not in such a manner as to form any exception to the remark made in the text; for his account relates rather to the manner in which they were invented and introduced than to their use and object, (*s.*)

NOTE 49. (See page 191.)

Our earliest records present many instances of what may be considered as special traverse in a crude and imperfect form. As these tend to illustrate the origin and meaning of the regular formula afterwards adopted, and confirm the views taken in the text of the reasons and manner of its introduction, a few specimens shall here be inserted.

In an assize of mortancestor the tenant pleads quod terra illa pertinet ad ecclesiam suam, quam habet ex dono Regis Ricardi, et ecclesia inde est seisita, &c. The plaintiff then denies the seizin of the church in this form: Robertus dicit quod pater suus inde fuit seisitus in dominico suo, die qua Rex Ricardus illam ecclesiam dedit prædicto Herberto; ita quod ecclesia illa tunc non fuit seisita, nisi de serviciis illius terræ, (*t.*)

In trespass for entering the plaintiff's court and taking away his ward, John, the defendants deny the trespass, but add an explanation: dicunt quod curiam prædictam non ingressi fuerunt, nec prædictam Johannem ibi ceperunt, &c. Sed verum volunt dicere; quod ipsi fuerunt versus Oxon, et tunc viderunt prædictum puerum, et puer percepit quod prædicta Isabella (one of the defendants) fuit mater sua, et secutus est eam, usque domum suam, et adhuc moram facit cum ea; sed ipsi eum non duxerunt, &c., (*u.*) On

(*s.*) 3 Reeves, 432.

(*t.*) Plac. Ab., 44, Staff., rot. 6, temp. Johan.

(*u.*) Plac. Ab., 134, Berk., rot. 18, temp. Hen. III.

the circumstances so disclosed the court decide that the defendants, in point of law, are guilty of taking away the ward.

In trespass for fishing in the plaintiff's *libera piscaria*, the defendants, instead of generally denying the trespass, plead that they fished there as in a fishery where their ancestors and themselves had fished as of their common of fishery; *et non in propria piscaria et libera ipsius Nicholai*, (x.)

NOTE 50. (See p. 192.)

The principle upon which the *absque hoc* was introduced is well illustrated by the following case from the Year-Books. In a writ of account, brought against a woman as guardian in socage, she pleaded "that the ancestor of the infant held of the defendant by service of chivalry, and that therefore she took the infant as guardian in chivalry," and prayed judgment. To this it was objected, "That is no plea, unless you go on to say, *without this, that he held in socage*; for your plea, at present, is merely *argumentative*." The plea was then proposed in this form: "He held the land of us by service of chivalry, *without this, that we occupy the land as guardians in socage*." To which it was objected, "Your plea is still no plea; you ought to say, *Without this, that he held in socage*; for though the defendant occupy the land as in her own right, she shall still be charged, under these circumstances, as guardian in socage." On this the defendant took the following issue: "*that he held by service of chivalry, without this, that he held in socage*," (y.)

With respect to the wording of this formula, *absque hoc quod*, it may be observed that *absque hoc quod* and *sine hoc quod* in the record, and *sans ceo que* in the viva voce pleading, were used as common terms of denial at a very early period. Thus, as early as the fifteenth year of John, we find the phrase *sine hoc quod* so occurring in the Placito-

(x.) Plac. Ab., 136, Buck., temp. Hen. III.

(y.) 10 Hen VI, VII.

rum *Abbreviatio*, (z.) They were not, however, originally appropriate (as the parallel English words, “*without this, that*” now are) to the case of a *special traverse*, for they were sometimes used where the denial was not of that kind, and, on the other hand, in cases of *special traverse*, we sometimes find a substitution of other synonymous expressions, such as *et non*, (a.)

NOTE 51. (See p. 206.)

Color a rhetoribus appellatur, probabilis alicujus rei causa, qua quod falsum aut turpe est, velamus, (b.)

And the following passage in Juvenal will readily recur to the reader's recollection:

Quis *color*, et quod sit causæ genus, atque ubi summa
 Quæstio, quæ venient diversa parte sagittæ,
 Scire volunt omnes; mercedem solvere nemo, (c.)

See the observations formerly made on the degree of connection which the method of pleading seems to have with the rules of the ancient logic and rhetoric. *Supra*, note 29.

NOTE 52. (See p. 207.)

The same quality of admitting an apparent right in the opposite party belonged to the pleadings in the Roman law. *Interdum evenit ut exceptio quæ prima facie justa videtur, tamen inique noceat; quod cum accidit, alia allegatione opus est, adjuvandi actoris gratia, quæ replicatio vocatur; quia per eam replicatur, atque resolvitur jus exceptionis. Rursus interdum evenit, ut replicatio quæ prima facie justa est, inique noceat—quod cum accidit, alia allegatione opus est, adjuvandi rei gratia, qua duplicatio vocatur. Et si rursus ea prima facie justa videtur, sed propter aliquam*

(z.) Plac. Ab., 90, Ebor., rot. 23, temp. Johan.

(a.) Plac. Ab., 136, Buck., cited *supra*, p. xlix.

(b.) Turneb. in notis ad Quinctil.

(c.) Juv. Sat., vii.

causam, actori inique noceat, rursus alia allegatione opus est, qua actor adjuvetur; quæ dicitur triplicatio, (d.)

NOTE 53. (See p. 213.)

The reason of the fiction of *color* is in some measure explained in Doct. and Stud., 271; and the explanation, as far as it goes, is conformable with the account given in the text. In this, and in most of the treatises, indeed, color is said to be necessary in a view to prevent the plea from amounting to the general issue. It will, however, appear in a subsequent part of this work, (e,) that this is, in fact, only an imperfect way of expressing the same doctrine that is laid down in the text.

It should also be observed that Mr. Reeves assigns as a motive with the ancient pleaders in giving color, and indeed as the secret origin of the practice, the wish to interpose *delay*, by preventing the more summary decision which the general issue would produce, (f.)

NOTE 54. (See p. 217.)

This important rule, "that every pleading is taken to admit such traversable matters alleged on the other side as it does not traverse," appears not to have existed in the *civil law*. "Non utique existimatur confiteri de intentione, adversarius quo cum agitur, quia exceptione utitur," (g,) "Non ad effectum exceptionis pertinet, quod reus excipiens, hoc ipso fateri videretur de intentione actoris," (h.) On the other hand, we find it established in the practice of the courts of *Normandy*. For it is laid down in the commentaries de Terrien, Quand les parties procedent, l'un afferme faicts—si la partie contre qui les faicts sont affermez, n'en donne

(d.) Inst., lib. iv, tit. xiv.

(e.) See pp. 362-364.

(f.) See 3 Reeves, 24.

(g.) Dig., lib. 44, tit. 1, s. 9.

(h.) Voet ad Pandectas.

neance, les faits affermez, demeurent pour confessez, (i.) And it may be observed here, that the analogous principle by which a demurrer is held to admit matters of fact also prevailed in the Norman law. Thus, it is laid down in the same work, Il est defendu de dire, je denie vostre fait, et neantmoins je le defens; qui est a dire que quand prouvé seroit, je le soustiens impertinent. Et se faut arrester à l'une des fins, (that is, the party must make his election of one of these issues,) c'est à dire, ou à le neir, (au quel cas s'il est prouvé, encores qu'il soit impertinent, le prouvant gaigne sa cause,) ou à le defendre et soustenir qu'il est impertinent, et n'inferre la conclusion du demandeur, (au quel cas le fait demeure pour cognu,) ou à soustenir que le fait qu'on afferme au contraire, est plus pertinent. Au quel cas aussi les faits demeurent pour cognus d'une et d'autre; et s'assiet le judgment de droict sur la pertinence ou impertinence des dits faits, (k.)

NOTE 55. (See p. 229.)

It may be observed that the question for decision by the grand assize is not properly an issue; for it is not in the form of a traverse or negative on one side, and affirmative on the other, but of an *alternative* proposition, "whether the tenant has greater right to hold, &c., or the demandant to have," &c. And for the same reason, the tenant, in putting himself upon the grand assize, cannot strictly be said to *tender issue*, though the two proceedings are analogous. Accordingly, the term *issue* is not generally applied to this case, but the word *mise* is substituted; and the tenant who pleads in this manner, is not said to tender an issue, but to *join the mise*, (l;) the word *mise* being apparently derived from *mettre*, and having allusion to the words "*puts himself on the grand assize*," &c. The truth is, that this form of question was established in practice as early as the time

(i.) Commentaires de Terrien, 1654, liv. ix, ch. xxvii.

(k.) Comment. de Terrien, liv. ix, ch. xxvii.

(l.) Finch Law, 398.

of Glanville, *i. e.*, before the doctrine of issues was well founded, (*m.*) and is a relic of an earlier system than that to which the ordinary issues belong. (*Vide supra*, note 46.)

NOTE 56. (See p. 244.)

In the report of the case in Carthew it seems to be supposed the duplicity is in general no objection to pleas in abatement; but this is not law, (*n.*) The mistake probably originated in a misapprehension of what is said by Lord Coke, (*o.*) but what he says evidently applies, not to duplicity in its proper sense, but to the use of several dilatory pleas *successively in their proper order*, which, as will be hereafter seen, (*p.*) the rules of pleading allow.

NOTE 57. (See p. 254.)

This rule against double pleading (peculiar at the present day, it is believed, to our own country) is not referable to the sources of the civil or the canon law, in both of which the defendant was allowed to use as many exceptions as he pleased, (*q.*) Nor has its origin been hitherto traced. It may not, therefore, be unacceptable to the reader to be informed that this rule, to a certain extent at least, very anciently obtained among the pleaders in *Normandy*, and was considered as a peculiarity in their plan of allegation. In the Commentaries de Terrien we find the following passage: En Normandie l'en ne plaide qu' à une fin, &c., (*i. e.*, a single *issue*.) And afterwards, De

(*m.*) See Glan., lib. 2, c. 3, 11.

(*n.*) See Bac. Ab., Abatement, P.

(*o.*) Co. Litt., 304 a.

(*p.*) See p. 373.

(*q.*) Qui excipit, non propterea confitetur agentis intentionem, cum eidem non solum unam, sed et plures exceptiones etiam contrarias, proponere liceat; quas, si legitimæ fuerint, si iudex non admiserit, potest appellari; iudex vero punitur. (Corv. Jus. Canon, lib. 3, tit. 32.) Pluribus defensionibus uti permittitur. (Dig., lib. 44, tit. 1, s. 5.) Nemo prohibetur pluribus exceptionibus uti, quamvis diversæ sunt. (*Ibid.*, s. 8.)

la regle dessus dite qu'on ne plaide qu'à une fin, s'ensuit, que combien que de disposition de Droit (*i. e.*, of the civil law) nullus pluribus defensionibus uti prohibeatur, toutes-fois cette regle souffre limitation par nostre usage et pratique, en ce qu'on ne peut user de defense de fait *denié*, et de fait, *defendu*, (*r.*) &c., that is, a party cannot at once plead and demur to the same matter.

After the proofs, given in some of the preceding notes, of the derivation of so much of our judicial system from that of our continental neighbors, the reader will perhaps have no difficulty in adjusting between the two nations the priority of claim to the regulation now in question.

It is further observable that this rule seems to have been unknown in England (at least not observed in practice) up to the date of Bracton's treatise, for it is not mentioned in the work of Glanville; and during the whole interval between these two authors the Placitorum Abbreviatio abounds with instances of the use of several pleas to the same matter, (*s.*)

So far with respect to the *origin* of this rule. With respect to its *principle*, or *object*, it was that of avoiding *several issues*. Thus, in the first year of Edward II, the court interrupt the pleader with this remark: Vous dites chose que veot avoir deux issues; tenez vous al une, (*t.*) So, in the same year, a similar admonition occurs: Il covient que vous tenez al une, qar chescun de eux prent diverse issue, (*u.*) Again, in the reign of Edward III, one of the judges asks: Si jeo port un assise devers vous, et vous dites que vous n'aves rien sinon a terme d'ans, et puis dites ouster que la terre est auncien demesne, avenes vous cestes deux plees? quasi diceret non: et la cause est pur ceo que deux issues purroient estre pris sur les plees, (*x.*)

(*r.*) Comment. de Terrien, liv. ix, c. xxvii.

(*s.*) See Plac. Ab., 8 Hertf., rot. 26; 9 Suff., rot. 22; 48 Linc., rot. 7; 50 Buck., rot. 2; 88 Sussex rot. 22; 92 Linc., rot. 14. (*Vide supra*, note 38.)

(*t.*) 1 Ed. II, 14.

(*u.*) *Ibid.*, 8.

(*x.*) 40 Ed. III, 45.

As for the reason why several issues were thus avoided by the early pleaders, it was no doubt the wish to abbreviate and simplify, as much as possible, the process of the legal contention.

While the explanation of the rule appears to be thus simple, it is not easy to account for the fantastic illustration of its meaning, given by Bracton, as cited in a former note, (y.) Indeed, it may be observed that the reasons offered for it by later writers, though less quaint, are not quite satisfactory. Thus it is said in Bacon's Abridgment, (z:) "The reasons why duplicity in pleading is a fault are, that the party being effectually barred by one single point, it is unnecessary and vexatious to put him upon litigating any other; and though he might take issue on any one point, yet must he be at a loss which the material point is, so as to traverse the same, and thereby put an end to the cause; whereas, the party pleading such double matter must be presumed conusant of his own strength, and therefore ought to put his defense on that single point which will put an end to it. Besides, the jury ought not to be charged with a multiplicity of things, when finding any one of them contrary to their evidence, lays them liable to the severity of an attain." Another writer gives as the reason why a party is confined to one matter of defense, "that the twelve men are commonly rude and ignorant; and so, consequently, not proper to be troubled with too many things at once." (a.)

NOTE 58. (See p. 254.)

On this point of practice, viz, the joinder of different demands in the same action, it may be worth remark that the canon law differed from the imperial institutions.

Plures actiones, says Voet, (quoting the Digest,) uno

(y.) See note 38.

(z.) Bac. Ab., Pleas, &c., K. 1.

(a.) Smith Republic, Ang., lib. 2, c. 13, p. 57, cited in System of Pleading, p. 197

libello cumulari nequeunt... Sed usu hodierno invaluit, plures uno libello actiones cumulari posse, ex Juris Canonici dispositione, quoties ex diversis causis, ad diversa tendentibus, agitur... Cavendum tamen, ne tales cumulentur quæ sibi invicem contrariæ sunt... Non etiam cumulandæ plures actiones ex eadem causa, et ad idem tendentes, veluti actio ex testamento, et rei vindicatio, ad consequendam eandem rem legatam, eo quod altera intentata, alteram perimit. Nec plures actiones contra diversos, ex diversis causis, debitores, &c., (b.)

The English courts, it will be observed, have adopted the same rule with the canonists; but whether by derivation from them, or from some other source, does not appear.

NOTE 59. (See p. 255.)

Count is also used, in a real action, as the name for the whole declaration. It is from the French *conte*, (narrative;) and it is worth notice that in the law of *Normandy* this word *conte* had a more extensive meaning, and one, therefore, more conformable to its popular and original sense of *narrative* than those which it now bears in the English law; being applied to any of the allegations of fact in the cause, at whatever part of the pleading it might occur. In the *Commentaires de Terrien* is cited an ordinance, under date A. D. 1462 and 1497, in the following terms: La court a ordonné et ordonné que dorenavant apres que les parties auront esté ouys verbalement en leurs raisons et conclusions, et escrit en *propos, responce, replique, et duplique* (es quels quatre *contes*, les dites parties seront tenués mettre et escrire tous leurs faicts, neances, offres, et raisons, et faire production de toutes leurs escritures quils seront tenués dater et produire) les dites parties pourront outre la duplique, mettre et eslire leurs conclusions en deux petits *contes*, &c., (c.)

(b.) Voet ad Pandectas, lib. ii, tit. xiii, sec. 14.

(c.) Comment. de Terrien, liv. ix, c. xxvii.

The observation of Craig, that the terms of art in the English law are all derived from the French tongue, and have no affinity with the Saxon, has been already cited, (*d.*) And perhaps when the reader considers how many proofs have been afforded in the preceding notes of the derivation not only of our legal *language*, but of our *forensic usages*, from the same source, he will be inclined to accede (with certain qualifications) to another still broader position of the same author. Certem est jus omne, quo Angli hodie utuntur, a Normannis, seu potius a Gallis, ad eos emanasse, (*e.*) That our system of *pleading* at least was borrowed from the Normans, with some early and slight admixture of the principles of the civil and canon law, there seems the strongest reasons to believe.

NOTE 60. (See p. 271.)

Such was the general state of the law on the subject of venue; but many nice questions arose as to the place from which the venue should come in particular cases. This appears to have been a matter in some measure in the discretion of the court, and we accordingly find the judges, in some cases, departing from the ordinary course, and directing the venue to come, not from the place where the matter in issue arose, but where the action was laid, or to come from more counties than one, or from different places in the same county, (*f.*) In one case, in consequence of doubts that had risen whence the venue should come upon a plea of *villenage*, it appears that the judges suspended the issue of the venire till they had consulted Parliament whether the venue should be of the county where the villenage was alleged, or where the writ was brought, (*g.*)

(*d.*) *Vide supra*, note 30.

(*e.*) Crag. Jus. Feud., lib. 1, d. 7.

(*f.*) Plac. Ab., Suff., 67; 86 Bedf., rot. 7; 94 Northum., rot. 4; 95 Bedf., rot. 2; 3 Reeves, 107-112.

(*g.*) 3 Reeves, 108.

NOTE 61. (See p. 272.)

Lord Coke says, that by the *common law* four of the hundred were required in actions, real, mixed, and personal, (*h.*) He probably by this expression means only the law as anterior to the statute which altered the number in personal actions to two, (*viz*, 27 Eliz., c. 6;) for it seems clear, that by the *common law* (if by that phrase be understood the state of law anterior to any of our existing statutes) the jury was to consist wholly of persons from the *immediate venue*, and neither four, nor any other number of mere *hundredors*, would suffice. Indeed, the form of the *venire facias*, as it existed even down to the time of Elizabeth and later, is alone sufficient to prove this. *Præcipimus, &c., quod venire facias. 12 liberos et legales homines de vincinetto de B., &c., (i.)* The law, with its usual adherence to old usages, retained this form of direction to the sheriff, though in fact his duty had at the time of that statute long been confined to summoning some of the jurors from the *hundred* only in which *B.* was situate, and the remainder from the *county at large*; but the form serves to show the nature of the more ancient practice upon which it had been originally framed.

The same point is yet more distinctly proved by the still existing rule, *that a hundred is not a sufficient venue to lay in the pleading, (k.)* a rule that seems quite inconsistent with the supposition that a summons of hundredors only was originally sufficient.

NOTE 62. (See p. 274.)

Lord Coke seems to hold that this distinction between local and transitory matters, and the maxim by which it is expressed—*debitum, et contractus, &c., sunt nullius*

(*h.*) Co. Litt., 157 a.

(*i.*) 27 Eliz., c. 6.

(*k.*) Co. Litt., by Harg., 125 a., n. 1.

loci—prevailed at the *common law*, (*l.*) Yet it is difficult to conceive this to have been the case, when the character of the original institution of trial by jury is considered, because the practice of observing the true venue, in transitory as well as local matters, seems necessarily consequent upon the nature of that institution, according to its most ancient form; that is, when the jurors consisted of persons cognizant of the fact on their own knowledge, (*m.*) Perhaps the expressions of Lord Coke, when fairly construed, do not mean more than to trace the prevalence of this distinction to a *very early period*, and are not to be taken as declaring the original state of the law on this point.

It is to be observed, that Lord C. B. Gilbert lays down on this subject propositions strongly confirmatory of the view taken in this work, and irreconcilable with the supposed doctrine of Lord Coke, if that doctrine be understood to imply an *original* distinction between local and transitory matters. “The venire was to bring up the *partes* of the place where the fact was laid in order to try the issue; and originally *every* fact was laid in the place where it was really done; and therefore the written *contracts* bore date at a certain place,” &c., (*n.*)

NOTE 63. (See p. 275.)

It has been said that the practice of changing the venue rests on the equity of the statute 6 Richard II, stat. 1, c. 2, (*o.*) On examination, however, of that statute, this doctrine will be found to be attended with great difficulties; and if the view taken in the last note be a correct one, the practice of changing the venue may be more simply and satisfactorily referred to the ancient principle of the common law requiring the jurors in all cases to be summoned from the true neighborhood.

(*l.*) Bulwer's Case, 7 Rep., 3 a.; and see 1 Saund., 74, n. 2.

(*m.*) See note 43.

(*n.*) Gilb. Hist. C. P., 84.

(*o.*) Vide 1 Saund., 74, n. 2; Santler v. Heard, 2 Black. Rep., 1032.

NOTE 64. (See p. 279.)

The objection of an impossible or inconsistent date, even where the time *is* necessarily alleged, will in many cases be aided, *after verdict*, by the effect of the verdict itself, (*p.*) And as well after verdict as after judgment by confession, *nil dicit*, or *non sum informatus*, it will in many cases be cured by the statutes of jeofails and amendments, (*q.*) 16 and 17 Charles II, c. 8, sec. 1, and 4 Anne, c. 16, sec. 2, by which it is provided that judgment shall not be stayed or reversed for mistaking the day, month, or year when the right day, month, or year is once truly and rightly alleged in the record.

NOTE 65. (See p. 282.)

Though in some of the preceding examples *the judgment was arrested after verdict*, on the ground of the omission of quality, quantity, or value, yet it must be observed that the objection is now rarely perhaps available at *that stage of the cause*. For in many cases the fault would no doubt be considered as aided by the effect of the verdict itself. Thus, if the jury find a certain amount of debt or damages to be due, it appears to supersede any further consideration of the quality, quantity, or value of those goods and chattels in respect of which the amount of the claim is thus liquidated. And even when the verdict has itself no healing operation of this kind, the statutes of jeofails, which, after verdict, cure all defects of mere form, would probably be held in many instances to remove the objection. The courts formerly, indeed, entertained another view on this subject, holding the omission of quality, quantity, or value to be matter, not of form, but substance, (*r.*) and therefore not capable of being cured by the statutes of

(*p.*) 2 Saund., 171 c. With respect to aider by verdict, *vide supra*, p. 163.

(*q.*) As to the operation of these statutes, *vide supra*, p. 164.

(*r.*) Playter's Case, 5 Rep., 34 b.

jeofails then in force; but the more liberal doctrines of the modern pleading or the wider effect of the subsequent statutes of jeofails seem to have relaxed this severity. Accordingly, it has been the tendency of recent authorities to consider objections of this kind as immaterial *after verdict*. Thus, in *assumpsit*, the declaration stated, that in consideration that the plaintiff had sold to the defendant a *certain horse* of the plaintiff's at and for a *certain quantity of oil*, to be delivered *within a certain time*, which had elapsed before the commencement of the suit, the defendant promised to deliver the said oil accordingly; though neither value, quantity, nor time was specified, yet the court held that the objections thence arising could not prevail *after verdict*, (s.) However, it seems that there are some instances in which the fault is still considered as matter of substance and ground for arresting or reversing the judgment after verdict, as in the case of *replevin* cited in the text, (t,) where the declaration did not set forth the nature, number, or value of the goods.

When an omission of this kind is considered as mere form, so as to be cured by the statutes of jeofails, it will be so cured, not only after *verdict*, but also after judgment by *confession*, *nil dicit*, or *non sum informatus*, and, if made the subject of demurrer, the demurrer must be *special*, (u.)

NOTE 66. (See p. 284.)

Though the rule prescribing the specification of quality, quantity, and value has been here classed as tending to the *certainty of the issue*, the author is aware that, according to some authorities, these particulars are required in another view, viz, the more certain information of the opposite party of the nature of the demand against him, in order to enable him to plead to it more precisely. But, though this object may have been sometimes contemplated as an

(s.) *Ward v. Harris*, 2 Bos. & Pul., 265.

(t.) *Pope v. Tillman*, 7 Taunt., 642.

(u.) As to special demurrer, *vide supra*, pp. 158, 159.

additional ground for enforcing the specification of quality, quantity, and value, the author conceives that particularity on these points was originally and mainly required in reference to the same general design which forms the basis of all the rules with respect to certainty, viz, the production of a *certain issue*, and that this subject, therefore, occupies its right place in the treatise.

That to produce *certainty in the issue* is the general design both of this and all the other rules that enforce certainty *in the pleadings*, may not only be inferred from the reason of the thing, but distinctly proved by several authorities. Thus Bracton lays it down: *Certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in iudicium, (x.)* So, in treating of an assize of novel disseisin of common of pasture, and of the form of intentio or count, he says: *Oportet docere de qualitate pasturæ utrum sit larga vel stricta, ut certa res deducatur in iudicium. Item de quo tenemento pertineat, et ad quale tenementum. Et eodem modo de tempore, genere, numero, et modo, (y.) &c.* And the same doctrine is laid down still more decisively in the following passage: *Oportet quod petens rem designet quam petit, videlicet qualitatem, ut sciatur utrum petatur terra, vel redditus, cum pertinentiis; item quantitatem, utrum didelicet sit plus vel minus, quod petitar. Certam enim rem oportet deducere in iudicium, ne contingat iudicium esse delusorium vel obscurum quia de re incerta in iudicium, deducta, certa fieri non poterit sententia....* Specificare autem poterit, sic, ut si dicat—*Peto versue talem tot maneria, quandoque cum pertinentiis, quandoque sine; item tot feoda militum cum pertinentiis; item tot carucatas terræ, tot virgatas, tot acras, tot selliones, &c., (z.)*

Thus, too, it is laid down by Lord Coke, that in pleading performance of the condition of a bond, the party "ought to plead, in certainty, the time and place and manner of

(x.) Cited Co. Litt., 303 a

(y.) Bract., 224 b.

(z.) Bract., 431 a.

the performance, so as a certain issue may be taken," &c.,
(a.)

See also *Rex v. Cooke*, 2 Barn. & Cres. 871, a case confirmatory of the same view, and decided since the first publication of this work.

NOTE 67. (See p. 335.)

The principle of the rule against a *negative pregnant* is not clearly or satisfactorily explained in any of the treatises; and indeed very little is said in them upon this subject, though the fault itself is in the older cases a frequent ground of objection. That the author has here suggested the true principle is confirmed, he thinks, by the form in which we find this kind of objection taken in the following case from the Year-Books. In an action for negligently keeping a fire, by which the plaintiff's houses were burnt, the defendant pleaded that the plaintiff's houses *were not burnt by the defendant's negligence in keeping his fire*; and it was objected that "the traverse was not good, for it *has two intendments*: one, that the houses were not burnt; the other, they were burnt, but not by negligent keeping of the fire; and so it is a *negative pregnant*," (b.) The same ground, viz, that of ambiguity, is taken in 7 Edward II, 213, 226, which are believed to be the earliest authorities for the rule itself. What is to be found in more modern books, on this subject, tends to support the same view. Thus we find it laid down, "therefore the law refuseth double pleading and negative pregnant, though they be true, because they do *inveigle*, and *not settle the judgment upon one point*," (c.) So it is said in another book, "A negative pregnant is; when two matters are put in issue in one plea; and this makes the plea to be nought, because the plaintiff cannot tell in which of these matters to join issue with the defendant, for the uncertainty upon which of the

(a.) *Halsey v. Carpenter*, Cro. Jac., 360.

(b.) 28 Hen. VI, 7.

(c.) *Slade v. Drake*, Hot., 295.

matters the plaintiff doth insist; and so it is not safe for the plaintiff to proceed upon it," (d.)

NOTE 68. (See p. 848.)

In treating of the observance of established forms of statement, by the ancient pleaders, Mr. Reeves remarks: "It was impossible that a set form of expression could be designed for every matter that might become the subject of a declaration or plea. But many modes and circumstances of property recurred so often in judicial inquiries as to obtain apt and stated forms of description and allegation, which were established by long usage; the experience of them having shown them preferable to all others. These, therefore, were adhered to by pleaders; and the nicety with which they were conceived is a strong mark of the refinement and curiosity with which this part of our law was cultivated," (e.)

NOTE 69. (See p. 845.)

The plea of *coverture*, however, concludes *to the writ*, i. e., with a prayer, *quod breve cassetur*, and not with *responderi non debet*, (f.) So, in an action against a man as executor, if he plead that he is *administrator*, this plea must conclude with *breve cassetur*, and not with *responderi non debet*, (g.) Indeed it may be remarked generally that all such matters as not *only* relate to the *person* of the plaintiff or defendant, but also tend to show the *form of the writ*, is erroneous, are apt to be considered as pleas in abatement *to the writ* rather than *the person*, and therefore conclude not with *responderi non debet*, but *breve cassetur*. It is only such matters as *alienage*, *excommunication*, &c., which relate to the person *exclusively* and show that no form of writ would be correctly applied that will be found to have the former

(d.) Styles Pract. Reg., tit. Negative Pregnant.

(e.) 3 Reeves, 463, 464.

(f.) 1 Chitty, 1st edit., 450.

(g.) Powers v. Cook, 1 Ld. Raym., 63.

conclusion. In Comyn's Digest, (*h.*) very numerous instances of pleas in abatement to the person, are enumerated; but, on examining them, they appear, for the most part, to relate both to the person and the form of the writ; and in all such cases we shall find, in conformity with the remark above made, that, though classed by Comyn among pleas in abatement to the person, they conclude with *breve cassetur*, and not *responderi non debet*.

NOTE 70. (See p. 350.)

Some of these formal commencements and conclusions are of great antiquity. Thus, in Britton (the first law treatise in French, supposed to be written in the reign of Edward I,) (*i.*) we find this form of commencement: *Le pleintife ne purra rien conquere*, (*k.*) which is nearly the same with *actio non*. We also find the following: *L'escript ne luy doit grever*, (*l.*) This is the *onerari non*. So, the prayer of judgment at the conclusion of pleadings is mentioned in Bracton, (*m.*)

A somewhat curious circumstance, and one that seems to deserve remark in this place, is that a form exactly parallel to that last cited from Britton is to be found in the still extant pleadings of the Lombards. Thus: *Ipsa charta non mihi nocet*, quia eram Longobarda, non potui facere sine parentibus, (*n.*) And again, si appellator dixerit, ecce charta quum pater tuus mihi fecit, et appellatus dixerit, illa charta nihil mihi impedit, quia pater meus fecit eam, per virtutem, (*i. e.*, vim,) approbet, (*o.*) &c.

NOTE 71. (See p. 351.)

Though it be said that it is sufficient to pray judgment generally, (except in the case of pleas in abatement,) and

(*h.*) Com. Dig., Abatement, E., F.

(*i.*) 2 Reeves, 280.

(*k.*) Brit., c. 96.

(*l.*) *Ibid.*, c. 28.

(*m.*) Bract., 57 b.

(*n.*) *Leges Liutpr.*, lib. vi, 74.

(*o.*) *Leges Ottonis II.*, Augusti, c. 5.

that upon such general prayer the court will, *ex officio*, award the proper legal consequence, yet it may be doubted whether this proposition does not require considerable qualification. Perhaps it cannot safely be laid down as settled law that a simple prayer of judgment, without more, would, in every case, be held good, supposing the want of form to be specifically objected upon special demurrer, (*p.*)

NOTE 72. (See p. 352.)

It is said in several books that if a plea which contains matter in bar conclude in abatement, it is a plea in bar, notwithstanding the conclusion, (*q.*) If this proposition be meant to include the case where there is not only a conclusion, but a commencement, as in abatement, it is opposed to the decision in 6 Taunt., 587, as cited in the text. And even if it be intended to apply only to the case where there is a conclusion in abatement, but no commencement either way, the soundness of the doctrine seems doubtful. For it is said to be founded on this principle, that where there is no cause of action the plaintiff can have no writ, (*r.*) and the opinions of Prisot, J., and Littleton, J., are cited to this point from the Year-Books. It is observable, however, that this principle would only tend to show that such a plea would be a good plea in abatement, and does not explain why it should be considered as a plea in bar. And though Prisot, J., in 37 Hen. VI, 24 a., holds that it would be a plea in bar, the opinion of Littleton, J., 36 Hen. VI, 18, when examined, does not go to that extent. He merely says it would be a good plea. There seems reason, therefore, to doubt whether such plea should not be taken (in conformity with the general principle, *conclusio facit placitum*) as a plea in *abatement*, (*s.*) As to the case where the

(*p.*) But see the cases, *Pit v. Knight*, 1 Lev., 222; *Barnes v. Gladman*, 2 Lev., 19; *Curwen v. Fletcher*, Str., 520.

(*q.*) 2 Saund., 209 c., n. 1; 1 Chitty, 446, 1st edit.; 1 Arch., 304.

(*r.*) 1 Chitty, 446, 1st edit.; 2 Saund., 209 c., n. 1.

(*s.*) See *Alice v. Gale*, 10 Mod., 112; *Godson v. Good*, 6 Taunt., 595; 2

commencement is one way, and the conclusion another, as where the plea commences in bar, and concludes in abatement, or commences in abatement and concludes in bar, see 2 Saund., 209 c., n. 1; *Medina v. Stoughton*, 1 Ld. Ray., 598; *Cárneth v. Priour*, 1 Show., 4.

NOTE 73. (See p. 354.)

Lord Coke defines it thus: "A departure in pleading is said to be when the second plea containeth matter not pursuant to his former, and which fortifieth not the same. And therefore it is called decessus, because he departeth from his former plea," (*t.*)

Mr. Sergeant Williams gives the following definition: "A departure in pleading is said to be when a man quits or departs from one defense, which he had first made, and had recourse to another; it is when his second plea does not contain matter pursuant to his first plea, and which does not support and fortify it," (*u.*)

NOTE 74. (See p. 368.)

This form of commencing the declaration, *ceo vous monstre*, occurs in the Year-Books passim, and in the Novæ Narrationes, which is of the time of Edward III, and contains the most ancient precedents in the law French, (*x.*) The same commencement, Latinized, occurs in Bracton: *Hoc ostendit vobis*, (*y.*) The form of an earlier period, as given by Glanville in Latin, is *peto*, (*z.*) &c.

Saund., by P. & W., p. 209 c., n. e, where the learned editors of Saunders, in a note not published when the remarks in the text were first made, appear to coincide with them.

(*t.*) Co. Litt., 304 a.

(*u.*) 2 Saund., 84, n. 11.

(*x.*) See also Britton, 59.

(*y.*) Bract., 296 b.; 372 b.

(*z.*) Glan., lib. 2, c. 1; 3 lib., 4, c. 6.

NOTE 75. (See p. 371.)

It is said in *Fleta* that the rule requiring the production of suit in the declaration is the subject of one of the provisions of *Magna Charta*. *Ad hoc facit hoc Statutum in Magna Charta: Nullus liber homo ponatur ad legem, nec ad juramentum, per simplicem loquelam, sine testibus fidelibus ad hoc ductis, (a.)*

NOTE 76. (See p. 373.)

The practice of finding pledges to prosecute appears to have been an effective one, at least as late as the time of *Bracton*. “*Si quis,*” says that author, “*plegios inveniet de prosequendo, et non fuerit prosecutus, omnes erunt in misericordia, tam plegii, quam principales.*”

NOTE 77. (See p. 373.)

The order of pleading has generally been given in a less detailed form than that contained in the text.

According to *Mr. Tidd* it is as follows:

1. To the jurisdiction of the court.
2. To the person, { 1. Of the plaintiff.
2. Of the defendant.
3. To the count.
4. To the writ, { 1. To the form of the writ.
2. To the action of the writ.
5. To the action itself, in bar thereof, (b.)

And it is given in nearly the same manner in the preface to the *Doctrina Placitandi* and in *Bacon's Abridgment*, (c.)

Lord Holt states it still more generally: “The law has prescribed and settled the order of pleading which the party

(a.) *Fleta*, 137.

(b.) 1 *Tidd*, 680, 8th edit.

(c.) *Bac. Ab., Pleas, &c., A.*

is to pursue, viz, to the jurisdiction of the court, to the disability of the person, to the count, to the writ, and, lastly, to the action," (*d.*)

This is almost in the same terms with Lord Coke:

"1. In good order of pleading a man must plead to the jurisdiction of the court. 2. To the person, and therein, first to the person of the plaintiff, and then to the person of the defendant. 3. To the count. 4. To the writ. 5. To the action, &c. Which order and form of pleading you shall read in the ancient authors, agreeable to the law at this day, and, if the defendant misorder any of these, he loseth the benefit of the former," (*e.*)

NOTE 78. (See p. 375.)

Defendere was the word most often used in ancient times to express *denial*. Thus we find it employed to deny the genuineness of a deed. *Petrus venit et defendit cartam, quod nunquam facta fuit per Petrum de Goldington, &c.*, (*f.*)

NOTE 79. (See p. 375.)

"Defense, in its true legal sense, signifies not a justification, protection, or guard, which is now its popular signification, but merely an opposing or denial (from the French word *defender*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians," (*g.*) As to the latter proposition, *vide supra*, note 42, where it is shown that the *contestatio litis* has a different meaning in the civil law.

NOTE 80. (See p. 377.)

With whatever object introduced, the use of the words *defendit jus suum* and *defendit vim et injuriam* in the

(*d.*) *Longueville v. Thistleworth*, Lord Ray., 970.

(*e.*) *Co. Litt.*, 303 a.

(*f.*) *Plac. Ab.*, 27 Leic., rot. 11, temp. Johan.

(*g.*) 3 *Bl. Com.*, 296.

plea, is coeval with the most ancient records, for we find them in the earliest specimens from the *Placitorum Abbreviatio*, in the beginning of the reign of Richard I. Rogerus de Hinton defendit jus suum et dicit, (*h.*) Et y vo venit et defendit jus suum et dicit, (*i.*) Et Robertus venit et defendit vim et injuriam et dicit, (*k.*)

NOTE 81. (See p. 377.)

The rule by which a plea in abatement is required to give the plaintiff a better writ is very ancient, being laid down by Bracton, in the reign of Henry III. Thus he says, in speaking of the plea of non tenure: Notandum, quod cum tenens semel talem exceptionem proposuerit, ulterius consimilem proponere non possit, ne diutius protrahatur negotium; et tenens ad hoc poterit coarctari, quod ostendat quis in possessione extiterit, ne iterum cadat breve per mendacium; et, etiam ad omnes exceptiones quæ faciunt ad breve prosternendum, (*l.*) So Britton says, in speaking of the same plea: Si le tenant die que il ne tient n'ye l'entier, adonques covient que il die qui tient le remenaunt. Car nous volons eins ceo que brefs se abatent par vice et par erreur, que les tenaunts informent les pleintifes coment ils purchaserount bons brefs, (*m.*)

NOTE 82. (See p. 378.)

This principle, relative to dilatory pleas, viz, that they should be pleaded at a preliminary stage of the suit, appears to have been borrowed from the canon or civil law. *Dilatorix exceptiones, si declinatorix judicii, ab initio et in litis ingressu, proponi debent; alioquin; omissæ, non reputantur, ut neque quæ contra judicem, vel ejus incompe-*

(*h.*) Plac. Ab., 1 Dorset, rot. 5, temp. 6 Ric. I.

(*i.*) Plac. Ab., 7 Cantabr., rot. 26, temp. 10 Ric. I.

(*k.*) Plac. Ab., 90 Ebor., rot. 23, temp. 15 Johan.

(*l.*) Bract., 431 b.

(*m.*) Brit., c. 84.

tentiam, proponuntur, quæ defensionem præcedere debent, &c., (n.) Si quis advocatus, *inter exordia litis* prætermisam *dilatoriam præscriptionem*, (i. e., exceptionem,) postea voluerit exercere, et ab hujusmodi opitulatione submotus, nihilominus perseveret, atque *præposteræ defensionis* iustiterit, unius libræ auri condemnatione, multetur, (o.)

NOTE 83. (See p. 379.)

The rule requiring that each pleading should be supported by proof appears to have extended equally to the declaration and to the subsequent pleadings, for the secta was considered as a species of proof offered in support of the declaration.

To establish in a satisfactory manner the existence of this rule, several authorities shall here be cited. First, in speaking of the intentio, or count, in a writ of right, Bracton says: *Item non sufficit quod petens intentionem suam sic proponat et fundet, nisi sic fundatam probaverit, et dicatur in fine intentionis fundatæ, "et quod tale sit jus suum offert," &c., (p.)* Again, with respect to exceptiones, or pleas, generally, he lays it down: *Sicut ille qui dicit, tenetur, probare actionem, ita ille qui excipit, exceptionem, sive affirmando, sive negando, dum tamen negativa habeat in se, affirmativam implicitam, (q.)* So, he says that where a tenant has occasion to plead the grant of the demandant, *ostendere debet tenens chartam ad probandam exceptionem suam, quod si non fecerit, exceptio sua nulla, et amittat sicut indefensus. Si autem chartam forte exhibere non possit, quia illam ad manum non habuerit, de necessitate erit ad patriam recurrendum, (r.)* And of exceptiones, in general, he says: *Sicut necesse est actionem proponere, et fundare, et probare, ut prima facie justa videatur, ita oportebit ex-*

(n.) Corv. Jus. Canon, lib. 3, tit. 32.

(c.) Cod., lib. 8, tit. 38, s. 9

(p.) Bract., 373 b

(q.) *Ibid.*, 307 b.

(r.) *Ibid.*, 34 a.

ceptionem, (s.) The reader may also be referred to the *Placitorum Abbreviatio*, *passim*, where the pleadings are constantly accompanied with an offer of some method of proof. The latter work contains, in particular, the following entries, which afford strong confirmation of the same principle.

Isabella de B. petit versus R. de B., dimidium, &c., ut jus suum et hereditatem. Et ipse venit et defendit jus suum. *Et ipsa nullam sectam adduxit. Eat sine die, (t.)*

Gilbertus de Beivill petit versus Willielmum de Beivill, duas virgatas terræ cum pertinentiis in Gunetorp, quæ eum contingunt de socagio quod fuit patris eorum, in eadem villa. Willielmus defendit quod socagium illud nunquam partitum fuit, nec debet partiri. Et hoc offert defendere, &c. Quia *Gilbertus nullam probationem produxit*, consideratum est quod Willielmus eat inde sine die, et quietus, (u.)

In an action of assize, of novel disseizin, we have the following entry: Assisa venit recognitura si Oliverus filius Ranulfi Haki, et Simon Medicus, disseisiverunt Willielmum filium Simonis, et Sibillam uxorem suam, injuste et sine iudicio, de libero tenemento suo in Cliftun infra assisam. Simon Medicus dicit, quod ipse disrationavit illud tenementum versus Oliverum, in curia Domini Regis, per concordiam inde inter eos factum. *Et inde protulit chirographum factum inter eos inde.* Et Oliverus venit, et idem testatur; et dicit quod disrationavit terram illam per assisam mortis antecessoris versus matrem suam et fratrem suum, et ipsam Sibillam sororem suam, post obitum patris sui; in qua terra ipsi injuste se tenuerunt. *Et inde producit milites de comitatu, qui eidem assisæ capiendæ interfuerunt, et hi idem testantur.* Willielmus et Sibilla dicunt quod postquam inde Oliverus disrationavit illam terram, dedit eis terram illam, et homagium inde cepit. *Et inde ponunt se super visinetum, (x.)*

(s.) Bract., 400 a.; see also 215 b.

(t.) Plac. Ab., 62 Staff., rot. 7, temp. 10 Johan.

(u.) Plac. Ab., temp. Johan.

(x.) Plac. Ab., 81 Bed., rot. 4.

The following is an entry in an assize of mortancestor. Assisa venit recognitura si Willielmus pater Jurdani saisitus fuit in dominico suo ut de feodo, de duabus carucatis terræ cum pertinentiis in Tadestorn, die qua obiit; et si obiit post primam coronationem Henrici Regis, patris Domini Regis; et si præfatus Jurdanus propinquior hæres ejus sit; quam terram Thomas frater Willielmi de Mare tenet. Et prædictus Thomas venit et dixit quod assisa inde fieri non debet, quia ipse Jurdanus et frater ejus primogenitus implacitaverunt ipsum Thomam de ipsa terra, per breve de recto, ita quod per placitum illud, quædam particula de terra illa, eis remansit; et postea ceperunt pro eadem terra duas marcas argenti et unum chazurum. *Et hoc offert probare adversus eum, prout curia consideraverit. Sed nullam produxit probationem.* Et Jurdanus venit et defendit quod ipse nullum fratrem primogenitum legitime natum habuit. Et quod ipse nunquam in curia ulla, quietam clamavit terram illam, nec inde duas marcas vel pecuniam aliquam inde cepit. *Et hoc offert defendere per quendam liberum hominem suum. Et Thomas nihil quam defensionem illam dixit vel obtulit, nec sectam quod ipse Jurdanus primogenitum fratrem habuit, produxit, nec curiam aliquam in qua placitum esset inter eos, nec quando finis factus esset infer eos.* Consideratum est quod ipse Jurdanus habeat inde saisinam suam, (y.)

These authorities, to which many others of the same class might easily be added, are sufficient to prove that a tender of evidence was, before and at the time when Bracton wrote, considered as a necessary ingredient in all pleadings of the affirmative kind. Soon after that period, however, the process of pleading began to be conducted with a more distinct and single view to the development of the particular question in controversy or production of the issue; and, when so conducted, the offer of evidence in support of any allegation would naturally be considered as premature till it were ascertained that such matter came

(y.) Plac. Ab., 20 Hertf., temp. Ric. I.

into dispute. The rule in question appears, therefore, under the influence of this cause, to have suffered a silent abrogation, yet vestiges of it to this day remain in the *production of suit* and in the formal *verification*.

NOTE 84. (See p. 379.)

Thus Bracton lays it down, (in a passage cited in the last note:) Si autem chartam forte exhibere non possit, quia illam ad manum non habuerit, de necessitate erit *ad patriam* recurrendum, (z.) Again, in treating of the exception that the demandant was a villein, he says: Oportet quod tenens probet exceptionem per parentes, quos statim habeat ad manum, si possit, &c. But if the case was, that no parentes could be produced on either side, then recourse was to be had to a *jurata*. *Probat enim tenens exceptionem per juratam*; in quam de necessitate consentire oportet, *propter defectum alterius probationis*; quia si non habeat parentes, de necessitate recurritur ad *juratam*—alioquin, *nulla erit exceptio, quasi deficiente probatione*. Eodem modo dici poterit de replicatione querentis, (a.) Again, this author observes: *Probari poterit exceptio multis modis, tum per vocem mortuam, sicut per instrumenta, tum per vivam, sicut per patriam et inquisitiones, &c., (b.)* And in another place he speaks of probatio per instrumenta—quæ quidem si non fuerint recognita, fides eorum multipliciter *probari* poterit, vel per collationem signorum, vel per testes, vel per *patriam*, et aliis multis modis, &c., (c.)

Even in the phraseology of later times, trial by jury is mentioned as a mode of *proof*. (Constable's Case, 5 Rep., 108 a.; Ladd v. Garrod, Lutw., 665; Vin. Ab., Trial, G. a.)

(z.) Bract., 34 a.

(a.) *Ibid*, 216 a.

(b.) *Ibid*, 400 a.

(c.) *Ibid*, 305 a., et vide 289 b., 290 a.

NOTE 85. (See p. 379.)

Prest, &c., was the constant form in the viva voce pleading of offering to prove *by jury*, as appears by the Year-Books.

Sometimes the *prest*, or *prest, &c.*, is more fully given, thus: *prest d'averrer*; that is, *ready to prove or to verify*.

NOTE 86. (See p. 382.)

The following examples (which, independently of the view in which they are adduced, are curious, and deserve attention) will illustrate the original meaning and object of the *profert*, and, as the author conceives, fully support him in the new view he has ventured to take on this subject.

In the first of them it will be observed the plaintiff offers proofs, both by deeds and by the roll of Winton, and the defendant also refers to deeds in support of his plea.

Abbas Sampson queritur quod Osbertus de Weckesham, miles episcopi Eliensis, injuste levavit furcas, et suspendiam fecit, in manerio de Hecham infra libertatem Scti Edmundi; et contra libertatem quam habuit beatus Edmundus a tempore Regis Edwardi, et ex ejusdem Regis dono. Et inde protulit cartas diversorum Regum, &c. Et præterea ponit se inde super Rotulum, Winton, &c. Osbertus venit et trahit inde Episcopum Eliensem ad warrentum. Episcopus venit et warrantizat illud suspendium quod et de jure factum fuit, ut dicit, quia libertatem habuit et habet Sancta Ethildreda a tempore Edgari Regis, qui universas libertates dedit ecclesiæ Sanctæ Ethildredæ, cum suspendii libertate, &c. Protulit etiam cartam et confirmationem Regis Edwardi, qui confirmavit libertates omnes ita datas Sanctæ Ethildredæ tam in manerio de Hecham, cujus membrum est Weckesham, et in pertinentiis omnibus, quam in aliis maneriis, sine omne exceptione, &c., sicut Rex Edgarus eis concesserat.

Protulit etiam cartas Regum Willielmi Conquestoris, Henrici avi, et aliorum, &c, (d.)

In the next example the plaintiff offers a *deed*, with the subscribing witnesses or the *grand assize*, as *alternative modes of proof*.

Johannes de Crioill, et Johanna uxor ejus, petunt versus Petrum de Goldington, terram de Winchinton tenendam et habendam, sicut illam quæ data fuit eidem Johanni, in liberum maritagium, ex dono Petri de Goldington et Evæ uxoris suæ, et unde Willielmus pater ejus et Johanna uxor ejus seisisi fuerunt tempore Henrici Regis patris, et ipse Johannes Crioill postea, capiendo inde explecia ad valenciam xx solidorum, &c. Et inde *protulerunt cartam* Petri de Goldington, et Evæ uxoris suæ, donationem testantem. Petrus venit et defendit jus, &c., et dicit quod terro illa de Winchinton fuit maritagium Evæ matris suæ, et eidem descendit tanquam recto heredi, et offert defendere jus et donationem cartæ, &c. Et præterea *ponit se in magnam assisam Domini Regis, &c.* Ipsa e contra dicit quod *ponit se in magnam assisam, si sufficere ei non potest carta* Petri patris sui et Evæ matris suæ, (quæ testatur quod si non possint ei terram illam warrantizare excambium ei facient ad valenciam in Stokes vel in Cotes,) et *vivæ voces testium carte, &c., (e.)*

The following passage of Bracton, already cited for other purposes in previous notes, seems decisively to confirm the same view of the original meaning of the profert:

Ostendere debet tenens chartam ad probandam exceptionem suam; quod si non fecerit, exceptio sua nulla, et amittat sicut indefensus. Si autem chartam forte exhibere non possit, quia illam ad manum non habuerit, de necessitate erit ad patriam recurrendum. Et eodem modo si casum allegaverit, et casum probaverit, (f.)

On this subject it is not undeserving of remark that,

(d.) Plac. Ab., 22 Suffolc., rot. 7.

(e.) Vide Plac. Ab., 63 Leic., rot. 13.

(f.) Bract., 34 a.

though in the king's bench the profert is made in the *body* of the declaration, yet in the common pleas its proper place is at the *conclusion*; a position that entirely corresponds with the idea that it is derived from the old rule of law in question, under which it was the practice to make the offer of proof at the *conclusion* of the pleading, as appears by the examples cited in this note and by a great variety of entries in the *Placitorum Abbreviatio*.

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